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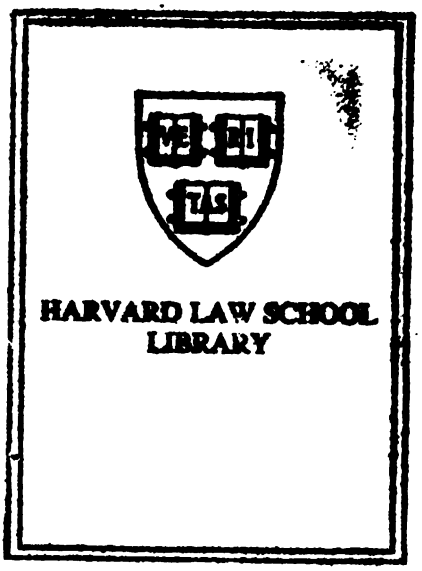
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KENTUCKY

LAW REPORTER.

VOL. XVIII.

JULY, 1896, TO JUNE, 1897.

Frankfort, Ky.
GEO. A. LEWIS, PUBLISHER.
1897.

Rec. Feb. 9, 1903.

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The Kentucky Law Reporter.

EDITOR:
WALTER G. CHAPMAN, ... Frankfort, Ky.

VOL. 18. JULY 1, 1896. No. 1

KENTUCKY COURT OF APPEALS.

HINES, &C. V. MUTUAL LIFE INS. CO. OF KENTUCKY.

(*Filed December* 12, 1895—*Not to be reported.*)

June 23, 1896, *petition for rehearing overruled and opinion modified on its face.*

Life insurance—Mode of ascertaining the equitable value of policy—Under a provision in the contract of insurance that when the insured ceases to pay, after a certain period, he shall have the equitable value of what he has paid, in cash or insurance, the proper mode of ascertaining this equitable value is by deducting from what the insured has paid in cash to the insurance company the amount he owes on the policy. This value may be paid in cash or a paid-up policy of insurance issued for same.

J. A. Mitchell and Edward W. Hines for appellants.

S. A. Bass for appellee.

Appeal from Logan Circuit Court.

Opinion of the court by Chief Justice Pryor.

The appellant at the date of the insurance was fifty-six years of age; the amount of the insurance was $5,000; the premium $312. The policy was taken out in June, 1868, on the half-note plan—one-half of the annual premium was paid in cash and the other in notes until June 6, 1882, when the insured ceased to pay.

The cash payment was $2,184. Interest was paid on the notes, and, deducting dividends from notes, leaves, in June, 1882, the insured indebted to the company $1,551, and, taking this from the $2,184, leaves due the insured $633.

The trouble in this case arises from the contract of insurance, that provides that where the insured ceases to pay after a certain period "*he shall* have the equitable value of what he has paid in cash or insurance, etc."

There is testimony in this case of an expert, showing what the custom of the company has been and the amount appellant is en-

titled to, which is about one-third of the amount found due by the mode of calculation adopted, and by which we determine the amount due the appellant.

The contract of insurance affords no guide to the chancellor, and the fact that the appellee adopts this mode of calculation is not conclusive on the chancellor or the party insured. The insurance is for $5,000. The insured has paid in fourteen years $2,184 in cash, and, deducting what he owes from the amount he has paid, the amount found due is not only just but equitable.

The judgment is, therefore, reversed and remanded, with directions to enter a judgment as herein indicated.

Modified—The appellant is permitted to issue a paid-up policy for the amount indicated.

Petition overruled.

LOUISVILLE WATER CO. V. COMMONWEALTH.

(Filed March 27, 1896—Not to be reported.)

1. *Report by sheriff to county court clerk lists of property omitted from taxation*—Under section 25 of article 6 of the Hewitt revenue law, making it the duty of the sheriff to report to the county court clerk lists of property omitted by the assessor, as the statute does not specify how the reports shall be made, a report made by the sheriff and certified by the clerk is sufficient, although the report was not signed by the sheriff.

2. *Same*—That provision of the statute gave the sheriff power to report property theretofore omitted from assessment as well as such as might be omitted after the act took effect.

3. *Same—Exemption from taxation*—As that statute expressly excepted from repeal all obligations incurred under existing laws, it did not relieve appellant from liability for the tax of 1886, which was levied by the previous law, although no assessment had been made, and, therefore, the sheriff had authority thereafter to make the assessment.

4. *Same—Repeal of statutes*—The revenue law of 1892 did not repeal the act of 1890 giving authority to bring suit for taxes. But even if such was the legislative intention as to claims for taxes to accrue in future the statute can not be construed to take away the right to sue for claims which had already accrued, especially where, as in this case, the right had already been exercised. It is not a question of the power to take away a vested right, but of legislative intention.

5. *Same*—As this court has held the act exempting appellant's property from taxation to be unconstitutional, appellant can not claim the exemption either for the years prior to the repeal of the exempting act or those subsequent thereto. The Supreme Court of the United States, in holding that the exemption was repealed, did not pass upon its validity.

6. *Limitation—Commencement of action*—In determining whether a suit has been brought within the statutory period of limitation, the filing of the petition and the issuing of summons is, by express provision of the Code of Practice, to be regarded as the commencement of the action.

7. *Same*—Even if this were not true it might well be held that the statute did not begin to run in this case until the expiration of the time during which the assessor might have made the assessment, which in 1886 would have been the last of April.

8. *Failure to file exhibits*—Appellant can not complain here of the failure to file exhibits referred to in the petition, there being no rule asked in the lower court to require them to be filed.

T. L. Burnett and Lane & Burnett for appellant.

W. J. Hendrick and Helm & Bruce for appellee.

Appeal from Jefferson Circuit Court, Law and Equity division.

Opinion of the court by Judge Guffy.

This appeal is prosecuted by the Louisville Water Co. from a judgment rendered by the Jefferson Circuit Court, Law and Equity division, in the suit of the Commonwealth of Kentucky and H. A. Bell, sheriff of Jefferson county, against the Louisville Water Co., to recover the taxes due for the year 1886.

The appellant interposed several defenses, all of which were deemed insufficient by the court below, and appellant now insists that the court below erred in rendering judgment against it, and asks a reversal.

The authority for reporting the tax list to the clerk of the county court is to be found in section 25, article 6, chapter 92, of the General Statutes, commonly called the Hewitt bill. The material part of the section is as follows: "It shall be the duty of the sheriff to report to the county clerk all lists or parts of lists of property which may, for any year or years, have been omitted by the assessor; and all property which corporations may have omitted for any year or years to have listed with the auditor; and said clerk shall enter the same on the assessor's book for his county and certify the same to the auditor on or before the last day of January in each year."

The law does not specify how or in what manner or form the report shall be made, and, as it appears that the clerk accepted the report and certified same as required by law, the report of the sheriff and certificate of the clerk must be held sufficient for the purposes of this action.

The act of 1882, exempting appellant from the payment of taxes, had been decided to be unconstitutional and void by this court in the case of Wm. Clark, sheriff v. Louisville Water Co., 90 Ky., 515, hence that act can not be relied on for reversal. The question of the constitutionality of that act was not decided by the Supreme Court of the United States; therefore the decision in the case of the appellant against Commonwealth, 143 U. S., 1, has no application to this case.

The plea of limitation can not avail. The suit was brought and summons issued January 9, 1891, which, by the express provisions of the Code of Practice, is made the commencement of the action, and this court has often so held, hence the decisions of the courts of other States as to what constitutes the commencement of an action can have no application to the case at bar. And, besides, it might well be held that the statute did not begin to run until the expiration of the time during which the assessor might have made the assessment, which, in 1886, would have been the last of April.

The act of 17th of May, 1886, before referred to, was, as is well known, a revenue bill, and the object was to increase the revenues, not to decrease them, and it expressly excepted all obligations, incurred under existing laws, from repeal. It is, therefore, clear that, if appellant had become liable for the tax for 1886, the act *supra* did not relieve it from such liability; nor can we agree with appellant that the act *supra* is only prospective. The evident purpose of the act was to confer power upon the sheriff greater than he had theretofore been invested with; and there is nothing in the act to authorize the conclusion that the power and duty devolved on the sheriff had reference only to the future. Such an intent would not have been consistent with the object of the act.

Appellant insists that the revenue law of 1892 repealed the act of

1890, which authorized the bringing of such suits as this. We do not concur in appellant's construction of the act of 1892. We do not think it was the intention of the Legislature to repeal the act of 1890. But, if such was the legislative intent, the general laws as to construction of statutes provide that "No new law shall be construed to repeal a former law as to any offense committed against the former; nor as to any act done, any penalty, forfeiture or punishment incurred, or any right accrued or claim arising under the former law; or in any way whatever to affect any such offenses or act so committed or done, or any penalty, forfeiture or punishment so incurred, or any right accrued or claim arising before the new law takes effect."

It is certain that the claim in suit existed before the passage of the act of 1892, and the right to sue therefor had accrued, and, in fact, had been exercised before the enactment of the law of 1892; hence the claim and the right to sue and recover therefor was wholly unaffected by the act of 1892. The question as to whether it was a vested right, that could not have been repealed or taken away, is not the question before us for decision. The simple question is, did the act of 1892 have the effect contended for by appellant? We think not.

We think it fair to presume that the depositions in the case were properly filed and considered. If such was not the case, appellant should, by proper proceedings in the court below, have sought a correction of the error if it deemed the same prejudicial; and if the failure to file the exhibits referred to in the petition was detrimental to appellant, that could have been remedied by rule in the court below.

We have read with care the very excellent and exhaustive briefs of appellant, as well as the entire record, and are of the opinion that the judgment of the court below is sustained by the law and facts, and the said judgment is affirmed.

HARKLEROADS, &C. V. TROSPER, &C.

(*Filed March* 28, 1896—*Not to be reported.*)

Wills—Description of lands—Where a testator by his will gave to his two daughters adjoining tracts of land, describing them by metes and bounds, a call in the description for a straight line to run through a "rock quarry" is not to be regarded as requiring that the line should run through the center of a hole in the ground, from which rock had been taken and which is referred to by the witness as a rock quarry, but the description is satisfied by a line located through that section of the land or field where the rock or stone had been quarried; and in adopting this interpretation the court is influenced by the fact that it secures to each daughter the identical tract of land which the testator had by parol given her before his death, and the boundaries of which he had fixed by actual survey. Nor does this interpretation violate the rule that excludes parol testimony offered to alter or modify the meaning of wills and other written instruments.

H. C. Eversole and W. L. Brown for appellants.

Appeal from Laurel Circuit Court.

Opinion of the court by Judge Landes.

The female litigants, Charlotte Harkleroads and Nancy Trosper, are daughters of Stephen M. Jackson, deceased, late of Laurel county; and this controversy is about the true location of a division line between two parcels of land allotted to them respectively by their father in his lifetime, and confirmed to them by his last will. The record does not show the date of the death of their father, but his will, which is copied in the record, without the certificate of probate, bears date the 3d day of February, 1883; and, judging by a certificate or affidavit made by James I. Weaver, his executor, which is embraced in the record, his death occurred some time before the year 1891. As far back as the 15th day of November, 1868, he gave to appellant, Mrs. Harkleroads, the parcel of land claimed by her, and had it surveyed by R. L. McKee, the county surveyor, himself being one of the chain carriers, and his son-in-law, S. B. Perman, the other, and at once placed the appellants in possession of it, and they have remained in possession ever since. The line now in controversy, as laid down by the surveyor, by the direction of Stephen M. Jackson, runs, as described in McKee's survey, from two chestnuts at the creek, "N. 63, W. 174 poles to a black oak in Farris' line." According to the testimony of S. R. Perman, the chain carrier, supported by all of the other witnesses, R. L. McKee, at the time he made the survey, "marked the black oak as the corner of Harkleroads' fifty acres by direction of Stephen Jackson," and that corner "has been recognized from that time by Stephen Jackson, in his lifetime, and all others, as Harkleroads' corner, until this controversy."

Shortly after he allotted Mrs. Harkleroads' parcel to her, but just how long the record does not reveal, Stephen M. Jackson allotted and gave to the appellee, Mrs. Nancy Trosper, the parcel of land which she claims, and placed appellees in possession, which they have held ever since. This parcel lies west or southwest of and adjoining that of Mrs. Harkleroads, and was surveyed by S. S. Phillips, then county surveyor, at the instance of Stephen M. Jackson. The line above named was made the division line between the two parcels by the direction of Stephen M. Jackson, and the corner at the chestnut trees, at the creek, and the black oak, in Farris' line, were made corners of both parcels. It appears that the then proposed west or southwest line of Mrs. Harkleroads' parcel was first run by McKee through or across a hole which had been made in quarrying rock; but, as stated by S. R. Perman in his testimony, when they reached Farris' line and found that "the line through the hole or rock quarry did not include fifty acres" (as it was intended by Stephen M. Jackson it should), then the line was established, by the direction of Stephen M. Jackson, to run from the chestnut trees, at the creek, in a straight line (N. 63 W.), to the black oak in Farris' line.

As has already been stated, the evidence shows that this line was, at all times and by everybody, recognized as the dividing line between Mrs. Harkleroads and Mrs. Trosper from the time it was first established by Stephen M. Jackson to the commencement of this controversy, five or six years ago. And appellee, John Trosper, stated in his testimony that, after his wife's parcel was surveyed and allotted to her, S. S. Phillips, the county surveyor, "ran out the division line" for him and Harkleroads, and this is confirmed by the testimony of Phillips. The precise time or date when this was done does not appear from the record, and whether it was done before or after the death of Stephen M. Jackson and the probate of his will we can not determine with certainty, and it would be just

as fair to assume that it occurred after as that it occurred before his death.

On the trial of the cause, in the lower court, a jury was waived and the cause submitted to the judge, who found and adjudged the true location of the line in controversy to be, as claimed by appellees, running from the corner of Harkleroads, on the bank of Little Laurel creek, through the center of the hole referred to by the witnesses, and called the "rock quarry," a direction of N. 61¼ W. (instead of N. 63 W., as claimed by appellants) 151 poles to a stake in now Kinsor's, formerly Farris' line, 44 links east of the black oak corner in Farris' line, which we have seen was established and always recognized as a corner to both parcels by Stephen M. Jackson in his lifetime, and this appeal is prosecuted from that judgment.

After a very careful examination of the record, we find ourselves unable to concur with the finding and judgment of the learned judge of the lower court, which is based, we doubt not, on what we conceive to be an erroneous interpretation of the will of Stephen M. Jackson, deceased. He failed to make a deed to either of his daughters; but he had each parcel surveyed by metes and bounds and a plat made of each of the surveys, and caused the description of each parcel, as surveyed and certified by official surveyors, and a plat of each, to be delivered, one to appellants and the other to appellees; and that he intended that each of his said daughters should have the land thus set apart and delivered to her there is not the slightest doubt; nor is there any doubt, from the evidence, that he intended that Mrs. Harkleroads should have all the land as surveyed for her on the east of the line running N. 63 W. to the black oak; and that Mrs. Trosper should have all of the land surveyed for her on the west side of that line.

In the second clause of his will he formally devised to Mrs. Harkleroads the parcel of land which he gave her in his lifetime, with the following description of it, viz: "Beginning at the south corner of the land of Hansford Farris' heirs on the bank of King's branch; thence with the meanders down said branch to its mouth; thence with the meanders of Little Laurel river to where James Harkleroads' fence now stands; *thence a straight line through the rock quarry to the said Farris' heirs' line;* thence with their line to the beginning."

In the third clause he devised to Mrs. Trosper the land he had allotted to her.

The evidence shows that, soon after the parcel of land was surveyed for Mrs. Harkleroads, in 1868, James Harkleroads, her husband, had a rail fence built along a portion of the line from the creek, which was his then west line, being the line in controversy, and that the worm of the fence was laid on the inside of the line, and that the fence was still there when the case was tried. So that there is no difficulty in identifying the "straight line" mentioned in the will, running through the "rock quarry," as the line in controversy.

It seems to have been assumed by the court that, in order to establish the division line under the will, it must necessarily be run through the center of a hole found there, from which rock had been taken, and which is referred to by witnesses as a "rock quarry," and that this particular hole was the "rock quarry" referred to in the will. But the evidence for appellants shows, and it is not contradicted, that there is in the field of appellees, west of this division line, another "rock quarry," which, as stated by James Harkleroads, "was an old quarry, and had been for years."

If the will is to be considered as speaking for itself, without regard to surrounding facts and conditions existing at the time it was written, there would be as much reason to assume that the old "rock quarry" was referred to in the will as to assume that the other, through which the line was run by John F. Pigg, surveyor, was referred to. So that, without further knowledge on the subject than that there were two holes, called "rock quarries," on the land, we would be left in doubt and uncertainty about the meaning and intent of the will. Viewed, however, in the light of the facts in proof, we are satisfied that the testator, in describing the line as a "straight line *through the rock quarry* to Farris' heirs' line," did not mean that the line should be drawn or located through or across either of the holes that had been made in the ground by taking out rock, but that he meant, rather, that the line was or should be located through that portion or section of the land or field where the rock or stone had been quarried or taken out, which he called the "rock quarry." In other words, he evidently intended to describe the survey in general terms, and in naming this particular line he had in mind the identical line as located by his direction from the corner at the creek, where the chestnuts formerly stood, in a straight direction to the black oak in the Farris line, which he knew was located through that portion of his land known as the "rock quarry."

That we have given the true interpretation of the second clause of the will and the intentions of the testator, with reference to Mrs. Harkleroads, is confirmed by what follows. In the third clause, as stated, he devised to Mrs. Trosper the parcel of land he had set apart for her in his lifetime, and described it in general terms. Reference is made to the survey of this parcel as "made by S. S. Phillips," and to "a straight line, according to the survey here made by said Phillips of said tract of land to the top or near the top of the ridge to the line of the lands belonging to Hansford Farris' heirs," and calling for a point where "Charlotte's line *strikes* the said Farris line."

At the time the will was made, in 1887, there is no doubt that "Charlotte's line" struck the Farris line at the black oak corner, that had been established by the direction of the testator. Phillips, in his testimony, shows that he made the survey and plat of Mrs. Trosper's parcel, one of the lines being from Mrs. Hackleroads' corner on the creek to the black oak corner, which he afterwards ran out for appellants and appellees.

And all this makes it evident that it was the intention of the testator to confirm to both of his daughters the identical parcels of land he had set apart to them respectively before the will was executed, and which they were occupying at the time.

But in the third clause reference is made to the fact that he had given to his other children and heirs portions of land, and, in substance, the desire is expressed that these gifts should stand as made by him, and that his children should "act in the matter with such kindness as is becoming all good brothers and sisters."

It occurs to us that this controversy never would have arisen if the noble sentiment of the testator last quoted had prevailed. The interpretation we have given of the meaning of the will and the intention of the testator is, in our opinion, required by the facts of the case, and does not violate the well-established and universally recognized rule that excludes parol testimony offered to alter or modify the meaning of wills and other written instruments.

The judgment is, therefore, reversed and the cause remanded, with directions to render a judgment establishing the division line between the two parcels of land as laid down in the plat of the sur-

vey made by John F. Pigg, surveyor, from the corner at figure 1 to the corner at figure 15, the last-named corner being the black oak in Kinsor's, formerly Farris' line, and to make such other orders in the cause as may be necessary to give both appellants and appellees all of the land they are entitled to in their respective parcels on their respective sides of said line established as above.

Appellants are entitled to their costs, both in this court and in the court below.

DUNLAP, &C. V. GOSNELL, &C.

(*Filed March* 31, 1896—*Not to be reported.*)

Assessment of street improvements—In this action to enforce a lien for the cost of street improvements, in which the defense in substance is that the territory attempted to be treated as a square or taxing district is in fact not a square within the meaning of the statute authorizing such assessments, although the testimony conduces to show that the taxing district is large, yet it does not appear to be so large as to make void the order for the improvements and apportionments in contest. The fact that other streets will probably be opened through the territory in question can not defeat plaintiff's claim.

Jno. S. Jackman for appellants.

Lane & Burnett for appellees.

Appeal from Jefferson Circuit Court, Chancery division.

Opinion of the court by Judge Guffy.

This action was instituted by the appellees, Geo. W. Gosnell, &c., against the appellants, J. H. Dunlap, &c., in the Jefferson Circuit Court, Chancery division, to enforce an alleged lien upon certain parcels of property in Louisville to satisfy three apportionment warrants issued by the city of Louisville.

It is alleged in the petition that, by appropriate orders of the city council of Louisville, it caused certain original improvements to be made on Twenty-fourth street in Louisville, including curbing, etc., and that the cost of the same was duly and legally apportioned and that three several amounts, viz, $116.30, $124.05 and $16.37, were apportioned as the proportion to be paid on the three several portions of the lands or lots of appellant, Carrie Dunlap, described in the petition and exhibits.

The appellants answered and resisted the enforcement of the alleged lien.

The substance of the defense is that the territory set out and alleged by plaintiff to be squares are in fact not squares within the meaning of the statute authorizing such assessments or apportionments as the one ordered by the city council, and that public necessity demands and that there is absolute certainty that, at an early day, Twenty-second street will be extended through the same territory now attempted to be treated as a square or taxing district, at some point near appellants' property, and that other streets will be so opened, thus subjecting appellants to double taxation if not to even a greater extent, if the claim sued on should be enforced.

After the pleadings were completed and issue joined, several depositions were taken by appellants and maps made out and filed.

Upon final hearing the court below was of the opinion that the

territory fixed by the city authorities as the taxing district was not larger in area than in many other cases, and rendered judgment enforcing the liens, and adjudged a sale of a sufficiency of each described parcel of land to pay the several sums apportioned against it, and from that judgment this appeal is prosecuted.

The orders and proceedings, under and by which the improvement and apportionments were made, appear to be regular and according to law.

It is true the testimony conduces to show that the taxing district is large, but it does not appear to be so large as to make void the order for the improvements and apportionments in contest.

It sometimes happens that a valid exercise of power imposes hardships. The fact that Twenty-second and other streets are likely to be opened through the territory in question can not defeat plaintiffs' claim.

The chancellor must, of necessity, have been well qualified to judge of the weight of the testimony adduced, and, inasmuch as the law and preponderance of the evidence sustains the judgment, the same is affirmed.

TAYLOR V. CLINE.

(Filed March 31, 1896—Not to be reported.)

1. *Construction of pleading*—While a pleading must upon demurrer be construed against the pleader where the averments are of doubtful meaning, yet where there has been no demurrer to a petition and no motion to make its averments more specific it will, if possible, be so construed upon appeal as to uphold a judgment in favor of plaintiff.

Upon this appeal from a default judgment upon a guardian's bond in which it is insisted as a ground for reversal that judgment has been rendered in favor of plaintiffs for the entire amount which came to the guardian from their deceased father's estate, whereas there were other children who were entitled to a part of the amount, the court will assume, although it does not clearly appear from the petition, that the money for which judgment was rendered was received by the guardian as the money of the infant plaintiffs to which they were legally entitled.

2. *Judgment in bar to further action*—Although the judgment is in favor of the infants by their next friend, when it appears the action was brought by the guardian, it is a bar to any further action, either by a next friend or by the statutory guardian, and, therefore, the form of the judgment affords no ground for reversal.

Geo. L. Husbands for appellant.

W. G. Bullitt for appellee.

Appeal from Hickman Circuit Court.

Opinion of the court by Chief Justice Pryor.

This is a judgment by default, and to enable the appellants to present their defense, if any, the judgment as originally entered was set aside and the case passed until the next term. When that term began no defense was made, nor any offered to be filed during its continuance, and the result was another judgment similar to that first rendered.

The proceeding is against a guardian and his surety upon the bond of the guardian, executed at the time he qualified as such for

the infant children of one Cline, deceased. It is insisted as a ground for reversal, and the only one necessary to be noticed, that the judgment is for too large a sum, the record showing there were more children of the deceased than the infants for whom the defaulting guardian had been appointed, and the judgment rendered gives to the infants the entire estate or all the moneys that passed to the guardian when the other children were entitled to their respective portions.

While the pleadings are not very skillfully drawn, it is apparent the pleader was endeavoring to collect by judgment against the guardian what moneys and no other he had received belonging to these infants, and, while a pleading must be construed as againt the pleader where the averments are of doubtful meaning, there was no demurrer to the petition or motion made to make the averments more specific, and after judgment it is too late to raise such a question, but the judgment must be upheld if authorized from the pleadings. We can not say that the judgment is for too much, or that the other children are interested in the amount of the recovery obtained, but on the contrary will assume from the pleadings that this money for which the judgment was rendered was received by the guardian as the money of the infants, to which they were legally entitled. The appellant could have made this plain by answer and failed to do so, and we are not disposed to disturb the finding of the court below; nor is there any merit in the objection that the judgment is in favor of the infants by *their next friend* when it appears the action was brought by the guardian. It is a bar to any future action either by a *prochein ami* or by the statutory guardian, nor will this court assume that the other children were entitled to a part of the sum recovered by the infants as next of kin to their deceased sister. They may have received their part and doubtless have.

Judgment affirmed.

CITY OF LOUISVILLE V. BANNON, &C.

(*Filed March* 31, 1896.)

1. *Closing streets and alleys*—Without some legislative authority a city has no power either to condemn or close streets or alleys.

2. *Same—Grant of power to towns and cities to do same*—The act for the government of cities of the first class does not grant to such cities the power to close public ways. Such a grant can not be implied from that section of the act (section 2826, Kentucky Statutes), providing that no public way shall be opened, narrowed, closed or constructed, except by ordinance recommended by the board of public works, as that provision is purely prohibitory in its nature. Nor is such a power included in the grant to such cities of the "power to govern themselves by such ordinances and resolutions for municipal purposes as they may deem proper, not to conflict with this act nor the Constitution and laws of this State."

3. *Same—Consent of lot owners*—Even if the provision of the charter of the city of Louisville as to the closing of public ways, under which the proceeding in Martin v. City of Louisville, 16 KY. LAW REP., 786, was instituted, was not repealed by the act for the government of cities of the first class, a question which does not seem to be determined, the state of case authorizing the closing of a public way under the charter provision referred to does not exist here, as some of the lot holders are not consenting to the closing of the alley, and the evidence is conclusive that damage will ensue to them if it is closed; nor can the right to condemn be claimed, as there is no false

pretense that this is a condemnation proceeding, or that the land is needed for a municipal use.

4. *Private property for public use*—A mere money consideration, to be paid to the government, State or municipal, is not a public use for which private property can be taken from one citizen and given to another.

Simrall, Bodley & Doolan, Lane & Burnett, T. L. Burnett and H. S. Barker for appellant.

Phelps & Thum for appellees.

Appeal from Jefferson Circuit Court, Common Pleas division.

Opinion of the court by Judge DuRelle.

This was a suit in the name of the city of Louisville to close a 40-foot alley, known as Cotton street, running east and west, extending from Thirteenth to Fourteenth street, between and parallel with Lexington and Maple streets. North of and parallel with Cotton street, in the same square, is a 20-foot alley, extending from Thirteenth to Fourteenth street, and connected with Cotton street by a 20-foot alley, running north and south, the last-named alley being the same one, the obstruction to the south end of which was enjoined, in the case of Bannon v. Rohmeiser, 90 Ky., 48.

Bannon, who is one of the defendants in the action, is the owner of all the land on both sides of Cotton street, except a lot fronting 60 feet on that street at its intersection with Thirteenth, owned by Bloomer. The other defendants are the owners of all the lots abutting on the two 20-foot alleys, which, with Cotton street, form the system of alleys of that city square.

The petition states facts showing the dedication of the alleys named as public ways, and alleges that the 40-foot alley (Cotton street) is on marshy soil, lower than the grade of the streets, and, owing to the impracticability of using it as a public way, has never been improved by the city; that the city has extended a line of curbing along Thirteenth street, across the end of it, and thereby preventing ingress and egress to and from that end; that the occupation of Fourteenth street by railroad tracks has practically closed the west end of Cotton street; that the closing of the alley is a public necessity and will be a public benefit, would benefit the city of Louisville and injure none of the owners of property on the square; that if it is kept open it will be the duty of the city to improve it, and the improvement will be a needless expense to the owners of lots on the square.

The petition also avers that the board of public works recommended, and the general council passed, an ordinance instructing the city attorney to institute an action in the Jefferson Circuit Court against all persons owning lots abutting on said 40-foot public way, and all persons interested therein, to close said strip as a public way.

The prayer of the petition is that the alley be closed, and for a judicial determination that its closing will be a benefit to the city of Louisville, and will work no injury to the owner of any lot on the square; and, further, that if, in the opinion of the court, any of the private easements of the defendants be of any value, the value be ascertained and the defendants compensated therefor.

Bannon and some other of the defendants filed answers admitting that the closing of the alley would be a benefit to the city, and no injury to the defendants, but other defendants have filed answers denying the averments of the petition and alleging that the 40-foot

alley is connected with, and is a necessary outlet to, the 20-foot alley, and that they are public ways, to the use of which the defendants are entitled.

These defendants plead that the passage of the ordinance under which this suit was instituted was procured by fraud, for the private purpose of benefiting the defendant, Bannon, and for no public use or benefit; that the ordinance is a mere proposition to sell the 40-foot alley to Bannon; that the closing of the alley will injure their lots and destroy the easements over both alleys, and is not authorized by law.

It is shown by the answers that a previous suit (No. 43,506) was brought in 1390 by Bannon to declare the alley closed, and that by resolution of the general council the appearance of the city was authorized to be entered and judgment confessed as against it; that this was done, but that afterwards, for some undisclosed reason, the city filed an answer in that suit, denying the averments of Bannon's petition, averring that the closing of the alley would be injurious to the lot owners and of no benefit to the city, and that Bannon's petition in that cause was accordingly dismissed. The judgment in that case is pleaded as a bar. It is also pleaded that the city is estopped by its answer in that cause.

The ordinance, under authority of which this suit was instituted, has the following preamble: "That, whereas, Patrick Bannon has, by written proposition, proposed to pay to the city of Louisville two thousand dollars for a strip of land (describing the 40 foot alley); and, whereas, it is deemed by the general council that said way should be discontinued as a public way. * * *"

It is perfectly evident from the pleadings and evidence in this suit that, while brought in the name of the city of Louisville, the real issue is between the defendant, Bannon, on the one side, and the defendants, who are resisting the closing of the 40-foot alley, on the other. The question for decision is whether an alley, which is a public way in the city of Louisville, can be closed against the will of the persons owning lots in the square through which the public way extends, and who have an easement over it.

This suit was brought in conformity with the provisions of the city charter as it existed prior to the adoption of the act for the government of cities of the first class. It is claimed, however, on behalf of the city that it is authorized by section 64 of the act of July 1, 1893, for the government of cities of the first class (Kentucky Statutes, section 2826) which provides that "no public way shall be opened, narrowed, closed or constructed * * * except by ordinance recommended by the board of public works."

It is claimed in the brief for the city that the $2,000 referred to in the ordinance was in the nature of a guaranty to the city, wherewith to pay the damages the property holders would suffer by the closing of the alley.

The evidence of real estate agents taken in the case is quite conclusive that damage would ensue to the lot-holders from the closing of the alley, though it is contended that this damage would be offset by the cost of construction of the alley, which would be assessed against the owners.

It is unnecessary to go into the question of fraud in the passage of the ordinance, of the estoppel pleaded against the city, or of the public necessity for the closing of the alley. No evidence is produced of any need that the city has for the land embraced by the alley, or of any public use to which it could be put. The intent of the ordinance and the proceeding based upon it was to allow the

land to revert to Bannon as the owner of the abutting property in consideration of $2,000. A mere money consideration, to be paid to the government, State or municipal, is not a public use for which private property can be taken from one citizen and given to another. Nor is it pretended that this is a condemnation proceeding, or that the land embraced in this alley is needed for any municipal use.

This court does not undertake to decide in this case that the State Legislature can not provide for the closing of streets and alleys in a municipality, or delegate that power to the municipal government. But whatever power the city has to close streets and alleys must be delegated by the State. If, therefore, the charter amendment under which the proceeding was instituted in Martin v. The City, 16 KY. LAW RFP., 786, was not repealed by the act for the government of cities of the first class, then, as held in that case, the mode there provided is exclusive. If that provision is repealed by the act of July 1, 1893, then there is no legislative grant to the city of power to vacate and close public ways. Such a grant can not be drawn by implication from section 2826, Kentucky Statutes, providing that no public way shall be opened, narrowed, closed or constructed, except by ordinance recommended by the board of public works, for that provision is purely prohibitory in its nature. Nor can such a power be safely held to be included in the grant in section 1 of the act for the government of cities of the first class of "power to govern themselves by such ordinances and resolutions for municipal purposes as they may deem proper, not to conflict with this act nor the Constitution and laws of this State." As is said by this court in the Martin case, before referred to, "Without some legislative authority the city has no power either to condemn or close streets or alleys." * * *

Judgment affirmed.

DRYE, &C. V. GRUNDY'S EX'OR, &C.

SAME V. SAME.

(*Filed April* 1, 1896—*Not to be reported.*)

Parties to actions—Although the husband of the beneficiary of a trust fund under a will survived his wife and thus became entitled to the fund, yet as it appears that he transferred his interest to his children they had the right, after his death, to bring this action against the executors of the will to recover the fund, but his administrator should be made a party as he may have some ground upon which to contest the transfer.

W. C. McChord, Thos. H. Hines and Avritt & Poston for appellants.

C. C. McChord and Jno. W. Lewis for appellees.

Appeal from Washington Circuit Court.

Opinion of the court by Chief Justice Pryor.

By the will of Charles Grundy, who died in the year 1881, a trust was created in favor of his daughter, Susan G. Tucker, by which Samuel Grundy was made the trustee, with power to invest, etc.

Thomas Grundy, Palmer Grundy and Samuel Grundy were left executors and qualified as such.

Samuel Grundy became the trustee and executed bond in the Washington county court.

In 1883 a settlement was had by the executors of their accounts, and it appears that the amount due at that time to Mrs. Tucker was $6,735. Mrs. Tucker, the beneficiary of the trust, died in the year 1893, leaving several children, among them Nannie Drye, who administered on the estate and qualified as guardian of the infants.

In 1894 the children and heirs of Mrs. Tucker brought suit against the executors to recover what was due their mother. Mrs. Drye, being a married woman, resigned as the personal representative and as guardian, and George Tucker was made the administrator, as appears from an amended petition filed in the case.

About this time Thomas Grundy filed an action in the same court asking to settle his accounts as executor of his father and to enjoin all parties from suing him as such, and an injunction was granted by the clerk prohibiting the prosecution of any claim except in the action of the executor.

There was a demurrer filed to the petition of Mrs. Drye, and it was contended that the administrator of Mrs. Tucker's husband should have instituted the action as he was entitled, having survived his wife a few months, to the trust fund. This demurrer was sustained and the case is here for revision.

When the demurrer was sustained the appellants, Drye and others, were required to plead to the action of Thomas Grundy for a settlement of his accounts as executor. They filed their answer, making it a cross petition against the other executors, who were co-defendants. Their cross petition and answer was dismissed and they have appealed that case.

There must be some mode or way suggested by which the beneficiaries of this trust can get their money. These two cases must go back and be consolidated and a settlement made and a judgment rendered for what is due of the trust fund to the parties entitled.

The personal representative of the deceased husband of Mrs. Tucker should be made a defendant, although it appears his interest was transferred to his children in his lifetime. This he had the power to do. Still his personal representative may contest the transfer, and, if he is not a defendant, either party may bring him before the court by proper pleading.

The ordinary action must be transferred to equity and tried with the case of Thomas Grundy.

The judgments are both reversed and remanded for that purpose and that a settlement may be had and judgment rendered for what is due the appellants.

DICKERSON V. COMMONWEALTH.

(*Filed April* 1, 1896—*Not to be reported.*)

Verdict supported by evidence—As the only ground urged for a reversal is that the evidence does not support the verdict of the jury finding appellant guilty of manslaughter under an indictment for murder, the court will not disturb the verdict, there being evidence tending to sustain it.

Stephen D. Parrish for appellant.

W. S. Taylor for appellee.

Appeal from Madison Circuit Court.

Opinion of the court by Judge Paynter.

The accused was indicted and tried for the murder of Albert Kidwell. He was convicted and sentenced to the penitentiary for ten years.

No question is raised as to the sufficiency of the indictment or as to the correctness of the instructions which the court gave the jury, nor is there any error suggested in the admission or rejection of evidence.

The only ground urged for a reversal is that the evidence does not support the verdict of the jury. A number of persons who witnessed the tragedy testify that the accused shot and killed Kidwell. On the trial the accused admitted that he did so.

We deem it unnecessary to go into details as to the evidence. From all the facts and circumstances proven in this case this court would not have disturbed the verdict had the accused been found guilty of murder.

The facts and circumstances surrounding this case strongly impress the court that the killing was premeditated by the accused, and the difficulty brought on to afford the accused an opportunity to accomplish his design. The jury had before them facts and circumstances which have so impressed this court with the belief expressed. The accused was some four or five steps from the deceased when the fatal shots were fired, and the jury were the judges as to the apparent necessity for the killing. They were the judges of the weight of the evidence, and, as there was evidence tending to sustain their verdict, we will not disturb it.

The judgment is affirmed.

WICKLIFFE V. PEYTON.

(*Filed April* 1, 1896—*Not to be reported.*)

Peremptory instruction—In this action of trespass, in which the plaintiff complains that defendant has so constructed a house on his lot that the roof overhangs the lot of plaintiff, and also that defendant has moved the division fence between the lots so as to embrace in his enclosure a part of plaintiff's lot, the evidence being conflicting, the court erred in giving a peremptory instruction to find for defendant.

Bugg & Wickliffe for appellant.

Appeal from Ballard Circuit Court.

Opinion of the court by Judge Paynter.

This is an action for trespass, wherein it is alleged that the plaintiff was the owner of a lot in the town of Wickliffe; that defendant is the owner of an adjoining lot; that defendant has so constructed a house on his lot that the roof overhangs the lot of plaintiff; that the rain falling on one side of the roof will flow from it on the lot of the plaintiff, and that defendant had removed two pannels of division fence between the lots.

On the trial of the case the proof fails to establish any special damages to the plaintiff. The evidence offered in behalf of plaintiff

shows the house was erected so that its roof overhung his property something over one foot; that defendant had removed it so that the roof only overhung it two or three inches; that the fence had been restored, but one part was replaced so as to be two or three inches further on plaintiff's lot than when it was removed.

The evidence offered by defendant tended to show the roof of the house as originally constructed overhung the lot of plaintiff, but that it had been removed so that it no longer did so, and that the fence had been restored to its original position.

On this state of case the court below instructed the jury to find for the defendant.

The action involved the right of the defendant to erect and keep the house where it was standing, and to any extent the roof covered the lot of plaintiff or the fence as replaced embraced in defendant's enclosure a part of his lot his title was involved, and the effect of the verdict of the jury and judgment of the court barred a subsequent action to recover same.

There was a question of fact for the jury to determine, and the court erred in giving the jury a peremptory instruction.

The judgment is reversed, with directions to grant appellant a new trial, and for further proceedings consistent with this opinion.

CRAWFORD V. COMMONWEALTH.

(*Filed April* 3, 1896—*Not to be reported.*)

1. *Criminal law—Displacing railroad switch*—Under section 807 of the Kentucky Statutes, which provides for the punishment of any person who shall willfully and maliciously displace or disturb "any rail or other fixture attached to the track or switch of any railroad in operation," an indictment need not allege in the language of the statute that the fixture disturbed was "attached to the track or switch," it being sufficient in this case to allege that the defendant committed the offense by "displacing and disconnecting the connecting rod of the said switch."

2. *There being some testimony tending to show guilt*, the court properly refused a peremptory instruction to find for the defendant.

3. *Misconduct of juryman*—Where, after the jury had retired to consider the case, a juryman expressed a desire to ask a question of counsel for the Commonwealth, and when refused the privilege asked the court in the presence of the entire jury if less than twelve of their number could make a verdict and was answered in the negative, and afterward, when asked if they could agree, the juror replied that one of the jury had said he "would hang the jury for a thousand years——" but was stopped before finishing the sentence, this did not constitute such misconduct of the juryman as to affect the substantial rights of the accused.

Rardin & Rardin for appellant.

W. S. Taylor for appellee.

Appeal from Pendleton Circuit Court.

Opinion of the court by Judge Hazelrigg.

The appellant was convicted of the crime of willfully and maliciously displacing and disturbing a fixture attached to the switch of the Louisville & Nashville Railroad by "displacing and disconnecting the connecting rod of the said switch by taking the key out of

same, and by removing and displacing said rod, thereby releasing, loosening and unfastening the switch-rail of the railroad."

The statute on the subject provides that "any person who shall willfully and maliciously tear up, displace, break or disturb any rail or other fixture attached to the track or switch of any railroad in operation * * shall be confined in the penitentiary," etc. (Section 807, Kentucky Statutes.)

Appellant's first complaint on this appeal is that the language of the indictment—quoted above—does not follow the statute; in fact describes no offense at all, because there is no averment that the rod, the fixture said to have been displaced, and the displacement of which is the gist of the offense, was attached to the switch or switch-rail.

It will be seen, however, that instead of the words of the statute, "fixture attached to the track or switch," the pleader uses the words "the connecting rod of the said switch." Manifestly the language used indicates that rod was connected with the switch, and is sufficiently explicit.

It is contended further that appellant's motion for a peremptory instruction to find him not guilty should have prevailed. This depends solely on whether or not there is any evidence at all to support the verdict, and, without reviewing it, it is sufficient to say that if the testimony of the witness, Hoffman, who spent the night with appellant in the shanty near the railroad just preceding the displacement of the switch-rod, and who testified to seeing him at the switch early next morning, is to be believed, then the verdict has some proof to sustain it, and especially so if we consider the contradictory statements of the appellant and the circumstances attending the entire transaction. Again, it appears that after the jury had retired to consider the case a juryman expressed a desire to ask a question of counsel for the Commonwealth, and, when refused the privilege, asked the court in the presence of the entire jury if less than twelve of their number could make a verdict, and was told "no." Afterwards, when asked if they could agree, the juror replied that one of the jury had said he would hang the jury for a thousand years, but was stopped before finishing the sentence. We can not think this was such misconduct of the juryman as to affect the substantial rights of the accused.

No other errors are suggested, and the judgment must be affirmed.

LAFFERTY, &C. V. HUFFMAN, &C.

(*Filed April* 1, 1896.)

1. *Constitutional law—Conclusiveness of enrolled bill—Local option*—A bill, properly enrolled, signed by the presiding officer of each of the two houses of the General Assembly and signed and approved by the governor, can not be impeached by reference to the journals of either house, either in a matter affecting the contents of the bill or the regularity of the steps taken in its passage.

The act of August, 1892, known as the "local option" law, being properly enrolled and signed, must be regarded as constitutionally enacted, although it does not appear from the Senate journal that the vote upon the final passage of the bill was taken by yeas and nays and entered in the journal as required by section 46 of the Constitution.

2. *Same*—A town of the sixth class which formed part of a magisterial precinct in which a special prohibitory liquor law was in force at the time

the present local option law went into effect had the right to take a separate vote under the general law for the purpose of determining whether liquor should be sold in the town, it not being necessary that the vote should be taken in the whole precinct. It is apparent both from the local option law and from the act for the government of cities of the sixth class that it was intended that such a separate vote might be taken.

3. *Officers*—There having been no election in November, 1893, of trustees of a town of the sixth class, the old trustees held over by virtue of the provision of section 167 of the Constitution that they should hold until their successors should be elected and qualified.

J. Q. Ward for appellants.

Blanton & Berry for appellees.

Appeal from Harrison Circuit Court.

Opinion of the court by Judge Hazelrigg.

Pursuant to the provisions of what is known as the "local option" law of August 4, 1892, a vote in the town of Berry, in Harrison county, was taken on January 31, 1894, and resulted in favor of the sale of spirituous, vinous and malt liquors.

When the county judge was about to direct the certificate of the election officers to be entered of record, and the trustees of the town were accordingly about to grant licenses, the appellees, certain citizens of the town, instituted this suit to prevent such action on the part of these officials.

The chief point relied on in the petition for injunction is that the law under which the election was held was not enacted by the General Assembly in the manner required by the Constitution; the allegation on that behalf being, in effect, that, on the final passage in the senate of the bill, as amended in the other house, the vote was not taken by yeas and nays and entered in the journal as required by section 46 of the Constitution.

A consideration of other points relied on will be deferred until after disposition of the principal question.

It is conceded that the bill, properly enrolled, was signed by the presiding officer of each of the two houses, and signed and approved by the governor.

The question is, can a law thus promulgated be impeached by reference to the journals of either house.

Different answers have been given to this inquiry in various courts of last resort in this country, but in this State it remains substantially unanswered; for whatever may be said of the argument of the question in the World's Fair Case (Norman, auditor v. The Kentucky Board, &c., 93 Ky., 537), we are not to take the case as decisive of that which it expressly disclaims to decide. After a discussion tending, it may be admitted, to the conclusion that such an impeachment might be had, the majority opinion yet determines it to be unnecessary to decide the question, and the plaintiffs seeking to recover under a law sought to be so impeached were there denied relief on grounds not pertinent to this inquiry.

It is to be observed, at the outset, that this is not a case where the enrolled bill is supposed to be in anywise different from the bill actually adopted by the legislative body.

It is not a dispute over contents. Such a question is presented in many of the cases. Thus in Field v. Clark, 143 U. S., 649 (1891), the allegation was that a section of the bill, as it actually passed, was not in the enrolled bill as authenticated by the signatures of the

presiding officers, and deposited with the secretary of state. And so in State v. Town Council of Chester, 39 S. C., 307 (1893), the contention was that the original bill, which was sent from the senate to the other house, was altered by the speaker of the house of representatives at the time or after it passed that house, and amended as he saw fit, when the journals of the house showed no such alterations.

These cases, and we note them here as samples of many others to the same effect, hold that the official attestation of the presiding officers of the legislative bodies and of the executive are conclusive that an act so authenticated is the very act passed by the body, and leave undetermined, in express terms at least, the further question whether an act may be impeached if the journals fail to show that which the Constitution expressly requires them to show; such as that the bill was passed by a yea and nay vote.

An examination of these cases, however, show that the argument against the use of the journals to show that the bill was not the same as that actually adopted is quite conclusive against their use to show the absence of the steps contemplated by the organic law.

And we may observe, in this connection, it would be strange if it were otherwise; for why should the journals, if deemed capable of shedding light on any question touching the bill, be rejected as evidence affecting the substance (the very bill itself) and held competent to effect the mere steps in the process of passing it?

Indeed, does there not seem to be stronger reason for seizing hold of the journals to expose the fraud of promulgating as valid a law which had in fact never passed at all, than for using them to undermine a law because of flaws in the steps taken during its passage?

Manifestly, therefore, the case of Field v. Clark, and the numerous decisions of the State courts, which have gone to the extent, and no further, because the particular case did not demand it, of holding the journals incompetent to declare the enrolled bill not to be the very one adopted by the legislative body, must be classed, with a few exceptions, along with the authorities holding that the verity of the enrolled bill, when duly certified and authenticated by the presiding officers, is absolute and conclusive.

So construing these cases, it becomes palpable that the overwhelming weight of authority is against the impeachment of the enrolled bill by the journals whether in a matter affecting the contents of the bill, or merely the regularity of the steps taken in its passage!

When we look to the argument, much may be said on either side of the question, and we shall content ourselves with suggesting only a few of the controlling reasons for our opinion.

In the first place, no court can begin its scrutiny of the manner in which the legislative department may have performed the details of its work, as shown by its daily journals, without a sense of assumed superiority, or without seeming to arrogate to itself a supervisory power wholly inconsistent with the fundamental truth that the departments are equal and independent in their respective spheres. Surely must the passing of bills, and all the accompanying minutiæ, be exclusively legislative processes. Courts do not make laws or pass bills; and the various steps required by the organic law to be taken seem, in the nature of things, to call for the exercise of legislative and not judicial functions.

The judiciary, at every step of its investigation into the journals of a legislative body, must find itself confronted with the embarrassing question, how is it that the courts have come to be the exclusive

guardians of those mandatory provisions of the Constitution which direct the Legislature only how to transact its business?

The answer must be more embarrassing because such a thing can not be except on the assumption that the courts must regard themselves as alone competent for such oversight.

It is to be admitted that unless the constitutional mandate is followed "no bill can become a law." The Constitution so says. But the question remains, what shall be taken by the courts as the basis of judicial knowledge? Must they look to the journals and accept as conclusive the hasty memoranda of the clerk or his assistant, or shall they assume that the Legislature obeyed the Constitution and accept as conclusive the certifications of its presiding officers?

That the act or successive acts of some agency somewhere or somehow must be held conclusive is entirely evident, unless we open the doors to all competent proof, including that of the member on the floor, an absurdity not to be thought of. The result is we must accept as conclusive either the entries of the clerk in the journals or the more deliberate acts of the presiding officers.

It must be conceded on all sides that at least some of the directions of the Constitution prescribing steps to be taken in the passage of a bill are addressed primarily if not exclusively to the Legislature. Thus no bill shall be considered for final passage unless the same has been reported by a committee and printed for the use of the members. Every bill shall be read at length on three different days in each house. (Section 46.) And so before the presiding officer of each house shall have affixed his signature to any bill he shall suspend all other business, declare that such bill will now be read, and that he will sign the same to the end that it may become a law. The bill shall then be read at length and compared, and if correctly enrolled the presiding officer, in the presence of the house in open session, and before any other business is entertained, affix his signature, which fact shall be noted in the journal, and the bill immediately sent to the other house. When it reaches the other house the presiding officer thereof shall immediately suspend all other business, announce the reception of the bill, and the same proceeding shall thereupon be observed in every respect as in the house in which it was first signed, and thereupon the clerk of the latter house shall immediately present the same to the governor for his signature and approval. (Section 56.)

Can it be said that a statute has not become a law if the journals show it was not reported by a committee or printed for the use of the members, or read at length on three different days, or was signed by the presiding officer without a suspension of all other business, and when no entry appears in the journals noting such signature? At least some of these steps are especially required to be entered in the journal, and nearly all of them ought to appear there if the houses keep a journal of their proceedings, as required by section 40 of the Constitution.

In some of the courts, where the journals are held to be competent evidence to impeach the enrolled bill, it is said that where those records are merely silent the presumption is absolute that the required steps were in fact taken. This seems to us hardly logical. If the validity of a law is to rest at all on the entries in the journals, it seems to us when there is a total absence of evidence that a necessary step has been taken the superstructure—the law—thus built up without a foundation must fall.

Those courts assume that the failure of the clerk to make the entry and in this violate the Constitution requiring the entry to be made,

was an oversight or mistake, and treat the entry as made, supplying the omission, and yet are not willing to assume it to be a mistake or mere misapprehension of the inferior officer, if an entry is made, showing steps taken not in conformity with the constitutional requirements.

Even if resort is had to the journals it would seem as consistent to overlook the sins of commission by the clerk and treat his entry showing a violation of the Constitution as not true as to overlook his sins of omission and supply the defects in his record. To avoid the necessity of resorting to these fine-spun distinctions we are convinced that the consistent and safe rule is to assume that the Legislature, in obedience to the Constitution, has taken the steps required by that instrument in the passage of every law, attested by the signatures of its presiding officers, the journals to the contrary notwithstanding.

The enrolled bill, so attested and signed and approved by the executive, is easy of access and inspection, but what shall we say of the journals? At the session at which the law now under consideration was adopted those records consist of over 4,000 pages. They seem to have been hurriedly and imperfectly indexed, as in the nature of things they must ever be. The assiduous lawyer who plods through these volumes may fail to find the evidence of an important step required by the Constitution to support a statute which has been promulgated as the law of the land, and the court in this case declares as a matter of fact that the *prima facie* law so promulgated is not, in fact, the law. In an adjoining circuit the court is more fortunate, and the missing step is found, or the erroneous entry is found corrected elsewhere in the record. So the law is upheld, and this confusing result will be reached, not because the law depends on the testimony or the pleadings in any given case, for the courts must take judicial notice of the journals, if they are controlling, as well as of the signatures of the presiding officers, if these are to be held conclusive; but the confusion comes from the nature of the record to be inspected. This is usually prepared by the subordinate officers hurriedly, amidst the excitement and confusion incident to legislative bodies, and with small concern for those details which are to become so important if the record is to be subjected to judicial scrutiny.

But it is said, since the Constitution requires the journals to be kept, it must be because they are to be used as evidence of legislative compliance or noncompliance with the constitutional requirements. We can see, however, much use for these journals other than the one suggested. Besides being necessary for the conduct of the business, it is to be remembered that our government is a representative one, and the journals show the respective parts borne by each representative in the enactment of the laws and the conduct of the public business. Responsibility can not be shifted or made to rest on the body as a whole. Again, we know that the enrollment of bills receive careful attention at the hands of special committees for that purpose. It is the final act of the body, the climax of the work before the finishing hand of the presiding officer sets his approval thereto. It receives and merits attention for that reason, and there is small room for imposition or fraud. The enrolled act is wellnigh necessarily the very act passed by the body, but the chances of mistake are very great in the makeup of the journals, as they are ordinarily kept, and if it be understood that the enrolled bill may be impeached by them the chances of fraud are likewise great. They are usually read from loose sheets or hurriedly made memoranda, and are approved with slight attention, are then passed to the jour-

nal clerk or some copyist, to be transcribed formally in the journal. They receive usually no further consideration at the hands of the body.

In after years the careless omission of a name on the affirmative side of a law, requiring a certain number of votes, is made the basis of a judicial finding that the law has not been enacted by a constitutional majority.

This feature is well put in the recent case of State *ex rel* Reed v. Jones Co., 6 Washington, 468 (1893), where it is said: "Unless the method of keeping journals should at once be revolutionized, and so much attention be paid to them that they will be made to absolutely represent all the doings of the body to such an extent as to very much prolong the sessions of the Legislature, the sanctity of legislative enactments will be entirely dependent upon the carefulness and good faith of some copyist employed by the Legislature at a few dollars a day."

The same point is thus stated by Justice Harlan in Field v. Clark: "The evils that may result from the recognition of the principle that an enrolled act, in the custody of the secretary of state, attested by the signatures of the presiding officers of the two houses of Congress and the approval of the President, is conclusive evidence that it was passed by Congress, according to the form of the Constitution, would be far less than those that would certainly result from a rule making the validity of congressional enactments depend upon the manner in which the journals of the respective houses are kept by the subordinate officers charged with the duty of keeping them."

It is said, however, that such a conclusion results in leaving the legislative department free to nullify the plain provisions of the Constitution, and refuse to comply with the formalities required by that instrument in the enactment of the laws. If this is true it does not follow that the courts may interfere with the processes of the Legislature in that respect. If that department fails or refuses to do the bidding of the Constitution it is responsible to the people and not to the courts. Besides, an assumption that it will so fail or refuse is not to be made the basis of judicial action. To the argument that if the authenticated roll is conclusive before the courts, then less than a quorum of each house may, by the aid of corrupt presiding officers, impose laws upon the State in defiance of the inhibition of the Constitution.

The Supreme Court of Indiana, in Evans v. Brown, 30 Ind., 514, responded thus: "It must be admitted that the consequence stated would be possible. Public authority and political power must of necessity be confided to officers, who, being human, may violate the trusts reposed in them. This, perhaps, can not be avoided absolutely, but it applies also to all human agencies. It is not fit that the judiciary should claim for itself a purity beyond others; nor has it been able at all times with truth to say that its high places have not been disgraced. The framers of our government have not constituted it with faculties to supervise co-ordinate departments and correct or prevent abuses of their authority. It can not authenticate a statute. That power does not belong to it, nor can it keep the legislative journal. It ascertains the statute law by looking at its authentication, and then its function is merely to expound and administer it. * Nor is there any great force in the argument which seems to be regarded as of weight by some American courts that some important provision of the Constitution would be a dead letter if inquiry may not be made by the courts beyond the rolls. This argument overlooks the fact that legislators are sworn to support the Constitution,

or else it assumes that they will willfully violate that oath. It is neither modest nor just for judges thus to impeach the integrity of another department of government, and to claim that the judiciary only will be faithful to its obligation."

From every point of reason, therefore, we are convinced that the enrolled bill, when attested by the presiding officers as the law requires, must be accepted by the courts as the very bill adopted by the Legislature, and that its mode of enactment was in conformity to all constitutional requirements. When so authenticated it imports absolute verity and is unimpeachable by the journals.

When we look to the authorities we find, as indicated before, a great diversity of opinion. They are too numerous to be reviewed here. We notice, however, that the more recent cases are adopting the English rule, and holding the enrolled bill conclusive. In several of the cases where the courts felt constrained to follow their former rulings, holding the journals competent, regret is expressed that a different rule had not prevailed. (State v. Moore, 37 Neb., 13.) Others express a doubt whether it is the better rule, and in South Carolina the court overrules its former decisions and adopts the views exressed in *Field v. Clark.* (State v. Town Council of Chester, 39 S. C., 307.)

In the recent case of Carr v. Coke, 116 N. C., 223 (1895), the question was considered as one of new impression in that State, and, after what seems to us a very satisfactory course of reasoning and a review of the principal authorities, the conclusion was reached that "when the Legislature has solemnly certified to a fact, that is to the passage and ratification of an act which is within its own sphere," the judiciary will not be permitted "to inquire into or dispute that certification."

To the same effect is the case of Hardee v. Wentworth, 42 Pacific Rep., 1028 (Arizona, 189.) The opinion in this case is well considered, and the doctrine restated on principle and authority. See also the recent cases of Lyons v. Woods, 153 U. S., 649; State v. Nye, 42 Pacific Rep., 856 (Nev.); Hunt v. Wright, 70 Miss., 298; Hollingsworth v. Thompson, 12 Southern Rep., 4: 45 L. A., 222; State v. Boyce, 40 N. E. R., 113 (Ind.), and Western Union Telegraph Co. v. Taggart, 40 N. E. R., 1051.

The older authorities are found collected in the notes to Field v. Clark, and the Washington & North Carolina cases cited, and need not be further discussed.

Regarding, therefore, the act of August, 1892, as constitutionally enacted, it is yet insisted by the appellees that as prior to January 31, 1894, when the vote in the town of Berry was taken, a special prohibitory law (1884) was in force in the magisterial precinct that included the town; therefore, no vote in the town alone could undo the vote of the entire precinct, and that the same subdivision which voted out the sale must act to vote it in.

The case of King, &c. v. Commonwealth, 86 Ky., 436, is relied on to support this contention. But in that case the right claimed by the town to take a separate vote was confessedly derived from the same law which conferred a similar right on the precinct which included the town. The power given each subdivision was from the same source, and was simultaneously conferred. Hence the conclusion was reached that no greater but equal power was conferred on each, and when the whole acted under the general law the part could not undo what it had done. But here we have a new political division created and new powers conferred. A complete separate entity is erected by a new charter of the town of Berry, and the trustees

thereof given exclusive control of the question at hand, except they can not grant license when forbidden by a previous law until the law is changed. And as showing that such a change might be had and how, we have only to quote a provision of the charter on that subject, adopted in July, 1893, to wit: "That in any town of the sixth class, in which the question as to whether spirituous, vinous and malt liquors might or should be sold * shall hereafter be submitted to the voters thereof, and the majority of votes cast thereat shall be in favor of the sale of such liquors therein, then the said board of trustees of such town shall have no right, power, privilege or discretion to refuse to grant licenses to sell such liquors therein until another election is held therein, as provided by general laws, and a majority of the voters of said town have voted against the sale of such liquors." (Subsection 4, section 3704, Kentucky Statutes.)

A vote in the new territory was, therefore, clearly contemplated and authorized by this charter, and, moreover, the general law—the local option law—was adopted to the end that consistent and uniform laws should prevail everywhere in place of these various and irregular special acts. Such was our conclusion in the recent cases of McTigue v. Commonwealth, 17 KY. LAW REP., 1418.

Of course the same precinct in which the vote was originally taken can never have another vote taken. It is well known that both the magisterial and voting precincts of 1884 have long since been obliterated and new ones erected (Kentucky Statutes, section 1078, 1443), and it is even doubtful if a special act of the Legislature could be constitutionally enacted, as where a general law can be made applicable a special one shall not be enacted.

Nor do we find any difficulty in determining the appellants to have been the trustees of the town of Berry at the time of the institution of this suit. They had been regularly elected under the old charter for one year from April, 1893, and while section 167 of the Constitution provided for a termination of their offices at the November election, 1893, it provided that the old officers should yet hold until their successors should be elected and qualified.

In the Wilson-Johnson case, 95 Ky., 415, the successor of the old officer was in fact elected at the November election, 1893, and the old officer was not entitled to hold thereafter. In answer to his contention that he might so hold over, we said: "It is true he was to hold until the general election in November, 1893, *and* until his successor was elected and qualified, but this is the usual method provided to prevent a vacancy, when from some unforseen circumstance no election has been held at the regular time, or some time must elapse until the succeeding officer shall qualify and be inducted into the office."

Here there was no election held in the town of Berry in November, 1893, and under the express terms of the Constitution the appellants were entitled to hold over, and were, therefore, not usurpers, as contended by appellees. The act of March, 1894 (section 3672, Kentucky Statutes), was passed to cure any possible doubt of the legality of the acting trustees of towns of the sixth class, arising out of the failure of many of those towns to elect trustees in November, 1893, and was not enacted, as contended by counsel, in recognition of the alleged fact that there were vacancies in those offices, or that the acts of the hold-overs were void. Such a legislative declaration, if made, would have been inoperative as an unauthorized interference with the functions of the judiciary in the exercise of its exclusive right to construe and interpret the laws.

We conclude, therefore, that upon none of the grounds relied on are the appellees entitled to the relief granted by the perpetuation of the injunction, and the judgment below is reversed, with directions to dismiss the petition.

SCHUFF V. PFLANZ.

(Filed April 2, 1896.)

1. *Forfeiture of office of sheriff for failure to renew revenue bond in time*—The Legislature has the power to authorize the county court to declare the office of sheriff vacant upon the failure of the incumbent to renew either his revenue bond or general official bond within the time fixed by statute.

2. *Same*—The statute authorizes the county court to declare the office of sheriff vacant upon the failure of the sheriff to execute a new revenue bond on or before the first Monday in January in any year; but the court also has the power to accept the renewal bond after that time, and, having done so, it is then too late to declare the office vacant. The present revenue law (section 4134, Kentucky Statutes), unlike the former revenue law, gives the county court power to take a new or additional bond at any time, and, therefore, the cases arising under the former law declaring new revenue bonds taken after the first Monday in January to be void have no application.

3. *Same*—The original revenue bond, like the general official bond, covers the entire term and not merely one year; and so with the several renewal bonds, which are merely cumulative, the sureties in all the bonds being jointly and separately liable for any default during the term.

Kohn, Baird & Spindle for appellant.

Dodd & Dodd, Samuel B. Kirby, Edward W. Hines and W. H. Newhall, jr., for appellee.

Appeal from Jefferson Circuit Court, Common Pleas division.

Opinion of the court by Chief Justice Pryor.

This proceeding was had under section 637 of the Code of Practice, with a view of determining the title to the office of sheriff of the county of Jefferson, the appellant, Schuff, and the appellee, Pflanz, each claiming the right to discharge the duties pertaining to that office.

The agreed facts show that the appellee, Pflanz, was the duly elected sheriff of the county of Jefferson for the term of three years. The election took place in the month of November of the year 1894, and on the first Monday in January, 1895, he, together with his deputies, entered upon the discharge of their duties. He had, prior to that date, executed his bonds as sheriff and qualified in the manner provided by law. Having been in office for nearly one year, he settled his accounts with the auditor of state shortly before the first of January, 1896, and obtained his quietus from that official, and, on the 11th of January, 1896, executed his annual revenue bond, which was approved and accepted by the judge of the Jefferson county court.

After this had been done, the county judge, on the 17th of January (the same month), came to the conclusion that Pflanz had forfeited all right to the office of sheriff by reason of his failure to execute this annual bond on or before the first Monday in January of that year (1896), and thereupon entered an order declaring the

office of sheriff vacant, and appointed the appellant, Schuff, to fill the vacancy.

The sheriff, by virtue of section 4129, Kentucky Statutes, is made collector of all State, county and district taxes, unless the payment is directed by law to be made to some other official, and from sections 4130 and 4131 originated the alleged cause for removing the appellee, Pflanz, from his office. Section 4130 provides: "The sheriff shall, on or before the first Monday in January next succeeding his election, and on or before the said day annually thereafter, enter into bond, with surety, for the faithful performance of his duties. A quietus from the auditor for the revenue tax for the preceding year shall be produced by each sheriff to the county court on or before that day; and no tax book shall be delivered to a sheriff, after the first year of his term, who shall fail to exhibit his quietus on or before such date."

The county court, by this section, is made the judge of the sufficiency of the surety.

Section 4131 provides: "On the failure of the sheriff *to execute bond and qualify*, as hereinbefore provided, he shall forfeit his office, and the county court may appoint a sheriff to fill the vacancy until a sheriff is elected, or it may appoint a collector for the county of all moneys due the State and county and taxing district authorized to be collected by the sheriff," etc.

Section 4134 provides: "The county court may require the sheriff to give an additional bond or bonds, with good surety, to be approved by the county court whenever it may deem the interest of the State or county demands; and the sureties on all the bonds executed by the sheriff shall be jointly and severally liable for any default of the sheriff during the term in which said bond may be executed, whether the liability occurred before or after the execution of such bond or bonds."

It is conceded in argument, as well as by the agreed facts, that Pflanz, the appellee, had fully complied with the statute by executing his bond for the collection of the revenue, as well as his general bond as sheriff (both in fact official bonds), but it is claimed that his failure to execute his bond for the collection of the revenue for the second year, on or before the first Monday in January, 1896, worked a forfeiture of the office, and the county judge was compelled to enter an order declaring him no longer sheriff.

The learned judge below, in the investigation of this question, reached the conclusion that the statute, under which this forfeiture was had, is in violation of the State Constitution. Section 227 of that instrument provides: "That judges of the county court, justices of the peace, sheriffs, coroners, surveyors, etc., shall be subject to indictment or prosecution for misfeasance or malfeasance in office or willful neglect in discharge of official duties in such mode as may be prescribed by law, and, upon conviction, his office shall become vacant; but such officer shall have the right of appeal to the court of appeals."

In this case it is not pretended that Pflanz was guilty of misfeasance or malfeasance in office or that he was guilty of a willful failure to discharge his duties as sheriff, and it, therefore, follows, if the proceeding by indictment or presentment, for the causes designated in section 227 of the Constitution, must be adopted, there is no mode pointed out by that instrument by which such an officer as sheriff can be removed upon his refusal to qualify or to execute an annual bond, as required by the statute, leaving his sureties, the

State, county and district without any protection, unless for causes that amount to misfeasance or malfeasance in office.

While the case of Lowe v. Commonwealth, 3 Met., 237, conduces to sustain the view taken of this case in the opinion below, it was held in the later case of Bartley v. Fraine, 4 Bush, 375, the county courts had the constitutional power to remove sheriffs from office for failing to give new bonds, and distinguished the latter case from that of Lowe v. Commonwealth, where the jailer of Mercer county was attempted to be removed for misfeasance in office, and in repeated adjudications it has been, in effect, held that such a power could be delegated to the county court.

Section 99 of the Constitution creates the office of sheriff and fixes the term, and section 100 the qualifications, and, although section 227 specifies some of the causes and the mode of removing a sheriff, other causes are found in the Constitution for which the office may be vacated, and there is nothing in that instrument that prohibits the Legislature from giving to the county courts plenary power as to the time and manner in which such officials are to execute their bonds, and to declare the office vacant upon their failure to comply with the statute.

Section 103 of the Constitution provides: "That the sheriff (with other officers) and such other officers as the General Assembly may from time to time require shall, before they enter upon the duties of their respective offices, and as often thereafter as may be deemed proper, give such bond and security as may be prescribed by law."

This power having been conferred, it necessarily follows that, when exercised, the power exists to enforce compliance with the statute as to the bonds to be executed and the time for their execution. The appellee, when elected to fill the office of sheriff, could exercise none of its duties until he qualified by giving bond with such surety as might be approved by the county court, and, in the absence of said qualification, the county would in fact be without a sheriff, and it would be absurd, in such a state of case, to hold that no power existed to vacate the office, but that resort must be had to an indictment or presentment for the failure of the sheriff to qualify.

The question does not affect the discharge of official duty, but pertains to the qualification of the officer that must precede the exercise of any of the duties of the office, and extends to the exercise of the further power, after the officer has qualified, on the part of the county court to see that the State, county and the citizen are protected against the acts of an insolvent official, by requiring additional security, as in the case of the sheriff, by the execution, every year, of a new bond or a renewal bond.

The exercise of this power has been conferred upon the county courts since the formation of the State government, and the power to require the execution of official bonds when qualifying and after qualification by the county court, and the failure to comply by the official to remove him or vacate his office, is now too well settled to admit of controversy. In fact it would be difficult to maintain our State government, with the collection of its revenues entrusted with those whose duty it is to give bond for the discharge of its duties, and yet with no power on the part of the State to compel its execution, and a resort only to the slow process of the law by indictment and a conviction, upon which rests the power to vacate the office or remove the official. In our opinion the statute in question is constitutional.

This brings us to a consideration of the various sections of the statute under which this power is claimed to exist.

If, as counsel for the appellant contends, the sureties in the bond for the collection of the revenue are only liable for the default of the sheriff for the one year, and are in nowise liable for any succeeding year of the term, without signing a new bond, there is much force in his conclusion, as, with such a complication, the county of Jefferson, the sheriff failing to execute a bond on the first Monday in January of the second year, would be without a collecting officer; but, on the contrary, if the sureties on the revenue bond, at the date of the qualification of the sheriff, are liable for the whole term, then it follows, if the bond be accepted for the second year, before any entry of an order declaring the office vacant, the sufficiency of the bond being conceded, the judge had no power to declare the office vacant, and Pflanz, by reason of his being sheriff and the execution of that bond, is the collector of the revenue and his sureties liable for his default in collecting or failing to pay over.

Section 4131 provides: "On the failure of the sheriff to *execute bond and qualify*, as hereinbefore provided, he *shall forfeit his office*."

The right of forfeiture under this section is made to depend upon his failure to qualify; and, by section 4130, he is permitted to execute bond at any time before the 1st of January. Pflanz, as appears, did qualify in the proper time, by giving bond satisfactory to the county court, and entered upon the discharge of his duties, but failed to execute his annual bond on or before the first Monday in January, 1896, and it is maintained that the failure to execute this bond worked a forfeiture and authorized the county judge to declare the office vacant.

Pflanz was still in the office of sheriff; had qualified with the execution of a bond that afforded ample protection to the State and the county for all the revenue that might come to his hands. The sureties on his bond, at the date of his qualification, bound themselves as such for and during the entire term of his office. This bond, provided for by section 4133, was not for the collection and payment over of the revenue for the year 1895, but stipulates that "we, A B, sheriff, and C D and E F, his sureties, bind and obligate ourselves, jointly and severally, to the Commonwealth of Kentucky, that the said A B, sheriff, shall faithfully perform his duties," etc. And the next section (4134) empowers the county court to require the sheriff to give an additional bond or bonds where the interest of the State or county demands it, and the sureties on all the bonds shall be jointly and severally liable for any default of the sheriff during the term in which said bond may be executed, whether the liability accrued before or after the execution of the bond or bonds. These bonds are not taken for one year, but bind the sureties for any default during the term for which they may be executed; and it can not well be said the sureties in these additional bonds are liable for the whole term and those on the original bond are liable for one year only. So we have a case where the qualification has been perfect and complete and a statute providing only that a failure to *execute bond and qualify* shall forfeit the office. Qualification means the execution of the bond, the oath of office. The question then arises, if the sheriff fails to give this annual bond for the collection of the revenue, can the county judge declare the office vacant?

The sheriff is required to give two bonds—one for the collection of the revenue and the other known as the general official bond.

Under the title of "Sheriffs," section 4552, it is provided: "It shall be the duty of the county court to cause the sheriff, annually, to renew his bond required by this chapter, and oftener if the court may deem proper; and, upon his failure to do so, the court shall enter up

an order suspending him from acting until he gives said bond, or the court may vacate his office."

This statute should be construed in connection with the revenue statute, and it is manifest that a fair interpretation of the legislative meaning is that, upon the failure to execute any bond required of this official, for the protection of the State, county or citizen, the county court may remove him from office; and particularly where by statute it is made the plain duty of the official to execute the bond on a particular day. The duty then devolves on the sheriff and he must comply with the law; but it does not follow because the sheriff fails to renew his general bond or to give an annual bond for the collection of the revenue that the county judge is powerless to accept a bond after the first Monday in January. He may, it is true, vacate the office, but before he does this he accepts a bond that is in addition to or a new bond, upon which the last sureties became jointly liable with the sureties on the first bond. It is a bond sufficient to satisfy the court that all will be protected who are interested in its execution, and when accepted, the sheriff having previously qualified, it is then too late to enter an order vacating the office.

In the case of Ridgeway v. Moody's adm'r, 91 Ky., 581, it was held that the sureties on the original bond were liable as well as those on the renewal bond, as the bond did not fix any other or less period, and if so, we perceive no reason why the same rule should not apply to the bond for revenue, and the greater the necessity for placing such a construction on that statute, for the sheriff in this one county collects nearly one-fifth of the revenue of the State, and to adjudge that, on the general bond, the sureties on the first bond are liable for the whole term, but on the revenue bond for only one year, not only lessens the security for the performance of these duties, but is in opposition to the plain intention of the Legislature.

In the case of the Commonwealth v. Yarbrough, 84 Ky., 496, this court held a revenue bond void because no authority was conferred on the county judge to accept a new bond after the first Monday in January; but it will be found that, in revising the present revenue law, the county judge is empowered to exact additional bonds whenever the interest of the State requires it; and still we are asked to enforce this forfeiture, although the bonds previously executed are still in full force and effect and ample to meet all liabilities incurred by the sheriff, and when it is conceded the county court accepted this annual bond before any order of forfeiture was entered.

A construction rational as to the results flowing from it, and in accord with the plain legislative intent that makes the sureties bound for the whole term, obviates the difficulties under which the State has been laboring for years in making sureties liable on these official bonds and secures the revenue and levy to which the State and counties are entitled.

The provision in section 4131 for a forfeiture "on the failure of the sheriff to *execute bond and qualify*" can not be made to apply to the subsequent bonds in cases where the county judge has accepted the annual or renewal bonds before any order of forfeiture is entered.

For these reasons the judgment below is affirmed.

COMMONWEALTH V. SHELTON.

(*Filed April* 3, 1896.)

1. *Conclusiveness of enrolled bill*—The House and Senate journals are not admissible as evidence for the purpose of showing that an enrolled bill was not constitutionally passed.

2. *Local option*—In determining whether an election under the local option law was held "earlier than sixty days after the application was lodged with the judge," the day on which the application was lodged must be included in estimating the sixty days, as the time begins to run after the act of lodging the application, and not after the day on which it is lodged.

3. *Indictment*—An indictment under the local option law must allege that the election was ordered upon a petition by a number of "legal voters in each precinct" equal to 25 per cent. of the votes cast therein, it not being sufficient to allege that the petition was "by a number of legal voters equal to 25 per cent. of the votes cast in each of the precincts."

4. *Same*—It is not necessary that the indictments should allege in terms that the petition was "signed" by the requisite number of voters, it being sufficient to allege, as in this case, that the county judge ordered the election upon a written petition which he had "received and filed" on a certain day "by a number of legal voters," etc.

5. *Same*—When an act of the Legislature can only be put in force by taking the sense of the legal voters of a given territory, an indictment for a violation of the act should allege a state of facts showing that the act has been put in force as required by its terms.

The case of Young v. Commonwealth, 14 Bush, 161, overruled in so far as it is in conflict with this case.

W. J. Hendrick for appellant.

W. G. Welch and W. H. Miller for appellee.

Appeal from Lincoln Circuit Court.

Opinion of the court by Judge Paynter.

The indictment charges that the accused, on the 15th day of May, 1895, unlawfully sold spirituous, vinous and malt liquors in Stanford magisterial district. The indictment is under the "Local Option Law." The election to determine whether or not liquors should be sold in the Stanford magisterial district was held under the local option act of 1892.

It is contended the act is invalid because the journals of the House and Senate relating to the passage of the act show a certain state of facts with reference thereto. The journals are not admissible as evidence for the purpose mentioned. The act in question must be accepted as having been constitutionally passed. (Lafferty, county judge v. Huffman, &c., *ante*, 17.)

This question was so fully considered in the opinion in that case it is unnecessary to discuss it here. The petition was lodged with the judge of the county court on the 25th day of January, 1894, and on the 26th day of March, 1894, the election was held. The act provides that the election shall not be held "earlier than sixty days *after the application is lodged* with the judge." It does not say sixty days after the day on which the application is made, but says after the application is lodged. The time begins to run after the act of lodging the application, not after the day on which the application is lodged. In estimating the sixty days the day on which the application for the election is made must be included, and sixty days had

elapsed before the day on which the election was held. This interpretation is in accord with numerous decisions of this court. (Wood v. Commonwealth, 11 Bush, 220; Handley v. Cunningham's trustee, &c., 12 Bush, 401; Mooar v. Covington City National Bank, 80 Ky., 305; Chiles v. Smith, 13 B. M., 460.)

It follows the election is not invalid for the supposed reason that the required time had not elapsed from the time of the act of lodging the application therefor until the election. The indictment alleges that "the judge of the county court of Lincoln county, upon a written petition which he had received and filed January 25, 1894, by a number of legal voters, equal to 25 per cent. of the votes cast in each of the precincts in said Stanford magisterial district at the last preceding general election, and which requested him to do so, made an order," etc.

It is not alleged in terms that the application for the election was made by written petition, "*signed by a number of legal voters in each precinct*" of the magisterial district, equal to twenty-five per cent of the votes cast in each of said precincts at the preceding general election. It is insisted that the indictment should charge that the petition was *signed* by the legal voters, and further that the legal voters thus signing the petition were voters in Stanford magisterial district. The indictment charges that upon a written petition, received and filed January 25, 1894, by a number of legal voters, equal to twenty-five per cent. of the votes cast, etc., the order for the election was made directing the sheriff of the county to open a poll in the Stanford magisterial district for the purpose of taking the sense of the legal voters in the district as to whether liquors should be sold in the district. There is a failure to allege that the legal voters who presented the petition were such voters in the precincts of the Stanford magisterial district. It is only on the application "by written petition, signed by a number of *legal voters in each precinct of the territory to be affected*," equal to twenty-five per cent., etc., which authorizes the judge of the county court to make the order for the election. The indictment is defective because it fails to state the petition was by "legal voters in each precinct" of the Stanford magisterial district. It is essential that that allegation should be made, because the first section of the local option law requires that those signing the petition should be "legal voters in each precinct of the territory to be affected" by the election. The indictment is not defective because of a failure to allege the petition was signed. To say as the indictment does, that upon the written petition by a number of legal voters, etc., the order for the election was made, imports that the legal voters presenting it had signed it. This opinion, as have been many others by this court, is in conflict with Young v. Commonwealth, 14 Bush, 161.

That case was under the former local option law, which provided for taking the sense of the voters as to whether or not liquors should be sold in a given territory, and the court said: "An indictment under the act should charge the defendant with the offense of selling spirituous, vinous and malt liquors without a license therefor, and contain a statement of the acts done by him, which constitutes the offense, and of the place where the acts were done, as in Civil District No. 5, in Meade county, and that the defendant had no license authorizing him to so sell."

In many cases the Young case has not been followed, the court holding that when an act can only be put in force by taking the sense of the legal voters of a given territory the court can not take

judicial notice of the acts which are essential to be done to put it in force. In other words, the court does not judicially know the act, thus depending upon the will of the legal voters, has been put in force. We think the better rule is to require the indictment to allege a state of facts which show that the act has been put in force as required by its terms. In so far as this opinion is in conflict therewith, Young v. Commonwealth is overruled.

For the reasons we have given the judgment is affirmed.

The Kentucky Law Reporter.

EDITOR:
WALTER G. CHAPMAN, ... Frankfort, Ky.

VOL. 18. JULY 15, 1896. No. 2

KENTUCKY COURT OF APPEALS.

ROUSE, &C. V. NEALE, &C.

SAME V. CRUME, &C.

(*Filed March* 31, 1896—*Not to be reported.*)

1. *Usury—Reversal of judgment*—Upon the return of these cases to the lower court after a reversal upon a former appeal as reported in 93 Ky., 151, the evidence upon the issue of fact as to the payment of money was sufficient to authorize the chancellor's judgment dismissing plaintiff's petition and also defendant's counterclaim.

2. *Restitution*—A judgment in favor of defendant for the amount he paid to plaintiff upon the judgment which was subsequently reversed was proper.

Fairleigh & Straus for appellants.

G. G. Gilbert and W. C. McChord for appellees.

Appeal from Spencer Circuit Court.

Opinion of the court by Judge Guffy.

On the 15th day of March, 1886, the plaintiff, now appellant, instituted these two actions in the Spencer Circuit Court. In the first-named action he sought to recover judgment on a note executed by the defendants to W. A. Rouse, and assigned to plaintiff, for the sum of $2,906.71, dated March 1, 1882, due in twelve months, subject to some credits set out in the petition.

The answer is, first, a plea of no consideration, and in the second paragraph it is alleged in substance that on April 21, 1862, the defendant, W. P. Neale, borrowed of W. A. Rouse $1,980, and executed his note therefor, due in twelve months, and that W. A. Rouse charged and collected ten per cent. interest thereon up to April, 1875, and so continued on up to the execution of the note sued on. It is also alleged in the answer that all the defendants, except W. P. Neale, were sureties of W. P. Neale. The answer shows and sets up that much more than the sum due, collated at the legal rate of interest, had been paid, and asks judgment over against W. A. Rouse therefor.

In the last-named suit, viz, the one against Crume, &c., plaintiff sought to recover on a note of $1,936, executed to W. A. Rouse and assigned to plaintiff. The note is dated the 1st day of March, 1882, due in twelve months, subject to some credits endorsed thereon. The substance of the defense in this case is that F. R. Neale, sr., now dead, was the sole debtor, the others being his sureties, and no consideration is pleaded. Also the plea of usury is relied on. It is alleged in substance that the decedent, F. R. Neale, did, on the 7th day of September, 1864, borrow of W. A. Rouse $5,000, and executed his note therefor, due in two years, and that he paid ten per cent. interest thereon up to September, 1868, and renewed the said note, after having paid part of the principal, and continued to pay ten per cent. interest thereon till September 15, 1873, and continued to make payments up to the execution of the note sued on. It is also shown by the answer that the debt had been fully paid off and more too if credited by the usury paid at the time the note in suit was executed, and defendant asked judgment over against W. A. Rouse. The ownership of plaintiff was denied in both cases. The allegations in the several answers were traversed, and plaintiff also relied upon and pleaded the statute of limitation against the claim to recover for usury.

It appears that there was considerable change as to the sureties from the execution of the first notes. The cases were transferred to equity and referred to the master commissioner, who made report showing an indebtedness to plaintiff according to the endorsements on the notes, and expressed the opinion that the claim of usury was barred by the statute. Defendant's exceptions were overruled to the report, and judgment rendered in each case in favor of the plaintiff, from which judgments defendants appealed to the Superior Court, which reversed the judgment, and an appeal was then taken to this court and the judgment of the circuit court was reversed (see 93 Ky., 151), this court holding in effect that the court below had not considered the evidence or fact as to whether or not usurious interest had been paid, but had only decided that the claim for credits, etc., on account of usury, was barred by the statute, and remanded the case for the trial of that issue of fact, this court holding that the change of sureties did not so far constitute a violation as to bar the plea of usury.

Upon the return of the cases to the circuit court a trial resulted in a judgment dismissing plaintiff's petitions, and also dismissing defendant's counterclaim and cross petition. It also appears that plaintiff had collected part or all of the judgment in one case, and the court gave judgment against plaintiff in favor of F. R. Neale for the sum so paid by him, viz, $979.46, with interest from date of judgment.

It seems that some compromise had been made by plaintiff with the proper parties as to the other judgment collected by him, hence no judgment was entered for a return of the sum so collected by plaintiff. From these last judgments W. T. Rouse prosecutes this appeal.

It may be conceded that the proof in the case is not perfectly clear and definite, yet it seems to us that the judgment of the court below is sustained by a preponderance of the testimony, and we are not disposed to disturb the same.

Judgment affirmed.

BRUCE, &C. v. VANCEBURG & STOUT'S LANE T. P. R. CO.

(*Filed April* 2, 1896—*Not to be reported.*)

1. *Taxation for benefit of turnpike company*—An act creating a taxing district and levying a tax upon the property therein for the benefit of a turnpike road company is not void because some of the property embraced therein is included in the taxing district of another company for the benefit of which it is also taxed. Nor does the fact that the road is of no value to the complainants in this case or that the tax is "useless and burdensome" invalidate the act as to them.

2. *Same—Validity of act*—The act is unconstitutional and void so far as it authorizes the turnpike company to appoint an assessor, requiring neither oath nor bond, and making no provision for a hearing by the taxpayer as to the value placed on his property.

3. *Special assessor*—In any event the company did not have the power to appoint a person who did not reside in the taxing district to make the assessment, as the Constitution requires all officers to reside in the county or district for which they act.

4. *Act valid in part*—The Legislature had power to levy the tax, and to that extent the act is valid. And by virtue of the general law the assessor of the county should assess the property in the taxing district and return the same as other tax lists are returned, and the taxpayers should have the same right to obtain corrections in or modifications of the lists as is allowed by the general law.

5. *Assessment*—No valid assessment can be made unless made by a proper officer, and the person assessed is entitled to a hearing as to the value to be placed upon his property.

A. M. J. Cochran and W. H. Wadsworth for appellants.

W. C. Halbert, Thos. H. Hines and A. E. Cole & Sons for appellee.

Appeal from Lewis Circuit Court.

Opinion of the court by Judge Guffy.

This action was instituted by the appellants, Thos. J. Bruce, &c., in the Lewis Circuit Court against the Vanceburg & Stout's Lane Turnpike Co., and J. C. Williams, sheriff of Lewis county, seeking to enjoin the collection of taxes, then about to be collected, for the benefit of the said appellee company, as well as to enjoin any future collection.

It is alleged in the petition that the law under which the taxes were about to be collected was procured by fraud; that the company was not organized before the adoption of the present Constitution, and that the act authorizing the company to appoint an assessor to assess the property within the taxing district is unconstitutional and void, and that the person so appointed had no legal authority to assess the property sought to be taxed; that no assessment in fact was made in 1891 and 1892. Some other averments were also made, which need not be noticed. A trial resulted in perpetuating the injunction as to the taxes for 1891 and 1892, but dissolving and dismissing the injunction as to future assessments and collections. Thos. J. Bruce, &c., appealed from the latter judgment, and the said company obtained a cross appeal from that part of the judgment which perpetuated the injunction as to the taxes of 1891 and 1892. The law under which the appellee company claims to act may be found in Session Acts of 1889 and 1890, volume 2, commencing on page 1885, entitled "An act to incorporate the Vanceburg & Stout's Lane Turnpike Road Co., in Lewis county."

The act, among other things, levied a tax of fifty cents on each $100 worth of property in a certain district for the benefit of said company.

Section 13 of the act in regard to the assessment of the property is as follows: "That the said company may appoint an assessor to assess the property subject to taxation as aforesaid for the building and construction of said road. The assessment shall be returned to the May or June term of the Lewis County Court in each year, and shall be subject to correction and revision in and by said court or the judge thereof; and it shall be the duty of the judge of said court at the terms of his court aforesaid to correct and revise the lists returned by the assessor of the company, and then the judge of said court shall cause the same to be made out and listed with the sheriff."

The evidence conduces to show that the company was organized before the present Constitution went into effect; that part of the citizens in the taxing district are also in the taxing district of the Ohio River and Wicks' Run Turnpike Co, which taxes them fifty cents on each $100 worth of property. It is also claimed and some evidence introduced to show that the road is of no value to the appellants, and that the tax is useless and burdensome, and only beneficial to the town of Vanceburg.

It seems to us that the facts aforesaid can not and do not invalidate the act in question. But it is insisted that the Legislature could not appoint or authorize the company to appoint a person to make the assessment, and that under the act in question no valid assessment could be made.

It was held by the Superior Court, in Davison v. Sterrett, &c., 13 KY. LAW REP., 265, that no valid assessment could be made unless made by a proper officer, and that the person assessed was entitled to a hearing as to the value to be fixed upon his property. It will be seen that the appellee was authorized by the act to appoint a person to make the assessment, and neither oath nor bond was required, and no provision made for a hearing by the taxpayer as to the value placed on his property.

It seems that the appellee appointed one of its stockholders to make the assessment, and that he did not reside in the taxing district at the time of the attempted assessment. The Constitution in force at the time and now requires all officers to reside in the county or district in which they are officers. It seems to us that so much of the act in question as attempts to provide for the assessment of the property in the taxing district is unconstitutional and void, and that the appointment and assessment made by the appointee of the company are both invalid. But the Legislature had power to levy the tax, and to that extent the act in question is valid, and by virtue of the general law the assessor of the county should assess the property in the taxing district and return the same as other tax lists are returned, and that the taxpayer should have the same right to obtain corrections in or modifications of the lists as is allowed by the general law respecting the assessment of property for general taxation.

For the reasons indicated the judgment is affirmed on the cross appeal and reversed on the original appeal, and cause remanded for further proceedings consistent with this opinion.

BEMENT V. OHIO VALLEY BANKING & TRUST CO.

(Filed April 2, 1896.)

1. *Fraudulent transfers—Limitation*—Where a father gave to his son a debt upon another, but subsequently brought suit upon the debt and had an attachment levied upon the debtor's property, and in compromise of that suit the debtor conveyed the attached property to the creditor's son, who undertook in consideration thereof to pay the debt to his father, the son can not, in this action by his father's creditors to subject what he owes his father on account of that undertaking, reply upon the original gift of the debt to him and plead the statute limiting actions for relief for fraud to ten years. The parties having subsequently ignored the original transaction, the son can not now rely upon it; and, the promise to the father being in writing, an action thereon is not barred until the lapse of fifteen years from the time it was made.

2. *Same*—A written release from the father to the son of a debt which the son owed him will not avail the son in this action by the father's creditors to subject the debt, the release being without valuable consideration. And as it was executed within ten years prior to the commencement of the action, and manifestly could not with reasonable diligence have been discovered by plaintiff until filed, the plea of limitation as to it will not avail, although it was executed more than five years before the commencement of the action.

3. *Same*—The liability of the grantor in a deed on his covenant of warranty, upon which judgment was recovered against his estate on account of his widow's claim to dower, must be regarded as an "existing liability" from the time the deed was made, and transfers of property made by him without consideration subsequent to the execution of the deed were constructively fraudulent as to that liability.

4. *Res judicata*—A judgment of a court of competent jurisdiction is in general conclusive not only as to all matters determined by it, but all incidental matters which might have been properly litigated and decided in the same suit. But this rule should not be applied where the new issues, being as to material and distinct matters, were not, either through fraud of one party or unavoidable casualty or misfortune of the other, presented and determined in the former action.

Where a creditor of a decedent in a suit brought by the administrator for the settlement of the estate of his intestate sought by cross-action to subject the proceeds of certain insurance policies, which he alleged belonged to the estate, but which the administrator had converted to his own use, and the court rendered a judgment which in effect allowed the administrator to set off against the insurance policies his claims against the estate upon the ground the policies had been given him by the decedent to indemnify him, that judgment is not a bar to this action by the creditor to subject certain debts which the administrator owed the decedent, as it was the duty of the administrator to submit to the court for its decision all questions properly relating to the estate, and, having failed to do so, he will not be allowed to profit by his own wrong.

Montgomery Merritt and H. F. Turner for appellant.

R. H. Cunningham and S. B. and R. D. Vance for appellee.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge Lewis.

Joseph Adams, having died in 1884 intestate, his son, John C. Adams, was appointed administrator, and in 1885 brought an action in equity to settle the estate, against which, however, he set up individual demands, arising from alleged payment of debts as surety of decedent, greater in amounts than assets reported.

In 1888 C. R. Bement, becoming on his petition a party defendant, filed an answer, made cross petition against John C. Adams. In it he stated and also showed that in 1880 Joseph Adams sold and by deed of warranty conveyed to him a tract of land, a dower estate in which, of value about $6,500, E. S. Adams, his widow, sued for and recovered in 1885, and he had consequently a subsisting demand for that sum and interest against the estate of decedent. He further stated for cause of cross action that John C. Adams did not have made and reported a true inventory and appraisement of the estate, but collected and converted to his own use proceeds of policies of insurance on the life of Joseph Adams, and also a government claim that rightfully belonged to the estate.

In defense John C. Adams stated that the policies and government claim was given to him by his father, and that he was entitled to the whole proceeds thereof, without any deduction on that account from the amount of his demands against the estate.

Judgment was rendered in that action August 19, 1891, dismissing the cross petition of Bement, though $2,447 of his demand was directed to be paid *pro rata* out of the other assets in the hands of the administrator. That part of the judgment relating to the individual demands of John C. Adams is in these words: "It is adjudged that the gift by Joseph Adams, deceased, to plaintiff, John C. Adams, of the several policies of insurance, and the claim against the United States, were intended in part to indemnify him (said John C. Adams) against loss on any debt then owing, viz, at the gift and delivery of said policies and claim by said decedent to said John C. Adams, and any debts on which said John C. Adams was then bound as surety for said decedent; and, therefore, it is further adjudged that said John C. Adams shall not be allowed any claim against his decedent's estate for any such debt due to or paid by him."

That judgment was, December 10, 1894, affirmed on appeal by John C. Adams and on cross appeal by C. R. Bement.

August 21, 1891, Bement, having obtained a judgment against John C. Adams as administrator for residue of his demand, upon which was issued an execution returned no property found, brought the present action to subject certain real property claimed and held by John C. Adams, since deceased, in his own right.

The different parcels so held and claimed are alleged and appear to have been acquired under these circumstances:

1st. August 23, 1881, Joseph Adams executed to him a mortgage on a debt he had against J. G. Adams, another son, for about $3,000, besides other property, to indemnify him as surety in the Farmers' Bank, and to the First National Bank on debts therein described. Subsequently Joseph Adams brought an action against J. G. Adams for judgment on the debt, obtaining and causing levied an attachment upon a tract of eighty acres of land. But October 2, 1884, that action was compromised, and for the recited consideration of $2,100 paid, and undertaking by the vendee to pay off and discharge the claim of Joseph Adams against himself. J. G. Adams then conveyed to John C. Adams said tract of eighty acres.

2d. June 1, 1882, Joseph Adams, for the recited consideration of $12,000, which John C. and Robert G. Adams had paid and assumed to pay for him, sold and conveyed to them various lots or parcels of land described in the deed.

3rd. In an amended petition, filed February 14, 1893, plaintiff stated that in March, 1891, Joseph Adams, having previously purchased from and paid the heirs of Chas. Clay for a certain lot de-

scribed, directed them to convey and they did convey it as a gift from him to John C. Adams. It is, however, alleged that if any part of the consideration for that transfer was valuable it was so because intended to further indemnify John C. Adams as surety.

The first ground of defense to the action we will consider is that of limitation.

It appears that the indebtedness of J. G. to Joseph Adams was by open account, and in order to avail himself of the statute limiting actions for relief for fraud to ten years, defendant alleged that the claim was, January 23, 1881, without valuable consideration, given to him by his father and filed what purports to be a written assignment of it of that date. But that transaction was evidently not regarded by the parties, nor should be now treated as effectual for any purpose, because in 1884, on compromise of the action brought by Joseph Adams to recover on that identical claim and release of his attachment upon the tract of eighty acres, John C. Adams undertook and promised to pay to him the full amount thereof as part consideration of the conveyance of said tract by J. G. Adams, and as it is plain Joseph Adams might, while living, have maintained an action on that promise, there is no reason why it is not now, nor why, being a written contract, it would not continue a subsisting liability of John C. Adams for fifteen years from 1884.

Defendant also pleaded and filed a written release from payment of any part of the consideration for the conveyance to him and Robert G. Adams, which Joseph Adams executed August 22, 1882. But, as that release without any valuable consideration was executed within ten years prior to the commencement of this action, and manifestly was not nor could with reasonable diligence have been discovered by plaintiff until filed, the plea of limitation can not as to it avail. It is, however, a confession that there was then an existing liability of John C. Adams to pay or account for one-half consideration of the conveyance by Joseph Adams to him and Robert G. Adams, and the amount of that indebtedness may, nothing to the contrary now appearing, be yet ascertained and subjected to pay creditors of decedent.

But it is argued that the covenant of Joseph Adams to warrant title and possession of the land conveyed to Bement in 1880 was not until 1884 an existing liability in the meaning of the statute, and, consequently, the release then executed, although a gift without valuable consideration, was not void as to it. It seems to us such a position can not be sustained without giving to the phrase "existing liabilities" a meaning more restricted than is reasonable or was intended by the Legislature. We, however, regard the question settled by this court in Garrard v. Garrard, 7 Bush, 436.

It is not definitely stated or shown that John C. Adams incurred any liability to Joseph Adams on account of the conveyance by Clay's heirs, but the allegation is the transaction was fraudulent, and as it occurred more than ten years before the amended petition was filed the plea of limitation must be sustained.

The main question is whether the judgment rendered in the action to settle the estate of Joseph Adams is a bar to this.

Dismissal of the cross action of Bement, we think, involved a decision merely that the proceeds of the insurance policies and government claim were not subject to the demand of Bement or, for that matter, of any other creditor of the estate, because they were, as said by the court, intended to indemnify John C. Adams against loss on any debt then owing to him by, or any debt on which he was surety of, Joseph Adams. But said proceeds appear to have

amounted to as much as his individual demands, a list of which was filed, and, consequently, it was at the same time adjudged none of the demands should be allowed.

The effect of that judgment was to offset the demands of John C. Adams with proceeds of the policies and government claim, and it does not in terms or meaning preclude Bement, or creditors generally, from subjecting other property of the estate in the hands of and improperly withheld by John C. Adams as administrator from cognizance of the court in that action.

But it is a rule often recognized by this court that a judgment of a court of competent jurisdiction is, in general, conclusive, not only as to all matters determined by it, but all incidental matters which might have been properly litigated and decided in the same suit; and as the property, which in this action it is alleged constituted part of the estate of Joseph Adams, and, therefore, subject to payment of debts against it, is a matter that might—indeed ought to have been—litigated in the other action, the judgment in question, according to rigid application of that rule is a bar to the relief now prayed for. But the rule being adopted by reason of necessity for some end to litigation, and because more injustice would generally result from reviving old issues than from limiting the right to prosecute actions, should not be applied where the new issues, being as to material and distinct matters, were not, either through fraud of one party or unavoidable casualty or misfortune of the other, presented and determined in the former action.

As that action was instituted by John C. Adams in his fiducial character, and he had, by reason of personal connection with it, actual knowledge of the condition of the property now in litigation, it was his duty to then report it to court as part of the estate, or at least submit for decision of the court all questions properly relating to it. But having, instead, withheld it from the notice of the court to the prejudice of the heirs and creditors, he should not now be allowed, in virtue of the rule in question, to profit by his own wrong. Clearly his conduct would have entitled the present plaintiff to a new trial of the former action, if applied for in proper time, and we see no reason why the court may not now ascertain the amount of John C. Adams' indebtedness to the estate, and subject it to the debts of the creditors and distribute the surplus, if any.

The judgment is reversed and case remanded for proceedings consistent with this opinion.

MASON V. COLUMBIA FINANCE & TRUST CO.

(*Filed April* 3, 1896.)

Homestead—Where husband and wife owned adjoining tracts of land which were cultivated as one farm, the fact that the dwelling house in which they resided was located upon the wife's part of the land did not deprive the husband of the right to the homestead exemption out of that part of the land owned by him, as they are to be regarded as residing upon his land within the meaning of the homestead law.

A. T. Wood, H. M. Woodford and C. C. Turner for appellant.

Stone & Sudduth for appellee.

Appeal from Montgomery Circuit Court.

Opinion of the court by Chief Justice Pryor.

The sole question to be determined on this appeal is whether or not the appellant, John Mason, is entitled to a homestead in certain real estate conveyed by him to A. A. Hazlerigg for the benefit of creditors.

The appellant, Mason, and his wife owned jointly a tract of 312 acres of land. The wife owned a part of the tract, laid off and designated by metes and bounds in her own right, and the land owned by the husband adjoined the land of the wife, the entire body of land owned by husband and wife containing 312 acres, and used and cultivated as one farm. The house in which they lived was on 25 acres of the land to which the wife had the fee, and the husband's land bordering upon it. The insolvency of the husband caused an assignment for creditors, and in the distribution of assets, his land having been sold, he was denied the right of homestead, or its value, and has appealed.

The case of Vanmeter v. Vanmeter's assignee is relied on as sustaining the judgment below. In that case the husband assigned, having a right of courtesy in a tract of land of his wife, upon which he lived worth more than $1,000, and this court held he was not entitled to a homestead in both tracts. The land on which he lived or his life estate in it being worth $1,000, and living upon it, he must take that and not his homestead in the tract to which he had the fee. It is insisted that to enable the appellant to assert his right he must have actually lived on the land to which he had the fee, and this is the general doctrine on the subject, and often controls the decision of such questions. In this case the appellant, in contemplation of the statute looking to both the letter and spirit of its provisions, was living on the land to which this right is asserted. It was all one tract, so regarded by the parties, used, cultivated and claimed as one tract, and because the house is outside of the boundary of the land to which the husband had the fee it is insisted no right of homestead exists.

The interpretation given the statute by this court is, "that it depends (this right) upon the present and actual purpose and intention of the debtor to use and enjoy the property sought to be exempted as a home for himself and family, and that the right does not exist where the debtor and his family are permanently located elsewhere."

We think the looking to the purposes contemplated by the statute, that of securing to the debtor this exemption for himself and family, it can not well be maintained that this residence on the tract of land must be regarded as a permanent location, claimed for no other reason than that the home happened to be located on the land owned in fee by the wife.

In the case of Lowell v. Shannon, 60 Iowa, 713, it was held that where the husband and wife own contiguous tracts of land, and occupy the two tracts as a homestead, with the dwelling on the land of the wife, the wife was entitled to a homestead in the adjoining land of the husband. That the husband occupied this land sold for creditors as a homestead is, we think, unquestionable.

Judgment reversed, with directions to award the homestead in money, as the land has been sold, and direct its payment to the appellant.

Judge Hazelrigg not sitting.

LOUISVILLE & NASHVILLE R. R. CO. V. COMMONWEALTH.

(*Filed April* 4, 1896.)

1. *Freight carriers—Extortion—Statute void for uncertainty*—Section 816 of the Kentucky Statutes, which provides for the punishment of any railroad corporation which shall charge "more than a just and reasonable rate of toll or compensation for the transportation of passengers or freight," is void for uncertainty, no standard being fixed by which the corporation may regulate its conduct. The infliction of the penalties prescribed by such a statute would be the taking of property without due process of law and in violation of both the State and the Federal Constitution.

2. *Same*—It would seem that such a statute, even if in all respects valid, could not be enforced against a corporation which has not exceeded the rates fixed in its charter, as those rates remain the legal rates until changed by law.

William Lindsay, J. W. Alcorn, E. W. Hines, Lisle & McChord, Walker D. Hines and H. W. Bruce for appellant.

W. J. Hendrick, W. H. Sweeney and H. W. Rives for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Hazelrigg.

The indictment in this case charges that the appellant "did unlawfully charge, collect and receive from A. Vancleave & Co. the sum of forty-one and 70–100 dollars as toll or compensation for the transportation of a car-load of coal, weighing 53,800 pounds, being at the rate of one and 55–100 dollars per ton, from Pittsburg, Ky., to Lebanon, in Marion county, over the line of said railroad, a distance of — miles, the said rate of one and 55–100 dollars per ton for the said transportation of said coal, being more than a just and reasonable compensation therefor, contrary to the form of the statute, etc."

A conviction followed, and from the judgment on the verdict of the jury for the sum of $500 the company has appealed.

Its complaints are that the statute prohibiting extortion by railroad companies, and providing a penalty therefor, prescribes no standard as to what is just and reasonable for the guidance of the corporation, and altogether fails to define what it may and what it may not do; that it is, therefore, void for uncertainty; that, even if the statute is valid, the indictment states no facts showing the appellant guilty of the offense charged, but only the conclusion of the pleader that the rate charged was more than a just and reasonable compensation.

It is also urged that the trial court erred in refusing to grant to appellant a change of venue upon the testimony heard, and in the admission of incompetent evidence; and it further insists that, on the facts of the case, the charge is reasonable and just, within the meaning of the statute, and especially so as the charge is within the rate allowed by the company's charter.

The chief question to be considered is the one affecting the validity of the statute, the provisions of which are found in sections 816 and 819 of the Kentucky Statutes. The first named section reads as follows: "If any railroad corporation shall charge, collect or receive more than a just and reasonable rate of toll or compensation for the transportation of passengers or freight in this State, or the use of any railroad car upon its track, or upon any track it has control of or has the right to use in this State, it shall be guilty of extortion."

Section 819 fixes the penalty for the first offense at not less than $500 nor more than $1,000, and increases the penalty for subsequent infractions of the law. The circuit court of any county into or through which the road runs, and the Franklin circuit court, are given jurisdiction of the offense, the prosecution to be by indictment or action in the name of the Commonwealth, upon information filed by the board of railroad commissioners.

That this statute leaves uncertain what shall be deemed a "just and reasonable rate of toll or compensation" cannot be denied, and that different juries might reach different conclusions, on the same testimony, as to whether or not an offense has been committed, must also be conceded.

The *criminality* of the carrier's act, therefore, depends on the jury's view of the reasonableness of the rate charged; and this latter depends on many uncertain and complicated elements.

That the corporation has fixed a rate which it considers will bring it only a fair return for its investment does not alter the nature of the act. Under this statute it is still a crime, though it can not be known to be such until after an investigation by a jury, and then only in that particular case, as another jury may take a different view, and, holding the rate reasonable, find the same act not to constitute an offense. There is no standard whatever fixed by the statute, or attempted to be fixed, by which the carrier may regulate its conduct; and it seems clear to us to be utterly repugnant to our system of laws to punish a person for an act, the criminality of which depends, not on any standard erected by the law which may be known in advance, but on one erected by a jury. And especially so as that standard must be as variable and uncertain as the views of different juries may suggest, and as to which nothing can be known until after the commission of the crime.

If the infliction of the penalties prescribed by this statute would not be the taking of property without due process of law and in violation of both State and Federal Constitutions, we are not able to comprehend the force of our organic laws.

In Louisville & Nashville R. R. Co. v. Railroad Commission of Tennessee, 16 Am. & Eng. R. R. Cases, 15, a statute very similar to the one under consideration was thus disposed of by the learned judge (Baxter): "Penalties can not be thus inflicted at the discretion of a jury. Before the property of a citizen, natural or corporate, can be thus confiscated, the crime for which the penalty is inflicted must be defined by the law-making power. The Legislature can not delegate this power to a jury. If it can declare it a criminal act for a railroad corporation to take more than a 'fair and just return' on its investments, it must, in order to the validity of the law, define, with reasonable certainty, what would constitute such 'fair and just return.' The act under review does not do this, but leaves it to the jury to supply the omission. No railroad company can possibly anticipate what view a jury may take of the matter, and hence can not know in advance of a verdict whether its charges are lawful or unlawful. One jury may convict for a charge made on a basis of four per cent., while another might acquit an accused who had demanded and received at the rate of six per cent., rendering the statute, in its practical working, as unequal and unjust in its operation as it is indefinite in its terms."

The Supreme Court of the United States, in Railroad Commission Cases, 116 U. S., 336, refers to this Tennessee case and substantially approves it by distinguishing the case then before the court from the Tennessee case.

This case is also used to support the text in 8 Am. and Eng. Ency. of L., 935, where it said: "Although a statute has been held to be unconstitutional which left it to the jury to determine whether or not a charge was excessive and unreasonable in order to ascertain whether a penalty is recoverable, yet where the action is merely for recovery of the illegal excess over reasonable rates this is a question which is a proper one for a jury."

Mr. Justice Brewer, in the case of Chicago, &c., R. R. Co. v. Day, 35 Fed. Rep., 866, had under consideration the provisions of a statute similar to the one we have before us, and while the statute was upheld it was only because there was a schedule of rates provided in the act which rendered the test of reasonableness definite and certain. The learned judge then said: "Now the contention of complainant is that the substance of these provisions is that if a railroad company charges an unreasonable rate it shall be deemed a criminal and punished by fine, and that such a statute is too indefinite and uncertain, no man being able to tell in advance what in fact is or what any jury will find to be a reasonable charge. If this were the construction to be placed upon this act as a whole it would certainly be obnoxious to complainant's criticism, for no penal law can be sustained unless its mandates are so clearly expressed that any ordinary person can determine in advance what he may and what he may not do under it."

"In Dwar. St., 652, it is laid down 'that it is impossible to dissent from the doctrine of Lord Coke that acts of Parliament ought to be plainly and clearly and not cunningly and darkly penned, especially in legal matters.' See also United States v. Sharp, Pet. C. C., 122; The Enterprise, 1 Paine, 34; Bish. St. Cr., section 41; Lieb. Herm, 156."

And the learned judge concludes that there is very little difference between a provision of the Chinese Penal Code, which prescribed a penalty against anyone who should be guilty of "improper conduct," and a statute which makes it a "criminal offense to charge more than a reasonable rate."

The same learned judge, discussing the kindred subject of unreasonable differences in rates, in Tozer v. United States, 52 Fed. Rep., 917, said: "But in order to constitute a crime the act must be one which the party is able to know in advance, whether it is criminal or not. The criminality of an act can not depend upon whether a jury may think it reasonable or unreasonable. There must be some definiteness and certainty."

When we look to the other side of the question we find the contention of the State supported by neither reason nor authority. No case can be found, we believe, where such indefinite legislation has been upheld by any court where a crime is sought to be imputed to the accused. Manifestly, in actions by shippers against carriers for recovering back the excess of charges over reasonable rates, the rule is quite different. In such actions the statute may be invoked as merely declaratory of the common law, and the question of reasonable rates is one to be heard by the court or jury. It is in fact a question of contract. Common carriers are "bound to carry when called upon for that purpose, and charge only a reasonable compensation for the carriage. These are incidents of the occupation in which they are authorized to engage." (94 U. S., 180.)

If this charge is more than is reasonable there is a violation of the contract, and the suit of the person aggrieved is because of such violation.

In some States the shipper is entitled to recover double or triple

the amount of the excess, but this does not change the nature of the action.

The nearest approach to an authority for the State's contention is a case in which the shipper sued the carrier, and is reported in Railroad v. Jones, 149 Ill., 361. There the first section of the act under consideration, of which our statute is a substantial copy, was attacked for want of certainty in defining the act of extortion, the contention being that the determination of what is a fair and reasonable rate must depend upon a variety of considerations. such, for instance, as the character of the freight, the necessity of dispatch, the cost of cleaning and unloading cars, the risk of liability as affected by the value of the articles carried, the volume of business, the amount of car room required, the difficulty of the service, the special attention demanded, etc.

The court said that "the difficulties which stand in the way of determining what are reasonable rates also stand in the way of embodying in a legal enactment such an exact definition as is insisted upon. The first section of the statute is merely declaratory of a well-known principle of the common law. At common law the common carrier was obliged to receive and carry all goods offered for transportation upon receiving a reasonable hire (Messenger v. Penn. R. R. Co., 31 N. J. L., 407), and the court was to judge of the reasonableness of the freight charges. * * Undoubtedly the Legislature has the power to declare what is a reasonable compensation, or to fix the reasonable maximum rates of charges (Dow v. Bridleman, 125 U. S., 680); but in the absence of statutory regulation upon the subject the courts must decide what is reasonable."

As we have seen, the action was one by a shipper against the carrier, and was in the nature of a suit for damages for a breach of the contract. The court, however, made its meaning clear by references to and approving its former construction of the act as found in Railroad, &c. v. The People, 77 Ill., 443, and of that case said: "But we held in Railroad Co., &c. v. The People, that the first section of this statute should be construed in connection with the eighth, and that the latter section, by providing for the making by the railroad and warehouse commissioners of a schedule of reasonable maximum rates for each of the railroad corporations in the State, furnished a uniform rule for the guidance of the railroad companies. In that case we said: 'When that is done there will be a standard of what is fair and reasonable, and the statute can be conformed to and obeyed.' "

As this Illinois section appears to have been substantially reenacted here without, however, accompanying it with the provision for a standard, we quote the more freely from the Illinois court construing the section.

In the 77 Illinois case the court said: "That section, by itself, makes the offense to consist in taking more than a fair and reasonable rate of toll and compensation, without reference to any standard of what is fair and reasonable. In such case, it may be seen, different persons would have different opinions as to what is a fair and reasonable rate. Courts and juries, too, would differ, and at one time or place a defendant might be convicted and fined in a large amount for the same act, which, in another place or at another time, would be held to be no breach of the law, and what might be thought a fair and reasonable rate on one road might be considered otherwise upon another road. There would be no certainty of being able to comply with the law. A railroad corporation, with purpose of conforming to the law, might fix its rates at what it believed to be rea-

sonable, and yet be subjected to the heavy penalties here prescribed. The statute furnishes evidence that it did not intend to leave the railroad in this state of uncertainty and danger and exposed to such seeming injustice. * * * The eighth section provides how reasonable rates shall be ascertained; what they shall be; that the railroad and warehouse commissioners should make for each of the railroad corporations in the State a schedule of reasonable maximum rates, thus furnishing a uniform rule for the guidance of the railroad companies."

These authorities and the argument abundantly supporting them are sufficient. Other objections to the judgment below need not be discussed, as the one noted is fatal, and the statute can not be enforced as a penal statute.

It may be observed further, however, that it would seem singular if such a statute, even if in all respects valid, could be enforced against a carrier whose rates, as fixed in its charter, are in excess of the rates alleged to be excessive in the indictment. And this, not because such rates are secured by an irrepealable contract, a matter not now considered, but simply because they at least remain the legal rates until changed by law.

The judgment is reversed, with directions to dismiss the indictment.

HALE V. GROGAN.

(*Filed April* 15, 1896.)

1. *Accord and satisfaction*—In a suit upon a promissory note an answer filed by the principal in the note, alleging that by an agreement to which the surety in the note was a party the plaintiff had agreed to apply to the payment of the note sued on a certain amount which he owed the surety and to release the principals and look alone to the surety, did not state a good defense, no consideration for the release of the principal being alleged, and the facts stated not being sufficient to constitute an accord and satisfaction.

2. *Same*—To constitute a good plea of accord and satisfaction the delivery or performance of what is agreed upon must be averred.

3. *Issues—Pleadings*—It is the duty of the court, upon or without motion, to compel the parties to form a material issue in the action, and to cause all redundant or irrelevant matter to be stricken from the pleadings; therefore, the court should in this case have stricken from the pleadings all allegations relating to the state of the accounts between the plaintiff and the surety in the note sued on, the surety not being a party.

4. *Provisional remedies*—It is the better practice to set up and controvert the grounds for provisional remedies in separate affidavits, and not in the pleadings; and as the grounds for the order of arrest in this case were stated in a separate affidavit filed by plaintiff at the commencement of the action it would have been proper for the court to require the defendant, if he desired to controvert them, to do so by separate affidavit instead of by his answer.

Fenton Sims for appellant.

W. M. Reed and W. M. Smith for appellee.

Appeal from Calloway Circuit Court.

Opinion of the court by Judge Landes.

The action in the court below was upon two promissory notes, one of them executed by the appellee alone, and the other by him and James A. Grogan, his surety. Both notes were executed to the mercantile firm of Hale, Head & Co., of which firm the appellant was a member. The partnership having been dissolved, the assets of the

firm were divided among the individual members, and in this way the appellant became the sole owner of these notes. James A. Grogan, the surety on one of the notes, was joined with the appellee as defendant in the action, but, before the answer was filed, on motion of the plaintiff, the action as to him was dismissed without prejudice.

At the commencement of the action an affidavit of the plaintiff was filed in the clerk's office, conforming substantially with section 157 of the Civil Code, and the plaintiff, having caused bond to be executed, as required in such cases, sued out an order of arrest, which was issued by the clerk, and under which the appellee was arrested, who, in due course of procedure, was bailed and released from custody.

In his answer the appellee set up in detail a number of debts or claims which he averred were due and owing by the appellant to James A. Grogan, the surety on one of the notes sued on, and several debts which he alleged the latter owed the appellant, and, without stating that there had been a settlement of accounts between the appellant and James A. Grogan, or that there was an ascertained balance due from the former to the latter, alleged, by way of defense to the action, that "it was agreed between said parties, N. T. Hale, J. A. Grogan and H. W. Grogan, that said Hale was to apply the amount due J. A. Grogan, as shown, to the payment of these two notes herein sued on, and was to and did then release said H. W. Grogan from the payment of said notes or any part of them, and to look alone to J. A. Grogan for the payment of same, and that all parties mentioned then agreed to said arrangement, and said defendant was released therefrom."

These allegations were specifically denied in the reply, and thus the only issue or attempted issue, on the merits of the case, was made up. But the appellee, without filing a separate affidavit controverting the grounds for the order of arrest, that were set up in the separate affidavit of appellant, controverted them in his answer, to which the appellant likewise replied. Appellant also, in his reply, controverted the statements of the answer by which appellee endeavors to show the state of accounts between the appellant and James A. Grogan. And the record shows the remarkable fact that the only issues that were submitted to the jury were as to the state of accounts between the appellant and James A. Grogan, who was not a party to the action, while the jury was precluded by the instructions of the court, against the objections of appellant's counsel, from considering or passing upon any question concerning the alleged agreement that the appellant should look alone to James A. Grogan for the payment of the notes sued on and to release the appellee from all obligation to pay them. And the jury were required by the court to respond, by special verdict, to certain questions growing out of the alleged transactions between the appellant and James A. Grogan, upon which special findings of the jury the court proceeded to settle their accounts, and having, in this way, ascertained that the appellant was indebted to James A. Grogan in a balance of $84.92, adjudged the notes sued on to have been fully paid off and satisfied, and dismissed the petition absolutely, and vacated the order of arrest. Exceptions were duly taken in behalf of the appellant to these proceedings, and, a motion for a new trial having been made and overruled, this appeal was prayed and granted.

Without enumerating or attempting to go into the details of the grounds for a new trial, the statement of the case thus far suffices to

show that the judgment of the lower court can not be sustained. It is manifest that no material issue was formed by the pleadings concerning the causes of action set up in the petition, and upon the pleadings as they were, the appellant was entitled to a judgment for the debts sued on. The plea of release was insufficient because there was no statement of facts showing any consideration for the alleged agreement to release or showing an actual release of the appellee from all obligation to pay the notes, which were retained by the appellant, and were neither demanded by appellee nor surrendered to him after the alleged agreement was made. The facts stated in the answer, although evidently so intended, were not sufficient as a plea of accord and satisfaction. It was not sufficient to allege that the parties had agreed upon the terms of settlement or satisfaction of the debts sued on. It ought also to have been distinctly alleged that the agreement was executed and the satisfaction made or performed in compliance with the agreement. In other words, in order to make such a plea good, the accord as well as the satisfaction, or the delivery or performance of what is so agreed upon, must be averred. (Payne v. Barnett, 2 Mar., 314; Am. & Eng. Enc. of Law, 2d edition, volume 1, page 420; Enc. of Pleading and Practice, volume 1, page 73; McKean v. Read, 12 Am. Dec., 13; Haggin v. Williamson, 5 Mon., 13; Peace v. Stewart, 4 J. J. Mar., 449.)

In addition to the foregoing objections to the answer, which are fatal to the defense attempted to be made, the court ought not to have permitted the pleadings to be encumbered with statements and counter-statements about the matters of account between the appellant and James A. Grogan, who was not a party to the record. These matters, in detail or in the aggregate, were not relevant to the merits of the appellant's demands against the appellee, and could not properly be litigated in the action. It was the duty of the court, upon or without motion, to compel the parties to form a material issue in the action, and to cause all redundant or irrelevant matters to be stricken from the pleadings, in order that there should be no confusion in regard to the true issues between the parties. (Civil Code, sections 114, 121.) And while we do not now hold that grounds for provisional remedies may not be set up and controverted in the pleadings, we do not regard it as being the better practice so to do; and, in this case, the grounds for the order of arrest having been stated in a separate affidavit of the plaintiff, filed at the commencement of the action, it would have been proper for the court to require the defendant to controvert them, if he desired so to do, by separate affidavit, instead of allowing the issues upon them to be made up in the pleadings. Such a course of procedure is evidently contemplated by the Civil Code, which provides (section 153) that the clerk of the court shall issue an order for the arrest of the defendant, either at the commencement of the action or at any time before judgment, "if an affidavit of the plaintiff be filed in his office showing" the grounds for the order. And, by section 178, it is provided that the motion to vacate an order of arrest in civil actions, or to reduce the amount of bail therein, may be supported or opposed by affidavit or other evidence, and the questions arising thereon are for the court and not the jury to decide. It is the manifest object and purpose of the Code to exclude from pleadings all redundant matter or matter that is not relevant to the issues upon the merits of the cause of action or of the defense.

For the reasons indicated, the judgment of the lower court is reversed and the cause remanded, with directions to grant the appellant a new trial and to proceed consistently with this opinion.

LINDSAY V. COMMONWEALTH.

(*Filed April* 15, 1896.)

1. *Sale of liquor by druggist—Evidence*—A license to sell liquor is not necessary in order to authorize one who is both a physician and druggist to prescribe and sell liquor as a medicine. Nor is a written prescription necessary. Therefore, upon the trial of appellant for the offense of selling liquor without a license, the court erred in excluding testimony tending to show that as a physician and druggist he had prescribed and sold the liquor in question as a medicine.

2. *Same—License*—A druggist need not have a license to sell liquor in order to authorize him to fill the prescription of a physician or his own prescription in which whisky is combined with other ingredients, provided he acts in good faith.

3. *Same*—The fact that one has had a license to sell liquor which he has forfeited does not deprive him of the right of subsequently carrying on the business of a druggist and selling liquor as such for medical purposes in accordance with the law.

Chas. W. Wood and Hanson Kennedy for appellant.

W. S. Taylor for appellee.

Appeal from Nicholas Circuit Court.

Opinion of the court by Judge Paynter.

The defendant, Lindsay, held a license as a retail liquor dealer. He was convicted of the offense of suffering gaming on his premises, and his license adjudged forfeited.

The indictment in this case charges him with selling liquors, subsequent to the judgment forfeiting his license, to one Geo. Ockerman by the pint and half pint without a license. On the trial of the case the court excluded from the jury that part of the testimony of Ockerman tending to prove that Lindsay had been his family physician for twenty-five years; that he applied to him for medicine to relieve his wife from a severe pain in the stomach and bowels. The court also refused to allow the defendant to prove that he was a regular practicing physician, and had been for many years; that he was a druggist in good faith; that he had been Ockerman's family physician for many years; that he had often examined and prescribed for his wife; that Ockerman applied for a prescription for his wife to relieve her from a severe pain in the bowels and stomach, and that the prescription on that occasion was two ounces of syrup of ginger and fourteen ounces of whisky, and mixed the same together as a medicine and gave the same to Ockerman for his wife.

The court erred in excluding the testimony of Ockerman mentioned, and in not allowing Lindsay to prove the facts above indicated.

It was held in Commonwealth v. Hawkins, 17 KY. LAW REP., 744, that "by the provisions of section 4205, Kentucky Statutes, a druggist, in his business as such, may sell 'in quantities less than a quart, for medicinal purposes only, on the prescription of a regular practicing physician,' and this he may do, in our opinion, without a license and free from any requirements or provisions of section 4203."

The same interpretation of the statute was given in Commonwealth v. Fowler, 17 KY. LAW REP., 1209. In that case it was said: "Besides, the druggest can compound his medicines and fill the prescription of the physician, or his own prescription, when whisky is only

one of the ingredients, without a license, and in so doing violates no law unless in filling such prescription he is evading the law by deception or fraud in selling whisky under a fictitious prescription."

The fact that Lindsay once held a license as a retail liquor dealer did not deprive him of the right of subsequently carrying on the business of druggist and to sell liquor as a druggist for medicinal purposes in accordance with the law.

A druggist who is a regular practicing physician need not make out for himself a prescription, prescribed and filled by him as such physician and druggist for others, and preserve them as a protection from prosecution. (Commonwealth v. Matthews, 3 KY. LAW REP., 473; Boyd v. Commonwealth, manuscript opinion, January 10, 1879.

If the defendant, in good faith, as a physician and druggist, prescribed and sold the liquor to Ockerman for his wife he did not violate the law.

Wherefore, the judgment is reversed, with directions to grant the defendant a new trial and for further proceedings consistent with this opinion.

COMMONWEALTH V. DRAIN, &C.

(*Filed April* 15, 1896.)

1. *Special legislation—Catching fish with a seine*—A statute which applies to the whole State is not special legislation merely because it provides that the fines imposed for a violation of the statute shall be disposed of in a way different from that in which fines imposed for other offenses are disposed of; or because it confers upon the circuit courts exclusive jurisdiction to try and punish offenses under the statute when justices of the peace have concurrent jurisdiction to try other offenses punished in the same way.

Section 1899 of the Kentucky Statutes and succeeding sections providing for the punishment of the offense of catching fish with a seine and for the disposition of fines imposed thereunder do not violate the provision of the Constitution prohibiting special legislation for the protection of game and fish.

2. *Validity of statute*—A statute providing that a part of the fine imposed for a violation thereof shall go to the civil officer securing the apprehension and conviction of the offender is valid.

3 *Indictment—Judicial notice*—The court judicially knows that Grayson county is an interior county, and, therefore, an indictment for catching fish with a seine in a stream in that county need not allege that the stream is not one "forming the boundary line between this and other States," even if it be necessary in any case to negative that exception to the statute, which is quite doubtful.

W. S. Taylor for appellant.

J. S. Wortham for appellees.

Appeal from Grayson Circuit Court.

Opinion of the court by Judge Hazelrigg.

The indictment charges the appellants with unlawfully catching fish by means of a seine in Rough Creek, a running stream in Grayson county, and a demurrer having been sustained thereto the State has appealed.

The provisions of the statute involved are as follows:

"Section 1899. That it shall be unlawful for any person or persons to catch or destroy fish in any of the running waters, lakes or ponds, other than private ponds, of this State, by means of a seine, net, other than a dip-net, drag or trap, except streams forming the boundary line between this and other States. Any one thus offending shall, on conviction, be fined in a sum not less than $25 nor more than $50 for each offense, and cost of prosecution."

By succeeding sections sixty *per centum* of the fines imposed under this law is to be paid into the county treasury where the offense is committed, and forty *per centum* is to go to the civil officer securing the apprehension and conviction of the offender, and the circuit courts of the respective counties are given exclusive jurisdiction to indict and punish.

It is said that the ground on which the demurrer was sustained is that the provisions respecting the disposition of fines and conferring exclusive jurisdiction on circuit courts render the law obnoxious as special legislation, and this is expressly prohibited by the Constitution. That instrument does prohibit special legislation providing for the protection of game and fish, but manifestly this was to remedy the common evil then prevalent of having laws on this subject in force in some localities and not in others. We think the statute a general one, and in no sense special or local within the meaning of the prohibitory clause of the Constitution. No authority is cited for the position assumed by counsel, but it is argued that a law offering a reward for informers is an encouragement to the spy, etc. If this is true it is a matter for the consideration of the legislative department alone. The courts can only construe the statute, and can not judge of its wisdom.

It is further suggested that it is not alleged in the indictment that the stream in which the fish were caught was not one "forming the boundary line between this and other States." As Grayson is an interior county, however a fact judicially known, it can not well have any stream within its limits forming such a boundary line; and, besides, it is quite doubtful if the exception be not a matter of defense merely.

The demurrer ought to have been overruled, and the judgment is reversed for proceedings consistent with this opinion.

WILSON v. COMMONWEALTH.

(*Filed April* 15, 1896.)

1. *Bail*—The bail of a defendant who has been committed to jail by an examining court having at the next term of the court having jurisdiction to try the offense been fixed by that court, the clerk of the court may take the bail bond at any time after that term, whether it be during the vacation or during the subsequent term of the court.

2. *Proceeding upon forfeited bail bond*—The proceedings upon a forfeited bail bond subsequent to the service of summons are the same as in an ordinary civil action.

3. *Leave to amend pleadings*—The court upon sustaining a demurrer to a pleading is not required to give leave to amend unless such leave is asked.

Little & Little for appellant.

W. J. Hendrick for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Paynter.

This proceeding is to recover of the appellant, Wilson, $300 on a bail bond which was forfeited.

The record, as construed, shows that the court made an order allowing Wm. Wilson to give bond in the sum of $300 for his appearance in the Daviess Circuit Court to answer an indictment charging him with horse-stealing. The clerk of the court accepted the bond with appellant as surety in the sum of $300. Counsel for appellant is in error in assuming the order of the court allowed the clerk to accept a bond only for $250. On a return of the indictment the court fixed the bail at $250. Subsequently the accused appeared in court. The Commonwealth's attorney entered a motion that the bail be fixed at $500. On consideration of that motion the court fixed it at $300.

Section 68, Criminal Code, is as follows: "The defendant, after commitment, and before the commencement of the next term of the court having jurisdiction to try the offense, may be admitted to bail in the sum fixed by the committing magistrate, by such committing magistrate or by the judge of the county court; but after the commencement of the term of the court can only be admitted to bail by the court or judge thereof. After the term, if the amount of the bail has been fixed, the bail may be taken by the clerk of the court in which the defendant is held to appear."

The bond in question was not taken after the commencement of the term and during its continuance, but the court fixed the bail. This was done at the August term, 1894. After the term, the amount of bail being fixed, the bond was taken by the clerk of the court. It appears that this was done during the following Nouember term of the court. After the term of the circuit court wherein the bail has been fixed the Criminal Code confers authority upon the clerk of the circuit court to take the bail. We think this authority continues to and during subsequent terms of the court. The Code provides that the committing magistrate or the judge of the court shall admit the defendant to bail before the commencement of the next term of the court having jurisdiction to try the offense. Then it provides that after the commencement of such term of the court the court or judge thereof can only admit the defendant to bail. If bail be fixed and not given during that term then "after the term" the clerk can take the bail, and the language does not place any limitation as to the time in which the clerk is authorized to take the bond for the amount fixed by the court.

While the court allows the order fixing bail to remain the clerk can take the bond.

Section 94, Criminal Code, provides that upon the forfeiture of a bail bond the court shall order summons to be issued against the bail, and that "no pleadings shall be required on the part of the Commonwealth, but the summons shall be served, and all subsequent proceedings shall be the same as in an ordinary civil action."

The appellant filed an answer, and to which the Commonwealth demurred. The court sustained a demurrer, and, as appears from the record, thereupon rendered judgment on the bail bond for the amount thereof. The record does not show the court granted or refused leave to amend, neither does it show that the appellant asked leave to amend or offered an amendment.

Section 94, Civil Code, provides: "If the court sustain the demurrer the party may amend the pleading with leave of court."

It does not require the court to offer the party to whose pleading the demurrer was sustained leave to amend. On the contrary the

language implies that the party shall ask the court for such privilege. Not having asked for leave to amend, nor having offered an amendment containing a good defense, certainly the appellant can not complain because the court rendered judgment against him.

Wherefore, the judgment is affirmed.

PREWITT, &C. V. GRAVES.

(*Filed April* 16, 1896—*Not to be reported.*)

Adverse use of passway— In this action to enjoin the defendants from closing a passway through their land from a farm owned by plaintiff, the plaintiff basing his claim upon an alleged adverse use of the passway for more than fifteen years, as the evidence shows that the use of the passway by plaintiff was permissive merely, the plaintiff has not established his right to the relief sought.

J. M. Benton and W. H. Holt for appellants.

Breckinridge & Shelby for appellee.

Appeal from Clark Circuit Court.

Opinion of the court by Judge Guffy.

This action was instituted by the appellee against the appellants to enjoin them from closing or obstructing a passway through their land from a farm owned by appellee.

It is claimed in the petition that appellee and those under whom she claimed had for more than thirty years continuously held, claimed and held adversely the passway described, and had so held it adversely to all the world, and especially to those owning said land.

Appellee also alleged in substance that the said passway is the only outlet from appellee's (Carter), farm to the Winchester and Lexington turnpike road. Appellants' demurrer to the petition having been overruled, they answered and denied all the averments of the petition touching the holding and using of the passway, as well as the right to so use it.

Upon final hearing the court adjudged that appellee was entitled to the passway claimed, and adjudged that appellants be perpetually enjoined from in any way obstructing the passway or interfering with plaintiff's right to the free and undisturbed use of the same, and from that judgment this appeal is prosecuted.

Appellee's contention is that the proof of long continued use of the passway by persons residing on the Carter place creates in law a presumption that the use was adverse and a matter of right, and that the testimony sustains her claim.

Appellant's contention is, first, that their demurrer to the petition should have been sustained; and, further, that even if the length of time the passway was used does create a presumption that the use was adverse, yet that presumption is overcome by the testimony introduced by appellants.

We deem it unnecessary to pass upon the sufficiency of the petition. It may be conceded that persons living on the Carter place (appellee never did reside upon it) and others used a passway through the Prewitt land for many years. But we think that the testimony of those in a condition to know the facts clearly shows that the use

was only by the permission of appellants and those under whom they hold title. There is no proof of a sale of the right of way nor of its formal dedication to public use. It is in proof that Carter, the former owner of the land, did not claim the passway as matter of right. When the Carter place was sold to appellee no right of passway was sold with it. Persons who lived on the Carter farm to within much less than fifteen years before the institution of this suit recognized the fact to be that the use of the passway was only permissive and subject to revocation by the owners of the Prewitt land.

Taking all the proof together it seems clear to us that appellee had not held or used the passway adversely for as much as fifteen years before the institution of this suit.

The judgment appealed from is, therefore, reversed, and cause remanded, with directions to dissolve the injunction and to dismiss plaintiff's petition.

CHESAPEAKE & OHIO RY. CO. v. COMMONWEALTH.

(*Filed April* 21, 1896—*Not to be reported.*)

Intersecting railroads—Failure to stop trains before reaching crossing—The statute which requires that "whenever railroads cross each other in this State the trains shall be brought to a full stop at least fifty feet before getting to the crossing" applies as well where the trains on both roads are operated by the same company as where they are operated by different companies.

Wadsworth & Cochran for appellant.

W. S. Taylor for appellee.

Appeal from Boyd Circuit Court.

Opinion of the court by Judge Paynter.

The indictment is under a statute which reads as follows: "That whenever railroads cross each other in this State the trains shall be brought to a full stop at least fifty feet before getting to the crossing: *Provided, however*, that the provision of this act shall not be applicable where the crossings of such roads are regulated by derailing switches or other safety appliances which prevent collisions at crossings nor when a flagman or watchman is stationed at such crossings and signals that the trains may cross in safety."

On a former appeal of this case this court held the indictment was good.

The Elizabethtown, Lexington & Big Sandy Railroad Co. owns a line of railway running east and west through Catlettsburg, Ky. The Ohio & Big Sandy Railroad Co. also owns a line of railway running east and west through the same town. These roads are leased by the Chesapeake & Ohio Railway Co., which operates freight and passenger trains on both lines of railroad, and at a point about fifty yards west of the freight and passenger station in Catlettsburg the two lines of railroad track intersect and cross each other. There is no derailing switch or other safety appliance to prevent a collision at the crossing, nor is there a flagman or watchman stationed at the crossing or signals that the trains may cross in safety. The defendant failed to bring its east-bound passenger and freight trains operated by it on and over the railroad tracks to a full stop at a point

at least fifty feet before getting to point of intersection and crossing of the tracks.

It is contended there was no violation of the statute because the Chesapeake & Ohio Railway Co., as lessee of both roads, operated all the trains which were run on them. As a matter of fact no trains are operated by the Elizabethtown, Lexington & Big Sandy Railroad Co. or the Ohio & Big Sandy Railroad Co. over their respective tracks. They are exclusively used by the Chesapeake & Ohio Railway Co.

The statute was intended, in so far as possible, to prevent collisions at points where railroads cross each other. It is a fact that the railroads cross each other in Catlettsburg. Trains are operated by defendant over each of such railroad tracks and pass over the crossing in question.

While we recognize the danger of collision is greatly lessened by the defendant operating the trains which pass on the crossing, yet this does not alter the fact that trains which pass on the Ohio & Big Sandy Railroad Co. track and those which pass over the Elizabethtown, Lexington & Big Sandy Railroad Co. track pass over the crossing, and a collision is possible unless safety is secured by the observance of the provision of the statute.

The judgment is affirmed.

HILL V. RUDD, &C.

SHIRCLIFF V. RUDD, AGENT, &C.

(*Filed April* 21, 1896.)

1. *Landlord and tenant*—When a lease of a storehouse was executed by an agent for husband and wife and their children, who owned the property jointly, the fact that the husband, in order to induce the lessee to rent the property, agreed to purchase groceries from him to a certain amount can not affect the wife and children, and. therefore, his failure to comply with that agreement does not authorize a cancellation of the lease.

2. *Same—Right of tenant to sublet*—Under a lease which provides that the lesseee shall not "under-lease" the property without the written consent of the lessor, the lessee has no right to complain if the lessor withholds such consent.

3. *Same—Liability of surety of tenant*—The fact that the lessor asserted that the lessee had no right to assign the lease or sublet the premises without his written consent would not release the lessee's surety from liability on the contract, even though the lessor's opinion on that matter was erroneous.

4. *The fact that the plaintiff sued as "agent" without disclosing the names of the persons for whom he was acting* can not now be complained of, even if such an objection would ever have been available, for, as the objection was not made in the lower court either by special demurrer or by answer, it must be regarded as waived.

Hill & Hill for appellants.

Wilfred Carrico for appellees.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Paynter.

These cases are heard together, but they are not consolidated, and so heard in the court below.

Wm. Rudd, agent, leased to Shircliff a business house in Owensboro, Ky., for a period of three years, for the sum of $500 per annum, payable in monthly installments. The appellant, R. G. Hill, signed the contract of lease as Shircliff's surety. After occupying the house for a few months as a grocery store Shircliff was unable to carry on the business, and made a contract with others by which he sublet the house for a grocery store. By the terms of the lease he was not authorized to "under-lease the property without the written consent of the said Rudd."

Shircliff brought the action against Wm. Rudd and others to cancel the lease because, as he alleges, Wm. Rudd in leasing the property was acting for "J. C. Rudd, his wife and children, who are the owners of the storehouse rented to the plaintiff." and that in order to "induce the plaintiff to rent said house the defendant, *J. C. Rudd, promised and agreed* to purchase groceries, etc., from the store of this plaintiff" which would amount to $100 per month; that the purchase of groceries from the store amounted to about $8 during a period of five months.

It is further alleged that Wm. Rudd's refusal to give his written consent to the subletting of the property was "an unlawful abuse of the provisions of said contract requiring said defendant's (Wm. Rudd), written consent to a subletting" of the property; that by reason of the facts alleged he had been damaged $800 and released from the obligations of the lease.

The allegations of the petition are taken as true on demurrer. Wm. Rudd was acting as agent for J. C. Rudd, his wife and children. If, as such agent, he had agreed to buy certain groceries from the plaintiff, his failure to do so would not have been ground for cancelling the lease. That, however, is not the state of case presented by the petition. It is alleged that J. C. Rudd, in order to induce plaintiff to rent the storehouse, agreed to purchase the groceries. J. C. Rudd's contract to purchase groceries could not affect the rights of J. C. Rudd's wife and children, for whose benefit in part the contract of lease was made, as they were part owners of the property.

Plaintiff can not in law complain that Wm. Rudd did not give written consent to the subletting of the premises, because by the contract he retained control of the matter of subletting by providing it could only be done by his written consent.

The court did not err in sustaining the demurrer to the petition of Shircliff.

Wm. Rudd, agent, brought suit against Hill as Shircliff's surety for certain months' rent of the storehouse. The lease says have rented of "Wm. M. Rudd, agent, store, building," etc. It does not state for whom he is acting as agent. In the caption of the petition the plaintiff is "Wm. M. Rudd, agent," but the petition does not disclose the names of the parties for whom he is acting as agent.

A general demurrer was filed to the petition but was never acted upon. An answer was filed. No special demurrer was filed to the petition, neither did the answer make any objection to it. If any objections could have been made by a special demurrer or by the answer they were waived. A general demurrer was sustained to the answer. The answer simply seeks to avoid a recovery by alleging that the parties to whom Shircliff sublet the premises would not take it, because Rudd would not give his consent thereto in writing, and the threat of litigation in the event it was sublet without such consent. The lease, as heretofore stated, provided property could only be sublet by the written consent of Rudd. The answer presented no defense to the action.

It is not necessary to discuss the question as to right of Shircliff to have assigned the lease without the written consent of Rudd, or the rights generally of tenants to sublet the leased premises or to assign the lease, or to state the distinction between assigning a lease and subletting the premises. Although Rudd asserted that Shircliff, under the contract, had no right to assign the lease or sublet the premises without his written consent, although his opinion was erroneous as to his right to prevent an assignment of the lease or the subletting of the premises, this would not release Hill from his liability on the contract.

The judgments are affirmed.

COMMONWEALTH v. HEATH.

(*Filed April* 21, 1896.)

1. *Criminal law—Allegation and proof*—A charge in an indictment of willful and malicious wounding by "shooting" is not supported by proof that the wounding was done by "striking" with a pistol or other weapon.

2. *Conviction of lower degree of offense than that charged*—To authorize a conviction of a lower degree of an offense than that charged in the indictment the evidence must show that the lower degree of the offense was committed substantially in the manner stated, or with the means or instrument specified in the indictment, and must be such that it would justify a conviction if the defendant were prosecuted under the same indictment only for the lower degree of the offense.

Under an indictment for maliciously shooting and wounding another with intent to kill there can be no conviction of the offense of assault and battery committed by striking with a pistol, although the offense of assault and battery is a lower degree of, or included in, the offense charged in the indictment.

W. J. Hendrick and C. W. Lester for appellant.

Appeal from Pulaski Circuit Court.

Opinion of the court by Judge Landes.

The appellee was indicted and tried in the Pulaski Circuit Court upon a charge under section 1166 of the Kentucky Statutes of willfully and maliciously shooting and wounding A. J. Beatie with a pistol with the intention to kill him.

The court instructed the jury properly under the said section, and upon the right of self-defense, and also gave an instruction under section 1242 of the Kentucky Statutes with regard to unlawful shooting and wounding in sudden affray, or sudden heat and passion, without previous malice, after which the attorney for the Commonwealth requested the court to give the jury the following conditional instruction, viz: "If you do not believe from the evidence beyond a reasonable doubt that the defendant shot Beatie either maliciously or in sudden affray, yet if you believe from the evidence beyond a reasonable doubt that in Pulaski county and within one year before the finding of the indictment the defendant, not in necessary or to him reasonably apparently necessary self-defense, *struck Beatie with a pistol*, you should find him guilty of an assault and battery, and fix his punishment at a fine in any sum in your discretion, or at imprisonment in the county jail for any period of time in your dis-

cretion. You may both so fine and imprison, or either, in your discretion."

The court refused this request, to which the attorney for the Commonwealth excepted. The jury acquitted the appellee, and the case is brought before us by the attorney for the Commonwealth for the purpose of having the action of the lower court in refusing the request reviewed by this court, and the question is raised by counsel for the Commonwealth whether or not a person can be convicted under an indictment for the offense charged in the indictment in this case "of *every character* of assault or assault and battery that may grow out of the transaction" which we are asked to decide.

As we have stated, the charge in the indictment is that the appellee willfully and maliciously *shot and wounded Beatie with a pistol* with the intention to kill him. The evidence established the fact that the accused, on the occasion of the difficulty with Beatie, had a pistol, and that the pistol in some way was fired or exploded while in his hand, and that Beatie *was wounded* in the back of his head *by a ball from the pistol*. But the testimony of disinterested witnesses who were present did not show conclusively that the accused intentionally fired the pistol. Beatie testified that the accused "drew his pistol and fired as I was trying to get over the counter," and that he was "shot in the back of the head." The accused, however, testified *that he struck Beatie with the pistol* on the back of the head, and that the pistol fired as he struck him, but that he did not intentionally fire it. But whether the pistol was fired by the accused intentionally or not, as already stated, it was conclusively proved by uncontradicted testimony, including that of the physician who attended on Beatie, that the wound on Beatie's head *was produced by a ball from the pistol* in the hands of the accused, and then and there fired or exploded, *and not by the blow* delivered by the accused with the pistol on the back of Beatie's head. And this, in respect to the cause of the wound, or the manner in which it was inflicted, is as it was alleged in the indictment. We are of the opinion that under the charge as laid in the indictment, and upon the evidence in the case, the court properly refused the request of the Commonwealth's attorney. After the instructions we have noted were given to the jury, the court was requested to say to the jury in effect that if the accused *unlawfully assaulted and struck* Beatie with a pistol they might find him guilty under this indictment of the offense of assault and battery and punish him accordingly. Undoubtedly the offense of assault and battery is a lower degree of or included in the offense charged in the indictment. (Commonwealth v. Duncan, 91 Ky., 592; Criminal Code, sections 262 and 263.)

Still it does not follow, as claimed by the learned counsel, that one charged and prosecuted on an indictment for the latter offense only may be convicted and punished under the same indictment for "*every character* of assault or assault and battery" growing out of the facts upon which the indictment may have been found or the charge based. The general rule is that a charge or statement in an indictment that an offense was committed in a particular way, or with a certain specified instrument or means, can not be sustained by proof that it was committed in an entirely different way or by some means or instrument wholly unlike those stated or specified in the indictment. Proof that a murder was committed by stabbing the victim would not sustain or be relevant to a charge that it was committed by administering poison. And a charge, as in this case, of willful and malicious wounding *by shooting*, would not be supported by proof that the wounding was done by *striking* with a pistol, a rock

or a bludgeon in the hands of the perpetrator. (Wharton's Criminal Law, ninth edition, sections 519–20; Guedel v. People, 43 Ill., 226.)

In the last-named case the court said: "We must hold that homicide by shooting and homicide by beating upon the head with a gun held in the hands are modes of causing death so essentially unlike that the proof of one mode would be inadmissible under an indictment charging the other." A proper and just application of the sound principles of law upon which this rule is based, in our opinion, requires that conviction, in cases of this kind, for offenses of lower degree than such as are charged, and where the evidence fails to establish guilt of the offense charged, should follow, if at all, only in cases in which the evidence shows that the offenses of lower degree were committed substantially in the manner stated, or with the means or instruments specified in the indictments. No one ought to be convicted of an offense of lower degree than that charged in the indictment under which he is tried unless the evidence would justify a conviction if he were prosecuted under the same indictment only for the lower degree of such offense. Whether the evidence would justify a conviction in such a case would generally depend largely, if not wholly, upon its correspondence with the allegations of the indictment as to the means or instrument with which the punishable act was committed.

This correspondence, however, is not so essential in cases wherein the evidence establishes only an assault which is included in all crimes of violence to the person without regard to the instrument or means used to effectuate the criminal intent of the assailant. (Am. and Eng. Enc. of Law, volume 1, page 778; Wharton's Cr. Pl. and Pr., eighth edition, section 159.)

The rule laid down is a safe one, and its application to each particular case as it arises will not be difficult in a wise administration of the criminal and penal laws of the Commonwealth. The learned judge of the lower court, it seems, acted upon it in refusing to give the instruction in question. It is quite in harmony with the principles of law laid down in the best text writers on criminal law and procedure, and in numerous adjudged cases in this State, to which we refer. (Criminal Code, sections 122 and 124; Wharton's Criminal Law, ninth edition, volume 1, sections 27, 576, 641, 644, 645*d*; Bishop's Criminal Law, seventh edition, chapter 53, sections 788, 804, *et seq.*; Commonwealth v. Magowan, 1 Met., 368; Commonwealth v. Perigo, 3 Met., 5; Bishop's New Criminal Procedure, fourth edition, volume 1, section 325, *et seq.*; Am. and Eng. Enc. of Law, volume 10, page 567; Erwin v. Commonwealth, 96 Ky., 422; Riggs v. Commonwealth, 17 KY. LAW REP., 1015; Sosh v. Commonwealth, 4 KY. LAW REP., 254. See also the case of Stephenson v. State, 25 S. W. Rep., 784.)

The rule we have laid down being in our opinion the correct rule in such cases as this, sustained by principle, and in harmony with the principles recognized in the authorities referred to, the action of the lower court in this case is affirmed, and the clerk of this court is directed to certify this opinion to the lower court as the law of the case.

COMMONWEALTH V. HOSKINS.

(*Filed April* 21, 1896—*Not to be reported.*)

1. *Homicide– Evidence*—In cases of homicide testimony going to show the violent character of the deceased is admissible where it is shown that the de-

ceased had threatened and was about to assault the accused; but testimony as to the general moral character of the deceased is not competent.

2. *Same*—It was error to admit testimony as to an indefinite threat by deceased which was not shown to be any reference to the accused, and which, even in its indefinite form, was not communicated to the accused.

3. *Instructions to jury*—It would not have been proper to instruct the jury that if the accused "brought on the difficulty, and was the aggressor, he must in good faith have abandoned it before he could avail himself of the plea of self-defense." The expression "brought on the difficulty" is, without proper qualifications, misleading.

W. S. Taylor for appellant.

Appeal from Bell Circuit Court.

Opinion of the court by Judge Landes.

The appellee was indicted by the grand jury of Bell county for the crime of murder. On the trial of the case the jury hung, and the case is brought here for the correction of several alleged errors committed by the court below during the progress of the trial, and in failing to instruct the jury upon the whole law of the case.

1st. Sherman Merideth was introduced and testified as a witness for the accused. He stated that he was acquainted with the reputation of the deceased in the neighborhood where he resided at the time of his death, and that from what his neighbors and acquaintances said of him his reputation was bad. The attorney for the Commonwealth objected to this testimony, but it was admitted by the court over his objection, and the court overruled his motion to exclude it from the jury, to all of which proper exceptions were taken. The court erred in permitting this testimony to go to the jury. The effect or tendency of the testimony that "the reputation of the deceased was bad" was not to show that he was a violent and dangerous man, but that he was a man of bad moral character. In cases of homicide testimony going to show the violent character of the deceased is admissible where it is shown that the deceased had assaulted or had threatened and was about to assault the accused in order to repel the imputation of malice as the motive for the perpetration of the alleged criminal act, and in support of the plea of self-defense. But in cases of this kind the *mere moral character of the deceased* is not involved, and, if bad, could not in any way affect the guilt of the accused. Therefore, testimony on the subject ought not to be admitted on the trial of the accused. (Am. and Eng. Enc. of Law, volume 3, page 111.)

2d. Over the objection of the attorney for the Commonwealth the court permitted W. A. Far, another witness for the accused, to testify that a week or ten days before the killing he was at a place where the accused was selling whisky without license, and that he heard the deceased say that he was going to the school election (at which the killing afterwards occurred) and that if things did not go his way "he would kill some son-of-a-bitch." This was likewise error. The evidence in the case established the fact that the accused was not acquainted with the deceased, and did not know him on sight. Under the circumstances, if this testimony had been that the deceased *threatened to kill the accused*, it would not have been admissible unless communicated before the killing to the accused; or, if not so communicated, unless other threats were proved to have been made by the deceased against the accused and communicated to the latter before the killing. But the threat, as proved by the witness, was indefinite, and it was not shown to have any reference whatever to the

accused, and even in that form was not communicated to him. These reasons are sufficient to render it inadmissible.

3d. But it is urged that the court did not instruct the jury upon the whole law of the case. The court gave the usual instructions as to murder, manslaughter and the law of self-defense, to which it does not appear that specific exceptions were taken either in behalf of the Commonwealth or the accused. But without requesting an instruction upon any particular point that was omitted by the court, as far as the record shows, the attorney for the Commonwealth "moved the court to instruct the jury and give them the whole law of the case." In the brief, however, it is insisted by the learned attorney general that the court ought to have instructed the jury that if they believed from the evidence that the accused "brought on the difficulty and was the aggressor, he must in good faith have abandoned it before he could avail himself of the law of self-defense."

We do not concur in this view of the case. As the case is to be tried again it would not be proper for us to discuss the evidence in detail. Sufficient to say the instruction suggested would not have been proper.

Following the case of Allen v. Commonwealth, 86 Ky., 642, we hold that an instruction of the kind suggested would have tended to mislead and divert the minds of the jury from the plea of self-defense and thus virtually to deprive the accused of the benefit of the instruction given as to that right. It has been repeatedly held, as in the case referred to, that to say to a jury in such cases (without proper qualification) that if the accused "brought on the difficulty" he can not avail himself of the plea of self-defense is to give them too great a latitude for speculation and inference. (Watson v. Commonwealth, 15 KY. LAW REP., 360; Wilcoxon v. Commonwealth, *Ib.*, 261; Crume v. Commonwealth, 12 *Ib.*, 162.)

The accused ought not to be deprived of the benefit of his plea unless the evidence establishes beyond a reasonable doubt that he sought and provoked the difficulty with the deceased, in which the killing occurred, and was throughout the aggressor therein, with the felonious intention and purpose to make the difficulty the occasion of taking the life or of seriously injuring the deceased. (Johnson v. Commonwealth, 94 Ky., 578.)

The clerk of this court is directed to certify this opinion to the lower court as containing the law of the case upon the questions passed upon herein.

POWER V. FLEMING COUNTY.

(*Filed April* 25, 1896.)

Putting prisoner at hard labor for nonpayment of fine—Liability of county to county attorney for his part of fine—Where an offender has been put at hard labor for nonpayment of a fine, for which judgment has been rendered in favor of the Commonwealth, the fact that the county has received the benefit of his labor does not render it liable to the county attorney for the 30 *per centum* provided for him by the act of 1884, in cases where such fines are imposed and "collected," as the fine can not be said to have been "collected" within the meaning of the statute; and, besides, the county can not be made liable for labor which was not rendered at its request, and of which it was only incidentally the beneficiary.

J. H. Power for appellant.

W. G. Dearing for appellee.

Appeal from Fleming Circuit Court.

Opinion of the court by Judge Hazelrigg.

The appellant, as county attorney of Fleming county, prosecuted in 1890 and for several succeeding years in magisterial and other courts numerous cases where judgments for fines in favor of the Commonwealth were rendered, and where the verdicts of the juries fixing the fines provided, in the language of the statute, that "if the fine and costs are not immediately paid or replevied by the defendant he shall be put at hard labor in lieu of imprisonment for nonpayment of the fine."

Accordingly, such of the defendants as failed to pay or replevy were "placed under the control of the jailer at hard labor for the benefit of the county" until the fine was paid. Thereupon the appellant demanded of the fiscal court of his county the thirty *per centum* provided for him by statute where such fines are imposed and *collected*, contending that as the defendants had paid the judgments to the county the latter had, in effect, "collected" them, and, therefore, ought to account to him to the extent of his *per centum* therein. His claim was rejected, both in the county and in the circuit courts.

The statute in force at the time of this service provided not only that the fines should be imposed but also *collected* before the attorney could demand his *per centum*. (Section 3 of amendment of April 28, 1884, B. & F.'s G. S., edition 1888, page 182.)

We think the word "collected" is used in this statute in its ordinary sense. When the judgment is rendered the defendant may pay it immediately or replevy it and afterwards pay it, in which events, and only in which, can it be said that the fine is "collected." Besides, the service of the attorney is not rendered at the instance or request of the county. The prosecution is in behalf of the Commonwealth, and while the officer designated by law works the culprit for the benefit of the county and thus the fine due the Commonwealth is discharged, the county is the mere passive beneficiary and gets the advantage of the work because the law requires it to do so, and not because it asks it or even desires it.

The "hard labor" of the defendant, on his failure to pay or replevy the fine, is a part of his punishment provided by law. Incidentally the county may be benefited under the express requirements of the law. Much clearer language must be used than is found in these various statutes before we can impose such heavy and uninvited obligations of the various counties.

The judgment dismissing the plaintiff's claim is affirmed.

WORTHINGTON V. WORTHINGTON'S EX'OR.

(Filed April 3, 1896—Not to be reported.)

Probate of will—Qualification of executors—Appointment of curator—Section 3901 of the Kentucky Statutes, which provides that during the contest about the probate of a will or when the granting of letters testamentary or of administration is delayed for any cause the court may appoint a curator to

collect and preserve the estate, etc., does not confer upon the county court the arbitrary power of disregarding the wishes of a testator by appointing a curator for the reason alone that the paper offered as the last will is being contested, where its probate has been granted, and no disqualification exists on the part of those named as executors.

An executor derives his right to qualify from the appointment made by the testator and by reason of the special confidence in him by the testator and the latter's desire that he should take charge of and settle his estate in the manner provided by the will under which he acts.

W. H. Mackay, C. B. Simrall and W. McD. Shaw for appellant.

J. W. Bryan, Tyler & Apperson and R. P. Ernst for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Chief Justice Pryor.

This cause was submtttted on the motion of the appellee asking an affirmance of the judgment as a delay case, and, although no argument is allowed by brief or otherwise on such a motion, it was thought proper to give counsel for the appellant an opportunity to show why the motion should not be sustained, particularly as the court was inclined to the opinion that the motion should be sustained.

The will of the testator shows a disposition by him of a very large estate, and is being contested in the court below by some of his heirs and devisees. George G. Hamilton and J. C. Hamilton were the nominated executors, and were empowered by the will to qualify without any other surety than the obligation of the one for the undertaking of the other.

They offered the will for probate in the Kenton County Court, in which county the testator resided at his death, and its probate was granted. The named executors then offered to qualify and proposed to give such a bond as would satisiy the judge of that court that the estate and the devisees would be amply protected. Their right to qualify was denied on the ground, as we suppose, the paper was not the last will of the testator, and their right to have it probated being then contested.

Section 3901 of the Kentucky Statutes provides that "during the contest about the probate of a will, or when the court for any valid cause shall be delayed in granting letters testametary or administration, it may appoint a curator to collect and preserve the estate of the decedent until probate of the will be granted, or until the cause for which the order was made shall be removed."

This statute does not confer on the county court the arbitrary power of disregarding the wishes of a testator by appointing a curator, for the reason alone that the paper offered as the last will is being contested, where its probate has been granted, and no disqualification exists on the part of those named as executors. An executor derives his right to qualify from the appointment made by the testator and by reason of the special confidence in him by the testator, and the latter's desire that he should take charge of and settle his estate in the manner provided by the will under which he acts.

The ancient rule on this subject permitted infants to qualify, and, as said in some of the cases as well as in the text-books, neither poverty nor insolvency constitutes disqualification, but now such matters are regulated by statutes that control and determine the

mode of qualification, as well as determining who are incapacitated from acting as executors.

In Berry v. Hamilton, 12 B. M., 191, it is said: "If he be a man not prohibited by law from being an executor, the county courts have no right to refuse his qualification."

In Holbrook v. Head, 9 KY. LAW REP., 755., where the county court admitted the will to probate and refused to permit the executors to qualify, it was said: "The testator confided the custody and control of his property to the one nominated as executor by his last will, and the person named as such is entitled to qualify, unless by reason of his mental condition or some legal disability he is prevented from acting as executor. It is the testator who appoints his executor, and the question as to his peculiar fitness for such a position, or of his want of ability to manage the estate because of his failure in his own financial affairs, can not be adduced to the discretion of the county judge when asked to permit him to qualify."

There seems to have been no reason assigned for denying the right of these appellees to qualify, and certainly when the will is admitted to probate the motion of the appellees to qualify should have been sustained. The record shows they offered to execute a bond amply to secure all the parties in interest. This bond should have been accepted and the executors allowed to qualify.

As this view of the case was taken by the court below, the judgment is affirmed.

The Kentucky Law Reporter.

EDITOR:
WALTER G. CHAPMAN, ... Frankfort, Ky.

VOL. 18. AUGUST 1, 1896. No. 8

KENTUCKY COURT OF APPEALS.

SCHMIDT, &c. v. LOUISVILLE, CINCINNATI & LEXINGTON RY. CO., &c.

(*Filed April* 4, 1896.)

1. *Judgment binding on one not a party*—One who, although not a party to a suit, files an answer in the name of the defendant, employs counsel to make defense and controls the defense from the time of service of process, is bound by the judgment rendered against the defendant, in whose name the defense was made.

In a suit by mortgage bondholders against a railroad company to subject the defendant's net earnings from business coming to it over a road which it had leased from the company which issued the mortgage bonds, a corporation which had purchased defendant's road, including its lease and all its franchises, having made defense in the name of the defendant, is bound by the judgment requiring defendant to pay into court the earnings sought to be subjected.

2. *Same—Amended pleadings making new parties*—As the company which controlled the defense is to be regarded as already a party defendant and bound by the judgment, the court properly rejected an amended petition seeking to make it a party. The proper course would have been either to institute a separate suit against that company, setting up the record in this suit and the facts connecting that company with this litigation, or to proceed against that corporation in this suit by rule based upon an affidavit stating those facts.

3. *Same*—If that corporation had not been bound by the judgment it would have been too late, after appeal and judgment, to bring it into the litigation.

Simrall, Bodley & Doolan and Pirtle & Trabue for appellants.

Helm & Bruce for appellees.

Appeal from Jefferson Circuit Court, Law and Equity division.

Opinion of the court by Judge DuRelle.

The appellant, Schmidt, over ten years ago, as trustee under the mortgage executed by the northern division of the Cumberland &

Ohio Railroad Co., brought suit against the Louisville, Cincinnati & Lexington Railway Co. upon a contract of lease between the Cumberland & Ohio Railroad Co. and the Louisville, Cincinnati & Lexington Railway Co., whereby the former company leased its railroad to the latter for thirty years, and the latter company, in the event that the net earnings of the leased road were insufficient to pay the interest and provide a sinking fund for the payment of the mortgage bonds issued by the Cumberland & Ohio Railroad Co., undertook to supply the deficiency by applying to the purpose so much as might be necessary of the net earnings of its own lines, earned from business coming to it from or over the lines of the Cumberland & Ohio Railroad Co.

The facts of the case are fully stated in the opinion of this court upon the former appeal by Schmidt, trustee, against Louisville, Cincinnati and Lexington Railway Co., reported in 95 Kentucky, 289, but by some mistake, entitled in the report "Schmidt, trustee v. Louisville & Nashville Railroad Co." For the facts up to the date of the former appeal it is unnecessary to do more than refer to that opinion.

After the reversal of the case on that appeal an order was duly entered in accordance with the opinion, requiring the Louisville, Cincinnati & Lexington Railway Co. to pay into court the sum of $53,565.62, with interest, on or before June 11, 1894, and a rule was awarded against the company to pay in that sum and interest. To this rule the company filed a response, stating "that in 1881 it sold and conveyed for a consideration paid at the time, all its property, rights, privileges and franchises, except the mere franchise to exist, and that it distributed the proceeds of such sale among its various stockholders, and since said time it has had no property, assets or funds of any kind with which to comply with the order of this court, and it is, therefore, unable to pay said sum, or any other sum, for the simple reason that it has no property or assets with which to do it."

Another rule was awarded against the company to report the amount of its net earnings on business coming to it from or over the Cumberland & Ohio railroad since the date of the last net earnings reported by the commissioner's report, which was confirmed in accordance with the opinion of this court on the former appeal. In response to this rule the company said that "it has not made any net earnings, or earnings of any kind, since the date aforesaid (the time of the net earnings reported in report "R. E. S. No. 2"), on business coming to it from or over the Cumberland & Ohio road, nor has it made earnings of any kind since it does not own any railroad or property of any character whatever, and has not since the date aforesaid."

Motions to strike these responses from the files and to make them more specific were overruled. Thereupon the plaintiffs filed a reply to the responses, denying the statements contained in them and averring that the Louisville, Cincinnati & Lexington Railway Co. had never made any legal or other sale of its railroad or property, and that the road had been continuously operated in the name of said defendant. Subsequently the plaintiffs asked leave to withdraw the reply to the responses of the Louisville, Cincinnati & Lexington Railway Co., and moved to file an amended and supplemental petition making the Louisville & Nashville Railroad Co. a party defendant.

The amendment tendered sets out the execution and terms of the lease, contract and mortgage relied on in the previous litigation, avers default in the payment of interest on the bonds in 1886 and

subsequently, and charges that net earnings of the Cumberland & Ohio railroad came into the hands of the Louisville, Cincinnati & Lexington Railway Co., which were not applied to the payment of interest, and that all the sources of the Cumberland & Ohio railroad for raising money having failed to provide sufficient funds to pay interest on the bonds, it was necessary to appropriate to that purpose the net earnings of the Louisville, Cincinnati & Lexington Railway Co. arising out of business coming to it from or over the lines of the Cumberland & Ohio.

It further alleges that in November, 1881, after the execution of the lease and mortgage, and with actual notice and knowledge of the provisions thereof, the Louisville & Nashville Railroad Co. bought the property, road and franchise to operate same of the Louisville, Cincinnati & Lexington Railway Co., and received a deed therefor, which was duly recorded; that by that deed the lease of the Cumberland & Ohio was assigned and transferred to the Louisville & Nashville Railroad Co., and the latter company accepted the transfer and assumed the obligations thereof; that having theretofore purchased the capital stock of the Louisville, Cincinnati & Lexington Railway Co. the Louisville & Nashville Railroad Co. took and kept the whole purchase price of the road, and has since had possession of the roads of both the Cumberland & Ohio and Louisville, Cincinnati & Lexington companies; has operated them and taken the earnings; has made the earnings shown in this case and ascertained in the judgments, which were described therein as the earnings of the Louisville, Cincinnati & Lexington Railway Co., that the Louisville & Nashville Co. not only knew the provisions of the lease and mortgage, but actually applied net earnings of the Louisville, Cincinnati & Lexington road in accordance therewith until April, 1883, and knew that the earnings referred to were made on the opperations of the roads of the Cumberland & Ohio and Louisville, Cincinnati & Lexington companies; that the Louisville & Nashville Co. filed an answer herein in the name of the Louisville, Cincinnati & Lexington Co., employed counsel to make defense, and has controlled the defense in this case from the time of service of process. The amendment further avers that until the responses to the rules herein were filed the plaintiffs did not know of the control by the Louisville & Nashville Co. over the roads of the other two companies, and that it was plaintiffs' intention in bringing this suit to sue the company or companies operating these roads, and which had made the earnings referred to.

The prayer is that the Louisville & Nashville Railroad Co. be made a party defendant for judgment against it, for the subjection of the earnings made on these roads, in accordance with the terms of the lease and mortgage, to the payment of the mortgage debt, and inasmuch as the Louisville & Nashville Railroad Co. has made the defense in this suit, and after judgment has attempted to thwart the collection thereof, that a receiver be appointed to take charge of and operate the properties acquired by the sale, and to apply the earnings according to the judgment of this court.

The motions to withdraw the reply to the responses and to file this amendment were overruled by the lower court, and from that judgment this appeal has been taken.

It is earnestly contended by counsel for appellants that the rule laid down in Heckman v. Louisville & Nashville Railroad Co., 85 Ky., 638, following and amplifying the doctrine announced in Louisville & Nashville Railroad Co. v. Hall, 12 Bush, 131, applies to this case and is decisive of it. Appellants claim that the Louis-

ville & Nashville Railroad Co. was the real defendant in this case, made the defense in the name of the Louisville, Cincinnati & Lexington Railway Co., and is bound by the judgment.

This appeal, therefore, presents two questions for decision. First, whether, upon the facts alleged in the amended petition and disclosed by the record, the Louisville & Nashville Railroad Co. is bound by the judgment herein to the extent that it received the net profits accruing from the lines of the Louisville, Cincinnati & Lexington Railway Co. out of business coming to it from or over the Cumberland & Ohio; and, second, if so, whether the proper procedure has been adopted to subject these earnings to the appellants' claim.

Upon the first question there is little difficulty. Assuming the statements of the amended petition to be true (and for the purposes of this appeal we must so presume), together with the facts disclosed by the record, it appears that the Louisville, Cincinnati & Lexington Co. had no railroad, property or means to conduct a defense; that it had only the franchise to exist, and that the Louisville & Nashville Railroad Co., by its officers and agents, took charge of the defense of this case, controlled it, employed counsel, produced evidence, and paid the expenses of the nominal defendant in the suit. The record discloses that Mr. R. E. Sewell, who made the report upon which the judgment was based, made affidavit "that as the auditor of the Louisville & Nashville Railroad Co., he superintends all work of a similar kind of the Louisville, Cincinnati & Lexington Railway Co., defendant herein, and all like statements rendered herein heretofore by said defendant have been made under his superintendency."

Numerous reports were filed in response to rules taken against the Louisville, Cincinnati & Lexington Railway Co. by the officials, who were also officials of the Louisville & Nashville Railroad Co., stating earnings as having accrued to the Louisville, Cincinnati & Lexington Railway Co. from business coming to it from or over the lines of the Cumberland & Ohio.

In our opinion the law is well settled that if the statements of the amendment tendered are true the Louisville & Nashville Railroad Co. is bound by the judgment against the Louisville, Cincinnati & Lexington Railway Co., and in any litigation between the Louisville & Nashville Co. and the plaintiffs in this suit the record of this suit might be introduced, with evidence showing the truth of the averments of the amended petition.

In the case of Louisville & Nashville Railroad Co. v. Hall the company was sued by the wrong name, and it was held that, as the company failed to plead further and failed to disclose its true corporate name, it could not complain that the judgment was rendered against it in the name by which it had been sued.

In the case of Heckman v. Louisville & Nashville Railroad Co., 85 Ky., 638, a suit was brought against the Louisville, Cincinnati & Lexington Railway Co. for an injury which was inflicted by the Louisville & Nashville Railroad Co. After a period of more than one year from the date of the injury an amended petition was filed, stating that by mistake the defendant was styled the Louisville, Cincinnati & Lexington Railway Co., when it should and was intended to be the Louisville & Nashville Railroad Co., which was the correct name of the defendant sued and intended to be sued in the action, and praying that the defendant be required to defend by its correct name of the Louisville & Nashville Railroad Co., and for judgment against it.

In that case the court held that the Louisville & Nashville Rail-

road Co. had entered its appearance and made defense to the action within one year from the date of the injury, and therefore the statute of limitation could not apply, though, in fact, the only answer filed up to that time was in the name of the Louisville, Cincinnati & Lexington Railway Co.

The court in that case said: "In our opinion, not only according to unvarying authority on the subject, but on the principle of estoppel and common fairness, when a party enters his appearance and makes his defense to an action he can not afterwards complain of the judgment that may be rendered against him upon the ground that he was sued by the wrong name, or what is practically the same thing, that the name of a different person was inserted in the caption of the petition and in the summons; and it, therefore, necessarily follows that the action must be regarded as commenced and actually pending against him, at least from the time he so enters his appearance, if not from the time he is served with the summons."

In the case of Eagle, &c., Co. v. Bradley, &c., Co., 50 Federal Rep., 193, suit was brought for an infringement of a patent, not against the firm which manufactured the articles, but against a branch of that firm. The firm which manufactured the articles conducted the defense and was defeated, and the decree in that case was held binding upon the firm which conducted the defense. Judge Blodgett, in delivering the opinion, cited Robbins v. Chicago, 4 Wallace, 657; Claflin v. Fletcher, 7 Federal Rep., 851, and said: "The conclusive effect of judgments respecting the same cause of action and between the same parties rests upon the just and expedient axiom that it is for the interest of the community that a limit should be opposed to the continuance of litigation, and that the same cause of action should not be brought twice to a final determination. * * Parties in that connection include all who are directly interested in the subject-matter, and who had a right to make defense, control the proceedings, examine and cross examine witnesses, and appeal from the judgment. And this same rule is restated and followed in numerous cases, among which are Beloit v. Morgan, 7 Wall., 619; Miller v. Liggett, &c., Co., 7 Federal Rep., 91; Claflin v. Fletcher, *Id.* 851; American Bell Tel. Co. v. National Imp. Tel. Co., 27 Federal Rep., 666; Morse v. Knapp, 37 Federal Rep., 352; Lea v. Deakin, 11 Biss., 23: 13 Federal Rep., 514; Wilson's executors v. Deen, 121 U. S., 525; 7 Sup. Ct. Rep., 1004.

"The proof in this case shows beyond doubt that the defendant in this case, with the consent of the defendants in the Iowa case made itself the *dominus litus* in that case; it controlled the defense; appeared by its own attorneys; it was the manufacturer of the plows in which the alleged infringement was found, and may, I think, with entire propriety be held to be bound, not only upon all questions which were raised and determined in the former case, but upon all which might have been raised and determined in that case. The Hague patent itself was considered by the Iowa court, and not held to be an anticipation or protection as against the complainant's patents. The defendants may, I think, be considered as bound, but all which it could have appropriately put into the record in that case, including the testimony, which it is claimed would carry the Hague invention back of the Wright invention.

"I am, therefore, of opinion that all the defenses which are urged here have been anticipated and are cut off by the decree in the Iowa case. A decree will, therefore, be entered, finding that the defendfendant infringed as charged, and for an injunction and accounting."

The judgment in that case was affirmed by the Court of Appeals, 7th Circuit, 57 Federal Rep., 981.

The court said: "The suit in the Circuit Court of the United States for the southern district of Iowa was brought to restrain the infringement of the same claims of the same patent here in question. The defendant there was the agent of the present appellant in the sale of the infringing machines. The defense of the suit there was assumed and prosecuted by the appellant here. The appellant was, in fact, the real party to that litigation, and, so far as the decree there is *res adjudicata*, is as effectively concluded thereby as if it were the actual defendant to the record. (Lovejoy v. Murray, 3 Wall., 1, 18, 19; Robbins v. Chicago, 4 Wall., 657, 672.)"

In Landes v. Hamilton, 77 Mo., 565, the court said: "It is not always essential to the creation of an estoppel that the person should be a party to the record, but one who thus instigates and promotes the litigation for his benefit by employing counsel, binding himself for costs and damages, will be bound by the litigation or procedure as much as the party to the record."

In Estell v. Peacock, 48 Mich., 471, an action was instituted on a note given plaintiff by defendant for logs. A stranger, who had licensed plaintiff to cut the logs, but had undertaken to revoke the license before plaintiff sold the logs and accepted the note, notified the defendant not to pay plaintiff the amount of the note, whereupon defendant permitted the stranger to defend the action in defendant's name. It was held, Judge Cooley delivering the opinion, that the stranger was bound by the judgment, although not a party.

In Bennett v. Wilmington Star Mining Co., 18, Ill. App., 17, the court citing Cole v. Favorite, 69 Ill., 457, announced the principle: "Persons on whose behalf and under whose direction the suit is prosecuted or defended in the name of some other person fall within this category, and in such cases parol evidence is admissible to show who are the real parties in interest, and that they conducted the litigation in the name of other parties."

In Valentine v. Mahoney, 37 Cal., 389, plaintiff brought suit in ejectment. Defendant introduced the record of a suit between himself and the tenant of plaintiff's grantor, in which the grantor, being the landlord, defended the suit in the tenant's name. It was held that the landlord, plaintiff's grantor, was bound by the judgment in the suit between the tenant and the present defendant, although not a party, because he conducted the defense, and that the plaintiff took subject to the infirmities of his grantor's title.

The court, holding the record admissible, said: "Would it not be an anomaly in practice to permit a person, after defending an action upon a particular issue, and immediately thereafter, to litigate the same matter in another action with the same adversary in total disregard of the judgment in the former action? The judgment is conclusive, both upon the landlord and tenant, in the subsequent action between them, involving the issue of eviction of the tenant by virtue of the judgment."

In Stoddart v. Thompson, 31 Iowa, 801, the court said: "One who, though not a party, defends or prosecutes an action by employing counsel, paying costs, and doing those things which are usually done by a party, will be bound by the judgment rendered therein."

To the same effect see also Palmer v. Hayes, 112 Ind., 292; Wood v. Ensel, 63 Mo., 193; Strong v. Phoenix Ins. Co., 62 Mo., 289; Cole v. Favorite, 69 Ill., 457; Linton v. Harris, 78 Ga., 265; Lovejoy v.

Murray, 3 Wall., 1; Warfield v. Davis, 14 B. M., 41; Freeman on Judgments, sections 174 and 175.

Upon the second question, whether the procedure adopted is correct, appellee's counsel rely principally upon the cases of Brown v. Vancleave, 86 Ky., 381, and Meadows v. Goff, 90 Ky., 541.

In the former case the actual question decided was that after a judgment in favor of the plaintiff, and the receipt by him of the amount of the judgment in satisfaction thereof, his demand was satisfied and his right to appeal barred.

In the latter case this court held that after a final judgment settling a controversy between two litigants it was too late for a third person to file a petition to be made a party to the suit and set up a claim to the property in controversy.

Neither of these cases seem to apply directly to the case at bar. But we are of opinion that after the appeal and judgment in this case it would be too late to bring into this litigation one who was neither a party to the record nor bound by the judgment. In our view the facts stated in the amended petition did not give the appellants the right to file a petition making the Louisville & Nashville Railroad Co. a party defendant to this litigation, for upon the theory of that amendment, and considering the facts therein stated to be true, that company was already a party defendant and bound by the judgment. The proper procedure, therefore, would have been either to institute a separate suit against the Louisville & Nashville Railroad Co., setting up the record in this suit and the facts connecting that company with this litigation, or to proceed against the Louisville & Nashville Railroad Co. in this suit by rule based upon an affidavit, stating the facts set out in the amendment.

Proceedings in this litigation were not ended by the judgment rendered after the last appeal. Undoubtedly the appellants could not only take steps to enforce the satisfaction of the judgment then rendered, but they could proceed to subject net earnings accruing to the Louisville, Cincinnati & Lexington Railway Co. (if that company had been the real defendant), since the last net earnings reported before the report "R. E. S. No. 2" was made. So, too, they may, in our judgment, proceed in this litigation to subject those earnings in the hands of the Louisville & Nashville Railroad Co., if it be, as alleged in the amended petition, the real party defendant in this suit. (Wiggins Co. v. O. & M. Ry. Co., 142 U. S., 292.)

This question, while not strictly before the court upon this appeal, has been considered and decided to the end of preventing needless litigation.

Wherefore, the judgment is affirmed.

Judge DuRelle delivered the following response to petition for modification July 17, 1896:

The petition for modification has been carefully considered, and while it is true that the appellee, the Louisville, Cincinnati & Lexington Railway Co., has no interest in the matters in regard to which a modification of the opinion is sought by it, it is perhaps also true that the opinion went too far in stating that questions were *decided* which were not strictly before the court upon the appeal. It has been the custom of courts, since opinions were written, to state the existence of a remedy which was not sought as a reason for denying the remedy which was sought. In thousands of cases it has been stated that the relief sought in equity was denied because an adequate remedy at law existed. This, however, is universally considered, and properly so, to be stated *arguendo*, and the opinion in

this case should have been confined in that respect to stating, as argument, that the Louisville & Nashville Railroad Co. was bound by the judgment, if the matters stated in the tendered amended petition were true, and without indicating the exact course of procedure to be adopted. To the extent herein indicated the opinion is modified.

SUTT V. HOUGH'S ADM'R.

(*Filed April* 15, 1896—*Not to be reported.*)

Advancements—Judgment supported by evidence—In this action to settle a decedent's estate the finding of the Chancellor as to the amount of advancements received by a particular heir, based upon the report of a commissioner, will not be disturbed, the evidence being conflicting.

Geo. S. Fulton for appellant.

Fairleigh & Straus for appellee.

Appeal from Bullitt Circuit Court.

Opinion of the court by Judge Paynter.

Tabitha Hough died intestate, leaving surviving her three children, Sallie Sutt, Samuel S. Hough and Mrs. McGloughlin, who were her only heirs at law.

This action was brought by her personal representative to settle the estate and to ascertain what, if any, advancements had been made the heirs by their mother. Samuel S. Hough, and McGloughlin admitted they had each received advancements from their mother, amounting to $1,000. Sallie Sutt admitted she had received from her mother advancements amounting to $600. The only question in this case is as to whether she had received the amount she admits, or the sum of $1,000, as claimed by the other heirs.

There is some conflict in the evidence on the disputed question. The commissioner of the court reported that Mrs. Sutt had received an advancement of $1,000 from her mother. The court below sustained the finding of the commissioner and charged her in the settlement of the estate with that amount.

After a careful examination of the evidence we can not reach the conclusion that the court erred in charging her with that amount.

Wherefore, the judgment is affirmed.

STEPHENS, &C. V. ARNOLD.

(*Filed April* 15, 1896—*Not to be reported.*)

1. *Compromise*—The evidence shows that the heirs of a decedent became the owners of the land in controversy by a compromise entered into by which the right of the decedent was finally settled and a litigation pending for many years determined.

2. *Adverse possession*—The pleadings and proof show an adverse possession by the decedent and his heirs that had ripened into a title, and therefore, even if no compromise had been made, the right of the heirs to the land in controversy would be perfect.

3. *Entry without right*—As the proof shows that those under whom appellants claim entered without right, no title vested in them or those claiming under them from that entry.

L. T. Applegate for appellants.

W. H. Holt and John H. Barker for appellee.

Appeal from Pendleton Circuit Court.

Opinion of the court by Chief Justice Pryor.

It is evident from the testimony that the heirs of Arnold became the owners of the land in controversy by a compromise entered into, by which the right of Arnold was finally settled and a litigation pending for a quarter of a century determined. If no compromise had been made the pleadings and proof show an adverse possession by Arnold and his heirs that had ripened into a title. Besides, the proof shows that the entry by the heirs of Stephens on the land in dispute was made without right, and from it no title vested in Stephens or those claiming under them.

Judgment affirmed.

DAVIS V. ADKINS, &C.

(*Filed April* 21, 1896—*Not to be reported.*)

Nuisance—Injunction—In this suit to enjoin the erection of a schoolhouse and outhouse, including a privy, on a lot bought for that purpose by the defendants, the trustees of a school district, the complaint being that the surface and under-ground waters will flow from the school site into plaintiff's spring, as the plaintiff's pleadings are indefinite and uncertain as to the anticipated damage the court properly dismissed the petition. If actual injury results the plaintiff will not be precluded by this proceeding from securing an abatement of the privy as a nuisance.

Tye & Sharp for appellant.

R. D. Hill for appellees.

Appeal from Whitley Circuit Court.

Opinion of the court by Judge Hazelrigg.

This is a suit to enjoin the erection of a schoolhouse and outhouses, including a privy, on a lot bought for that purpose by the appellees, the school trustees of a district in Whitley county. The complainant owns a farm across the public road on the opposite side thereof from the objectionable structures, and has a spring some 150 feet from his dwelling house, and that far or further from the buildings complained of into which, he avers, the surface and underground waters will flow from the school site. His petition was dismissed, as we presume, because its averments do not make it reasonably clear that such a flow into his spring will inevitably result.

It seems to us that the plaintiff's pleadings are indefinite and uncertain in this respect. There is surely no reason to apprehend that surface waters will ruin the spring, as by the slightest precautionary measures they may be diverted therefrom. The course of the underground waters is a matter of uncertainty and speculation

so far as the pleadings advise us, and the distance would seem to be too far for damage from percolation. If actual injury results the plaintiff will not be precluded by this proceeding from securing an abatement of the privy as a nuisance. While the object of the writ is preventive, the anticipated damage must be more certainly set forth than is done here.

Judgment affirmed.

SALLEE'S EX'OR V. SALLEE.

(Filed April 22, 1896—Not to be reported.)

1. *Fraudulent conveyance of exempt property*—A conveyance by a debtor of property which is exempt from execution is not fraudulent as to creditors.

2. *Right of grantor to cancellation of deed*—Where a father, eighty-six years of age and physically infirm, conveyed to his son property which was exempt from execution as a homestead, because he feared it would be taken from him under a judgment in a suit for slander which was threatened by his grandson, and the grantee, although without fault on his part, failed to comply with the covenants of the deed as to the support and care of the grantor, in an action brought by the grantor to set aside the conveyance within seven months after it was executed the chancellor should, in view of the age and condition of the grantor and the treatment accorded him, and the promptness with which he disaffirmed the contract, have granted the relief sought.

C. A. Hardin for appellant.

Thompson & Wilson and Bell & Bell for appellee.

Appeal from Mercer Circuit Court.

Opinion of the court by Judge Guffy.

This action was instituted in the Mercer Circuit Court September 14, 1891, by O. P. Sallee against Henry Sallee, his son. The chief object sought was the cancellation of a deed made by plaintiff to defendant February 14, 1891.

It is substantially alleged in the first paragraph of the petition that the defendant falsely and fraudulently represented to the plaintiff that G. W. Sallee and his wife would or was about to bring a slander suit against the plaintiff, and that he, plaintiff, would not be allowed to testify in the case, and that a large judgment would be rendered against him, and his farm sold to pay same, and that he would have nothing to support him, and that he relied on the said representations, and but for the same would not have made the deed. G. W. Sallee is the son of the defendant. It is also alleged that defendant represented to plaintiff if he would make the conveyance that the land could not be subjected to the judgment, and that after plaintiff's death defendant would divide the land equally among plaintiff's children and heirs. It is also alleged in the petition that plaintiff was in his eighty-sixth year, and by reason of age and physical infirmity he was unable to go to town to consult a lawyer or otherwise protect his rights.

The recitals in the deed are in substance that the defendant should furnish the plaintiff with a good comfortable home, feed and clothe him, give him careful attention, both in sickness and in health, see that he wanted for nothing to make him comfortable so far as can

be provided in reason so long as he may live, and after death bury him decently. And it is further provided in the deed that if defendant failed to comply with the conditions aforesaid then the deed to become void and the title revert back to plaintiff.

It is alleged in the second paragraph of the petition that defendant had failed to comply with the conditions of the deed, although he moved onto the farm so conveyed and has been there ever since. The defendant in his answer denied making the false or fraudulent representations set out, and the promise to divide the land among the children; also claimed that he had fully complied with the covenants in the deed, which claim plaintiff denied.

After considerable preparation for the trial of the cause had been made, the plaintiff departed this life testate, and in his will requested that this suit be prosecuted. The executor and devisees continued the prosecution, of the suit, and on final hearing the court adjudged that plaintiffs were not entitled to any relief, and dismissed the petition, and from that judgment the executor, John T. Panky, and others have appealed.

Counsel for appellee insists that, inasmuch as the conveyance was made to defraud a creditor or to defeat an apprehended judgment in a slander suit, he can not be allowed to recover the property so conveyed.

Counsel for appellant says the ideas that seemed to govern the circuit judge, and which were the basis of his decision, were that the old man made the deed to avoid having his property taken from him in the "slander suit," and that, however fraudulent the conduct of Henry Sallee might have been, the old man was "in *pari delicto*," and could not be relieved in a court of equity. The learned judge below did not assign his reasons for the judgment, hence we can not know the reasons which controlled him.

The evidence in the case shows that the land conveyed was the homestead of the plaintiff, and the only evidence as to value is the statement of appellee, who shows it to be worth $6 per acre, and there being 150 acres in the tract its value was $900. It being exempt from execution, the plaintiff could not commit a legal fraud as to creditors by any disposition he could make of it, as has been often held by this court, hence the contention of counsel on the question of relief from the consequences or results of fraudulent conveyances need not be further noticed. It appears that G. W. Sallee did go to town with the intent to bring suit against his grandfather, with whom he had been living for some time, and perhaps he had a good cause of action, but it does not clearly appear why he finally abandoned the idea, nor is it at all material to the decision of this case. Plaintiff instituted this suit within seven months after the execution of the deed, and the cause of action of G. W. Sallee, if any he had, was not then barred.

It seems manifest from the testimony of plaintiff and all the circumstances that the fear of his farm being taken from him under judgment in the slander suit caused the plaintiff to make the conveyance, but it is not clear that the appellee had anything to do with causing such fear or made the representations complained of. The plaintiff, it is true, testifies to that effect, but the appellee testifies to the contrary as to that matter. A number of witnesses were introduced, and much of the testimony is incompetent. Taking all the testimony into consideration it seems to us that the allegations of the second paragraph of the petition are to some extent sustained. It may be that appellee could not, under the circumstances, have

prevented the failure, yet the failure was none the less a failure to comply with the requirements of the deed.

It is claimed that appellee agreed with plaintiff that after his (plaintiff's) death he (defendant) would divide the land with the other children, and one witness, Panky, testified in substance that, after the institution of the suit, appellee in substance said he would deed it back to plaintiff if they would shut up, or something to that effect. It may be conceded that neither of these promises are obligatory, yet they tend to show, if true, the real contract between the parties. It appears that plaintiff had deeded the land to Panky once, and that afterwards Panky conveyed it back. The reasons for this do not appear. The testimony shows that appellee obtained some personal property of the plaintiff, which plaintiff contends he was not entitled to, but appellee testified that he was to have it as part of the trade, but as no judgment was asked for it it is not necessary to determine that question.

Considering the age and condition of the plaintiff and the treatment accorded him, and the promptness with which he disaffirmed the contract and sought the cancellation of the deed, we are of opinion that the deed should have been cancelled and held for naught.

The judgment of the court below is, therefore, reversed, and cause remanded, with directions to annul and cancel the conveyance of the land as prayed for in the petition, and for proceedings consistent with this opinion.

WALKER, PETERS & CO. v. YELLOW POPLAR LUMBER CO.

(*Filed April* 22, 1896—*Not to be reported.*)

Judgment supported by evidence—In these suits upon claims growing out of contracts for the delivery of saw logs, in which the defendant relied upon a compromise as a bar to the claims sued on, the evidence is sufficient to support the judgment dismissing the petitions.

James Goble and Thomas H. Hines for appellants.

W. S. Harkins and John F. Hager for appellee.

Appeal from Floyd Circuit Court.

Opinion of the court by Judge Guffy.

This appeal is prosecuted by Mack J. Peters from a judgment rendered by the Floyd Circuit Court in the following consolidated actions, viz: Walker, Peters & Co. v. Yellow Poplar Lumber Co., filed Jan. 2, 1892; Peters & Mills v. Same, filed Jan. 2, 1891; Walker, Peters & Co. v. Same, filed Sept. 20, 1892; Peters & Mills v. Same, filed Sept. 20, 1892; and Walker, Peters & Co. v. Same, filed July 20, 1893.

The suits were on claims growing out of one or more contracts for the delivery of saw logs. After the institution of two of the above-named suits a compromise was effected, or at least attempted to be made. The alleged compromise reads as follows:

"Know all men by these presents: That we, P. S. Walker, N. J. Peters, A. L. Toney and Jno. R. F. Mills, individually, each for himself and as partners doing business under the firm name of Walker, Peters & Co., and the said N. J. Peters, A. L. Toney and Jno. R. F. Mills, individually, each for himself and as partners doing business

under the firm name of Peters & Mills, or Peters, Mills & Co., in consideration of three thousand and five hundred dollars ($3,500) cash in hand paid, at the delivery of these presents to the said Walker, Peters & Co. and said Peters, Mills & Co., by the Yellow Poplar Lumber Co., a corporation organized under and pursuant to the laws of the State of Illinois, having its principal place of business at Coal Grove, in the county of Lawrence, and State of Ohio, do, and each does, hereby revise and release the said Yellow Poplar Lumber Co., its successors and assigns, and its predecessors, the Chicago Lumber Co., also a corporation created under the laws of the State of Illinois, its successors and assigns, of and from all manner of actions, causes of action, suits, debts, dues, accounts, bonds, covenants, contracts, agreements, judgments, claims and demands whatsoever, in law or equity, which against the said The Yellow Poplar Lumber Co., or the Chicago Lumber Co., we individually or as partners aforesaid have had, now have or which our heirs, executors or assigns hereafter can, shall or may have for or by reason of any cause, matter or thing, and especially the claim or demand of the said Walker, Peters & Co. set up in the suit lately pending in the circuit court of Floyd county, in the State of Kentucky, upon contract, in writing, dated 25th July, 1889, between the Chicago Lumber Co. and said plaintiffs, which cause has been transferred upon the application, petition and bonds of the Yellow Poplar Lumber Co. aforesaid, and is now pending in the Circuit Court of the United States for the District of Kentucky at Frankfort, and also cause of action set up by the said Peters, Mills and others against same defendants, and now pending in the Circuit Court of Floyd county, in the said State of Kentucky; and hereby authorize the said Yellow Poplar Lumber Co., or its attorney of record in the actions pending aforesaid to procure dismissal of the said actions and of each one of them, and agree, furthermore, to direct the dismissal of said actions and of each of them by our attorney of record therein.

"Given under the hands and seals of the said above-named grantors, this the 29th day of August, A. D. 1892.

(Signed,) "P. S. WALKER, [Seal,]
"ALONZO TONEY, [Seal,]
"J. R. F. MILLS, [Seal,]
"M. J. PETERS," [Seal.]

The appellee, besides traversing the allegations of the petitions of plaintiffs, also pleaded and relied on the compromise aforesaid as a settlement and bar to the claims sued on.

Appellant's plea and contention, in substance, is that the compromise was fraudulent and not authorized by him nor assented to by him, and that he did not receive any of the $3,500 paid, and that it was much less than what was due from appellee, and that he and Walker, by agreement in writing, were the only parties authorized to transact the business of the firm, of which appellee had notice.

These contentions of appellant are denied by appellee.

The cases were all transferred to equity and referred to a commissioner to take proof and report, which report was made and exceptions filed, which were overruled by the court, and, upon final hearing, plaintiffs' petitions were all dismissed, and from that judgment appellant appeals.

The testimony of the witnesses is somewhat conflicting, and we deem it unnecessary to recite the testimony at length.

The paper signed by the partners composing the firm of Walker, Peters & Co. does not, in terms, exclude the other partners from the

rights common to partners, and, besides, if it did, Walker signed the compromise agreement. It is true that Peters did not sign it nor does it appear that he authorized his name to be signed to it, but the other partners signed the paper, and the money, in part at least, seems to have been used for the benefit of the firm. It does not appear that the appellee procured the settlement by any fraudulent means. All the partners except appellant seem to be satisfied with the settlement.

Taking all the evidence together, we are of the opinion that the judgment of the court below is sustained by the law and testimony, and the judgment is affirmed.

WARREN DEPOSIT BANK V. ROBINSON'S ADM'RS, &C.

(*Filed April* 23, 1896—*Not to be reported.*)

1. *Usury*—Where each of two partners upon a settlement assumed one-half of a partnership debt, each releasing the other to that extent, one of the partners who executed a note for his half was, upon a plea of usury, properly allowed a credit for one-half the usury which had been paid by the firm prior to the settlement.

2. *Same*—When a note had been renewed from time to time, interest being paid in advance each time, in saying the claim of usury it was error to deduct from the principal the amounts paid as interest as of the dates they were paid, and then calculate interest upon the balance. As the receiving of legal interest in advance is not usurious, the payments, to the extent of the legal rate, should have been treated as interest paid in advance, and the excess of the legal rate credited upon the principal.

Wright & McElroy for appellant.

Clark & Clark for appellees.

Appeal from Warren Circuit Court.

Opinion of the court by Chief Justice Pryor.

Robinson & Seely borrowed for the firm, of which they were the only members, large sums of money of the bank (appellant), and in October, 1891, made a settlement of the matter, and each one assumed his part of the indebtedness, releasing the other to that extent. They paid usurious interest to the bank on this money for years prior to the settlement, and, Robinson dying, his representatives are claiming a deduction on account of the usury paid. Robinson's part of the debt due the bank was $5,600, when this settlement was made, for which he executed his note, and he has been allowed one-half of the usury paid by the firm prior to its execution, and this we think was just and equitable; that much usury had gone into the note, and, it being a part of the indebtedness for which Robinson was jointly liable, we perceive no reason why it should not be purged of usury. Usury was also pleaded as against the bank on other transactions or notes given by Robinson to the bank, and the only reversible error committed consists in the manner of ascertaining the usury, or rather of entering credits for the usury paid. The interest, which exceeded the legal rate, was paid in advance, and the commissioner in making his calculation proceeded to deduct this interest (not the excess), the whole of it, from the principal, thereby

crediting the note with the interest as paid at the date of its execution.

This was error, and the error applies also to what is called the discount of the paper, which was a mere loan at a usurious rate. The excess of the legal rate should alone have been credited, as the recovery of legal interest in advance is not usurious. We have not made a calculation, but on such large sums, running for a considerable length of time, the mode adopted below of calculation and the one suggested would make quite a difference.

Reversed and remanded, with directions to render a judgment on the basis herein indicated.

KENTUCKY LIFE & ACCIDENT CO. v. THOMPSON, ASSIGNEE OF KENTUCKY MUTUAL BENEFIT SOCIETY.

(*Filed April* 28, 1896—*Not to be reported.*)

Sale by insurance company of register of applications and of good will—False representations—In this action by appellee as assignee of a mutual benefit society to recover of appellant insurance company upon a note executed to him in consideration of the sale to appellant of the register of applications of the second-class membership of said mutual benefit society and of the good will of the society, a good defense was presented by a paragraph of appellant's answer, alleging that appellee had falsely represented the membership of members on the register that were of insurable age, and that appellant relied on the same when in fact the register did not truly state the ages of the members, but that they were much older than represented and but few of them of an insurable age and that the note was without consideration, and appellant had been put to much trouble and expense, which it pleaded as a counterclaim. But as these allegations were traversed by the reply it was incumbent on appellant to sustain the defense by a preponderance of the testimony, which, in the opinion of this court, it has failed to do.

M. Mundy and W. B. Hoke for appellant.

Victor F. Bradley for appellee.

Appeal from Scott Circuit Court.

Opinion of the court by Judge Guffy.

This appeal is prosecuted by the Kentucky Life & Accident Insurance Co. from a judgment rendered by the Scott Circuit Court in the suit of W. Z. Thompson, assignee of the Mutual Benefit Society, against the said society and the appellant and others.

It is alleged in substance in the petition that the plaintiff (assignee) sold to appellant the register applications of the second class membership of said mutual benefit society, as well as the good will of said society, and was to and did furnish a circular letter recommending appellant to the favorable consideration of the said members for insurance, for which appellant was to pay $1,000, and that it executed its acceptance therefor, due in thirty days, but failed to pay same, and for which judgment was prayed. The second paragraph of appellant's answer denies appellee's right or power to make the sale set out in petition. The substance of the third paragraph is that appellee falsely represented the number of members on the register that were of insurable age, and that the appellant relied on the same when in fact the register did not truly state

the ages of the members, but that they were much older than represented, and but few of them of an insurable age, and that the acceptance was without consideration, and the appellant had been put to much trouble and expense, for which it asked judgment over against appellee for $100 as a counterclaim. The reply of appellee denied the material averments of the answer. The court upon final hearing rendered judgment for the amount as claimed by appellee.

The third paragraph of the answer presented a good defense, but being traversed by the reply it was incumbent on appellant to sustain the defense by a preponderance of the testimony, which, in our opinion, it has failed to do.

The judgment appealed from is, therefore, affirmed.

BOWEN V. CLEARY.

(*Filed April 22, 1896—Not to be reported.*)

Pledge of stock—Notice—In this action in which the surety in a note asserts a lien upon a certificate of stock pledged to him by the principal to indemnify him, as the evidence shows that the certificate was assigned to the principal in blank in order that it might be pledged by him to secure a particular note in bank, which has since been satisfied, and the surety in another note who now asserts a lien had notice when the certificate was pledged to him of the purpose for which it had been assigned to the principal, and that the principal had no authority to pledge it for any other purpose, the lien can not be enforced against the owner of the stock.

D. A. Glenn for appellant.

O'Hara & Rouse for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Chief Justice Pryor.

The appellant, Bowen, asserts a lien on a certificate of stock, No. 359, issued by the Latonia and Stock Association, and owned by the appellee, Cleary, alleging in his pleadings that it was pledged to secure the payment of a note of $700, payable to the Northern Bank of Kentucky, John E. Hamilton being the principal, and the appellant, Bowen, his surety.

This stock was issued to the appellee, Cleary, and the proof conduces to show, and there seems to be no dispute as to the fact, that Cleary assigned this stock in blank to Hamilton that it might be pledged by Hamilton to secure the payment of a note to the Covington City National Bank for $1,900, on which Cleary and Bowen were the sureties.

Cleary intervened by a proper pleading and alleged that this note for $1,900 had been fully paid, and the liabilty to the bank terminated; that Hamilton had no authority to pledge this stock for the payment of the $700 due by Hamilton and Brown to the Northern Bank, and further that the appellant, Bowen, knew the purpose for which the stock had been pledged, and in this he is sustained by the facts connected with the transaction. In the original pleading filed by the appellant he alleges that this $700 note was the balance due on the $1,900 note, for which Bowen and Cleary were liable as sure-

ties, and, if so, there could be no doubt as to the right of Bowen to subject the stock to its payment. It appears, however, by an amended answer of the appellant that this $700 note was the renewal of two other small notes payable to the Northern Bank upon which Bowen was liable as the surety of Hamilton, and had no connection with the $1,900 transaction, and it was, therefore, incumbent on Bowen to show the authority of Hamilton to make the pledge or to show that Hamilton was in fact the owner of the stock.

That Cleary loaned the stock to Hamilton to raise this money in the Citizens National Bank is evidenced by a writing between the two, and it is not to be presumed that Cleary, in order to aid Hamilton, would have permitted or consented to have his stock pledged to secure the two small notes upon which Bowen was already liable, and to secure the latter in preference to the claims upon which Cleary was already bound, or that he would assume to relieve Bowen at a sacrifice of this stock. Cleary had agreed that the stock might be pledged to secure a note of $1,000 to the City National Bank, and also consented to the pledge to secure the note for $1,900, but it is contended that Hamilton, with the consent of Cleary, or if not with his consent, having the stock assigned to him in blank, pledged it to Bowen to secure not only Bowen's liability to the national bank but his liability to the Northern Bank, notes upon which (to the Northern Bank) the appellant was already bound. Whether Hamilton pledged the stock to the bank or to Bowen is immaterial if Bowen had notice of the extent of the authority vested in Hamilton by reason of the transfer of this stock to him by Cleary.

Shutt, the president of the City National Bank, had possession of this stock, as it is claimed, as the agent of Bowen. Cleary knew it was at this bank, and in fact had drawn the dividends upon it; but if in Bowen's possession, as he maintains it was, still, with knowledge of the object of the transfer by Cleary to Hamilton, he can not hold this stock as against Cleary; and, while Bowen is positive as to his want of knowledge and his belief that it was Hamilton's stock, the facts indicate plainly that Bowen must have understood that Cleary was not parting with his title or giving to Hamilton the power to dispose of the stock in any manner he pleased. It is true that Hamilton was the law partner of Cleary and had given to the latter a lien on his (Hamilton's) library to secure the return of the stock, yet it appears that this note for which the stock was pledged to the City National Bank was settled in January, 1892, and in October following it is claimed that Hamilton pledged it *again* to Bowen for this $700 note due the Northern Bank that was a renewal of two small notes that had been executed to that bank by Hamilton and Bowen two years before. Cleary was not apprised of the settlement of the $1,900 note until long after the settlement had been made. He had inquired of the president of the Citizens National Bank if the stock was there with a view of obtaining the dividends, and Hamilton swears that both Bowen and Cleary knew all about the stock and the purpose for which it was pledged, and the pledge of Bowen when this lien was first executed shows that he was basing his right to assert it on the idea that the $700 note was the balance due on the $1,900 note, and it would be inconsistent with the facts of this case, or with any rational view of such a business transaction, to hold that Cleary, who was attempting to aid his partner in his pecuniary troubles, and to raise money, had consented to the pledge of this stock to secure old debts, for which Bowen had

become liable years before, nor can it be well assumed from the record that Bowen was ignorant of the purpose for which this stock was pledged.

Judgment affirmed.

LOUISVILLE & NASHVILLE R. R. CO. v. KINGMAN.

(*Filed April* 21, 1896—*Not to be reported.*)

1. *Passenger carriers—Postal clerk a passenger*—A postal clerk carried by a railroad company under its contract with the government is to be treated as a passenger as regards the liability of the company for injuries received by him while being thus carried.

2. *Punitive damages—Neglect*—As the plaintiff's injuries were the result of the negligence of defendant's employes in leaving a switch open with full knowledge of the expected approach of the train upon which plaintiff was a passenger, the degree of neglect was such as to authorize an instruction as to punitive damages, although every effort was made by the employes to notify those in charge of the passenger train of the danger ahead.

3. *Same*—Punitive damages may be awarded against a corporation for injuries resulting from the wanton and reckless acts of its employes in the course of their employment, although such acts of the employes were not ratified or approved by the corporation; and while it is not every act of gross neglect that will authorize the awarding of punitive damages, yet where the neglect is such as shows a reckless and wanton disregard of human life or the safety of those in charge of the employe punitive damages may be awarded against the corporation.

4. *Effect of former injuries—Excessive verdict*—A verdict for $12,000 for injury to plaintiff's spine is excessive in view of the fact that his present helpless condition is largely due to injuries received by him several years prior to the acts of negligence of which he complains in this action.

5. *Same—Instructions*—It was error to instruct the jury that they could not consider "in mitigation of damages" the plaintiff's physical disability at the time of the accident complained of, as it was proper for them in fixing compensation to look to the original injury and its effects for the purpose of determining to what extent his present condition is due to the negligence complained of in this action. The court should have instructed the jury, as aked by defendant, to the effect that if they believed from the evidence that the plaintiff was diseased or injured before the accident complained of, but that by said accident his disease or former injury had been aggravated or intensified, then if they find a verdict for plaintiff by way of compensation they will award him damages only for such injuries as are the result of the accident complained of in this action.

H. W. Bruce, Wm. Lindsay and B. D. Warfield for appellant.

Waddill, Nunn & Waddill, W. G. Bullitt and C. L. Randle for appellee.

Appeal from Hopkins Circuit Court.

Opinion of the court by Chief Justice Pryor.

This action was brought to recover damages for a personal injury to the appellee while a postal clerk on appellant's train. The passenger train of the appellant was approaching Earlington, where it ran off the main track upon a switch track, the switch leaver having been thrown open by one of appellant's employes, and collided with a switch engine that was being used on the switch track, resulting, as is alleged, in serious injury to appellee's spine, and on the hearing he was awarded a verdict for $12,000.

The collision took place on the 7th of September, 1893, and threw the appellee against what he calls the distributing table, and pigeonholes at back of table, and thence to the floor, causing the injury complained of, and producing convulsions and certainly injuring his spine, as is testified by several prominent physicians who were called to attend him.

The case of Price v. Pennsylvania R. R. Co., 113 U. S., 218, is relied on as determining that the appellee was not a passenger when engaged in the service of the government, although the corporation was bound by the contract with the government to carry him. Such was the ruling of the Supreme Court of Pennsylvania under a statute of that State which placed the right of recovery in certain cases and in behalf of certain persons upon the same footing with the right of recovery by employes. The supreme court dismissed the writ of error, as there was no federal question involved, and it is difficult to perceive in what manner that statute is to affect the right of recovery in this case.

It is an undisputed fact that the employes of the appellant, with a full knowledge of the approach of the passenger train, or with a knowledge as to the time of its approach, left the switch open, causing the injury complained of, and the fact that every effort was made by the employes to notify those in charge of the passenger train of the danger ahead, can afford no excuse for the negligence complained of, and that it was of such a degree of neglect as authorized an instruction as to punitive damages can not be questioned if we adhere to the repeated rulings of this court on the subject. We are aware that in many of the State courts will be found decisions denying the recovery of punitive damages against corporations by reason of the wanton and reckless neglect of their employes in the discharge of their duties pertaining to the employment, but this court has adopted a different rule, and for wanton and reckless acts of employes in the course of the employment, resulting in injury to others, the corporation has been held liable, although they were not ratified or approved by the corporation; and, while every act of gross neglect, will not justify awarding exemplary damages, still where it is such neglect as shows a reckless and wanton disregard of human life or the safety of those in charge of such employes, punitive damages may be awarded against the corporation, and the point made is not now an open question.

It is apparent, however, from a careful examination of the facts of the record, that the damages given are excessive and the jury misled by the instructions for the plaintiff. It appears the appellant was injured while on a railroad train, in the same employment, in November, 1889, about four years before the injury now complained of, from a blow in the stomach that knocked him over an iron mail rack that injured his spine, threw him into convulsions and rendered him for some time unconscious.

He was compelled to wear plaster of Paris jackets for a long time and had to be suspended, from time to time, to relieve him of his suffering, and in fact continued thus crippled and injured until a short time before this last accident. His recovery was by no means assured, and, while the last accident no doubt intensified his suffering, it cannot well be said, from the evidence, that the injury complained of was the sole cause of his physical condition, for it is manifest that the spine of the appellee had been seriously affected for years, with convulsions following the original injury, and equally plain that the last shock only increased the pain and aggravated a suffering that had lasted for years.

The jury were told in instruction No. 4, given by the court, that "if they believed, from the evidence, the plaintiff received the injuries complained of by reason of the colliding of the defendant's trains, and that, at the time of the accident, the plaintiff was laboring under such physical disabilities, except for which plaintiff would not have been injured, still they can not consider the plaintiff's then physical disability in mitigation of damages, if plaintiff is entitled to recover at all."

The purpose of this instruction, doubtless, was to say to the jury that the appellee, being crippled or theretofore injured, afforded no justification for the negligence complained of, still, in awarding compensation, his condition, caused by prior injuries, would have much to do in estimating the loss sustained by reason of his then and his future disability for performing labor, and, therefore, the jury, in fixing compensation, might look to the original injury and its effects in order to arrive at a correct verdict.

The court did give an instruction to the effect that, if the diseased condition of the appellee was in no part attributable to the accident complained of, they should find for the defendant, but refused instruction R, to the effect "if they believed from the evidence that the plaintiff was diseased or injured before the accident or injury complained of, but that by said accident his said disease or former injury had been aggravated or intensified, then, if they found a verdict for the plaintiff [by way of compensation], they will award him damages only for such injuries as he has sustained which are the result of the accident complained of."

We have inserted the words "by way of compensation" in instruction R that the jury may understand it more clearly, and where considering the two instructions, No. 4 given by the court and letter R refused by the court, it is evident the jury, in fixing compensation, had, in effect, been instructed to disregard the evidence as to the physical condition of the appellee, caused by the injury received four years prior to the negligence complained of.

We perceive no error in the other instructions.

Reversed and remanded, for the reason that the damages are excessive, and for the error in giving instruction No. 4 and refusing instruction R a new trial will be granted in conformity to this opinion.

GARVEY, FELTMAN & CO. v. CROUCH.

(Filed April 22, 1896—Not to be reported.)

1. *Statute of frauds*—Where a firm agreed with a customer in consideration of certain things to be done by him to give him credit upon his account by the amount of a debt which a member of the firm owed him, this agreement was not, within the meaning of the statute of frauds, a promise to answer for the debt, default or misdoing of another, and was therefore binding, although not in writing, being based upon a valuable consideration.

2. *Limitation*—As the amount was agreed to be placed as a credit on the running account between the parties, no cause of action accrued thereon in favor of the customer prior to final statement of the accounts or close of the transactions, and therefore limitation ran only from that date.

3. *Warehousemen—Degree of care required*—It was the duty of tobacco warehousemen engaged in the business of storing and selling tobacco to take such care of tobacco while stored in their warehouse as ordinarily prudent men would take of their own property under like circumstances, and for injury to the tobacco resulting from their failure to do so they are liable in damages.

4. *Counterclaim—Joint demand*—While as a general rule a defendant can not plead as a counterclaim a demand against the plaintiff held by him jointly with others, yet that rule, like every other, is no longer applicable when the reason for it has ceased. Therefore, in this action by tobacco warehousemen to recover money advanced by them to defendant with which to purchase tobacco, as plaintiff refused to have any dealing with defendant's partners, but would charge him alone with the money advanced and account to him alone for proceeds of the tobacco when sold by them, they cannot question defendant's right to plead as a counterclaim the damage to tobacco while stored in their warehouse. Nor can plaintiffs be prejudiced, as defendant's partners, having acquiesced in the transaction, would be hereafter estopped from suing plaintiffs for the same cause.

5. *Amendment of pleadings*—It was not improper for the court to permit the filing of an amended answer to conform to the proof.

6. *Prejudicial error*—Appellants were not prejudiced by a remark made by the court which was simply a direction to the jury to look alone to the instructions given, and not to interpretation by attorneys arguing the case.

Lindsay & Botts for appellants.

E. E. Settle and J. W. Green for appellee.

Appeal from Owen Circuit Court.

Opinion of the court by Judge Lewis.

Garvey, Feltman & Co., owners of a tobacco warehouse in Cincinnati, Ohio, and engaged in storing and selling tobacco, brought this action October 14, 1886, to recover of C. H. Crouch $684.78, alleged balance of money advanced, including interest, between February 28, 1883, and October, 1885, after deducting net proceeds of tobacco sold by them for him during that period.

Various items of counterclaim were pleaded, all of which we need not consider, and on the first trial a verdict, followed by a judgment over, was rendered in favor of defendant for $500. But, upon appeal to the Supreme Court, that judgment was reversed and cause remanded for a new trial; and now this is an appeal from the second judgment in favor of defendant for $557.56.

The sum of $684.78, found to be the balance according to the account as stated by plaintiffs, was not controverted on either trial; nor did defendant, at the last trial, rely upon any but two of the various causes of counterclaim at first pleaded. They are stated substantially as follows: 1. That before the time he, defendant, first began shipping tobacco to plaintiffs, in the year 1881, and as an inducement to him to ship to them for storage and sale, and also to use his influence with friends and neighbors to patronize plaintiffs, they agreed to give him the sum of $282 as a bonus, to be credited on the account he might thereafter create with them—that being amount of a debt Thomas Stevens, then a member of the firm of Garvey, Feltman & Co., owed him; that he did ship and continue to ship tobacco to plaintiff and influenced his friends and neighbors to do likewise, upon faith of their agreement, and would not have done so otherwise.

2. That, during the latter part of the year 1883, he shipped to plaintiffs and had stored in their warehouse 23 hogsheads, containing 22,480 pounds of tobacco, of fine grade and quality, awaiting sale, which they negligently permitted to be rained on and overflowed with water and otherwise injured and damaged at least $1,613.60.

In our opinion the alleged agreement of plaintiffs to pay the sum of $282 was valid and enforcible if defendant complied with his

part of it; for it was not, in the meaning of the statute, a promise to answer for the debt, default or misdoing of another, and, therefore, necessary to be in writing; but was founded upon a valuable consideration promised to plaintiffs, and, as there is evidence tending to show and the jury, properly instructed, found, performed by defendant. Nor does the five-years limitation apply, because the amount was agreed to be placed as a credit on the running account between the parties, and, therefore, no cause of action accrued thereon in favor of defendant prior to final statement of the accounts or close of the transactions, which did not take place until 1885.

It was, as the court instructed the jury, the duty of plaintiffs to take such care of the 23 hogsheads in question, while stored in their warehouse, as ordinarily prudent men should take of their own property under like circumstances. And as the jury found, and there was evidence tending to show, they failed to exercise such care, whereby the tobacco was damaged to the extent assessed, this court can not disturb the verdict in that respect.

It, however, appears, and is admitted by defendant, that two persons, F. K. Crouch and P. Garvey, each had a joint and equal interest with him in the 25 hogsheads of tobacco; and upon this fact is based an argument that the demand arising from damage done to it, being joint, can not be pleaded as a counterclaim in this action by defendant alone and to the exclusion of his two co-partners, who are not parties. According to a well-established rule of practice, defendant would not alone have the right to make that a cause of counterclaim; but that general rule, like any other one, is no longer applicable when the reason for it has ceased.

In an amended answer, filed after return of the case from the Superior Court, it is alleged, and on the trial proved, that the damaged tobacco was purchased by defendant with money advanced to him individually by plaintiffs for that purpose and that they expressly refused to have any dealing with either of his two partners, but would charge him alone with the money advanced and account to him alone for the proceeds of the tobacco when sold by them. As, then, the entire transaction was between plaintiffs and defendant, and recovery for the money advanced is sought in this action against him alone, and credit for proceeds of the tobacco sold given in the account filed to him alone, it does not seem to us they are in a position to question his right to maintain the cause of counterclaim. Nor do we see here how they can be prejudiced, inasmuch as the two partners of defendant appear to have assented to or at least, with notice of the transaction, acquiesced in it, whereby they would be hereafter estopped from suing plaintiffs for the same cause.

It was not improper for the court to permit the amended answer filed to conform to the proof; nor do we think plaintiffs were intended to be or were in fact prejudiced by the remark made by the court, as shown by the affidavits of those present, for it was simply directive to the jury to look alone to the instructions given and not to interpretations by attorneys arguing the case.

Judgment affirmed.

RICHIE, JUDGE OF JEFFERSON COUNTY COURT V. PEIPER'S EX'TX, &C.

(Filed April 23, 1896.)

1. *Terms of county courts—Repeal of statutes*—The act of February 25, 1854, establishing a levy and county court for Jefferson county, and providing for bi-monthly terms of the county court, was repealed by the act of June 10, 1893, "relating to courts of justice," which regulates the jurisdiction and terms of the county courts established under the present Constitution. And that act had the effect to fix the first Monday of the month as the beginning of each regular monthly term of the Jefferson County Court, since that Monday in the month was the beginning of each regular bi-monthly term, as provided in the act of February 25, 1854.

2. *Probate of wills on other than first day of court*—The county court has authority under the statute to consider and act upon any matter within its jurisdiction, and properly brought before the court, upon any juridical day of any monthly term of the court, and the court may be kept open for the transaction of any business within its jurisdiction by adjourning from one day of any term to any other day during the same term and up to the final adjournment for the term, the only limitation being as to the subjects which may be considered at a special term, which are specified in the statute. Therefore, the Jefferson County Court, having met on the first Monday in the month and adjourned to the next day, the mere fact that a will offered for probate on the second day of the term had not been offered on the first day was not sufficient reason for refusing to admit it to probate.

Chas. G. Richie and Chas. M. Lindsay for appellant.

Alfred Seligman for appellees.

Appeal from Jefferson Circuit Court, Law and Equity division.

Opinion of the court by Judge Landes.

The questions presented on this appeal are, *first*, what is a regular term of the Jefferson County Court? *second*, what constitutes the first day of such a term? and, *third*, has the county court the power to probate wills on any day other than the first day of a regular term? These questions were raised in a friendly proceeding in the law and equity division of the Jefferson Circuit Court in the name of the appellee against the appellant, Charles G. Richie, judge of the Jefferson County Court, in which it was sought by the judgment of the lower court to compel and require the appellant by the proper writ to proceed and to determine the matter of the probate of the last will of William Peiper, deceased, late of said county, which had been propounded by the appellee in said court on Tuesday, the 7th day of April, 1896, but which the court, although sitting, declined to admit to probate on that day, notwithstanding the fact that the appellee was present in court and had her witness present to establish the will. The court convened regularly on Monday, the 6th day of April, 1896, the appellant, who was the regular judge of the court, sitting as such, and at the close of the business on that day, by an order duly and regularly made, the holding of the court was adjourned until the next day, when the court again convened and was opened for business pursuant to the order of adjournment. It was on that day, while the court was open for business, the appellant sitting as the regular judge, that the will was offered for probate by the appellee.

It appears that the paper offered for probate as the last will of William Peiper, deceased, had been signed and published by him

in the presence of Otto C. Minor and Henry Wolks, subscribing witnesses thereto, and that when the paper was offered for probate as stated, on Tuesday, April 7, 1896, Minor was present and was sworn as a witness, and testified as to the execution of the will, and also proved the attestation of Henry Wolks, the other subscribing witness; nevertheless the court refused either to probate or reject the paper, and refused to enter any order in the matter because the paper was not produced and propounded on Monday, the 6th day of the month. These facts were all properly set up in detail in the petition, to which the appellee filed a general demurrer, and which the court overruled, and thereupon a judgment was entered in substance ordering the appellant to proceed in the matter of the probate of the will in question, and to hear evidence for and against it and to hear and determine the question whether or not the paper offered as such was or was not the last will of William Peiper, deceased. From that judgment this appeal is prosecuted.

By an act of the General Assembly, approved February 25, 1854, entitled "An act to establish a levy and county court for Jefferson county" (2 Stanton's Revised Statutes, edition 1860, 523), it was provided (section 4) that a county court for said county should be held "on the first Monday in every second month in the year, beginning with the first Monday in April, 1854."

It was also provided (section 10) that the regular terms of said court should begin "on the first Monday in April and every second month thereafter, and end the Saturday next preceding the first Monday of every second month," and also that the judge of the court might hold the court "*at any time* to transact its ordinary business."

It appears that this act of February 25, 1854, continued in force, without amendment affecting the terms of the court, until the passage of the act entitled "An act relating to courts of justice," approved June 10, 1893, which, among other things, regulates the jurisdiction and terms of the county courts established under the present Constitution.

Section 38 of the last-named act (Kentucky Statutes, section 1058) is as follows:

"Section 38. There shall be a regular term of the county court held by the county judge *in each county once every month* on Monday, and, until changed as herein provided, shall be held *on the same day it now is*. The time of holding the county court in any county may be changed by an order made by the county judge and entered upon the records of the county court at the last regular term held in the year next preceding the year in which the change is to be made. Special terms of the county court may be held at any time for the transaction of any business except probating of a will or granting tavern, liquor or druggist license, and the court may adjourn from time to time until the business is disposed of, but no adjournment shall be to a time beyond the commencement of the next regular term."

It will be observed that this section of the statute provides for both *regular* and *special* terms of the county court, established by the Constitution, *in each county* of the Commonwealth. It also provides a method for changing the time of holding the court—that is, the beginning of the term of the court in each county—excludes certain matters that are within the jurisdiction of the court from being considered and acted on at special terms, and authorizes the adjournment of a court from time to time within the period allowed for any regular term until the business is disposed of. It fixes no juridical

days during the term, except the first, which must be Monday, and assigns no kind of business to any particular day, but leaves it to the judge by empowering him "to adjourn from time to time until the business is disposed of;" to sit on as many juridical days, during any one term, as the business of the court and the public interest may require, and to regulate the order of the business. Manifestly, it was the purpose and intent of this enactment to make the terms of the county courts throughout the State uniform, so far as to require that they shall be monthly, and the effect of it was to abrogate or repeal the act of February 25, 1854, which, by virtue of the first clause of the schedule of the Constitution, was continued in force "until altered or repealed by the General Assembly." It had the further effect to fix the *first Monday* of the month as the beginning of each regular monthly term of the Jefferson County Court since that Monday in the month was the beginning of each bi-monthly term as provided in the act of February 25, 1854.

It follows from the foregoing construction of the section of the act which we have quoted at large that the county court of Jefferson county has authority under the statute to consider and act upon any matter within its jurisdiction and properly brought before the court upon any juridical day of any monthly term of the court, and that the court may be kept open for the transaction of any business within its jurisdiction by adjourning from one day of any term to any other day during the same term, and up to the final adjournment for the term, subject only to the exceptions contained in the section relating to the business of special terms of the court. Hence the fact that the will of William Peiper was not produced and offered for probate before the court on the first Monday in April, 1896, which, under the statute, was the first day of the April term of the court, was no sufficient ground or reason for not proceeding with the probate of the instrument.

This disposes of all the questions properly before us on the record of the case, and, finding no error in the judgment appealed from, it is affirmed.

NORTHUP, &C. V. MOLLETT.

(*Filed April* 23, 1896—*Not to be reported.*)

1. *Agreement to convey in consideration of extension of railroad—Cancellation of deed*—The appellee having executed to appellants a bond agreeing to convey to them one-half the minerals upon and under a certain tract of land in consideration of the extension of a certain railroad, and the road having been extended as agreed, and appellee having executed a deed in compliance with his bond, the fact that the extension of the road was made under a charter other than that under which the original road was built affords no ground for canceling the deed. Besides, appellee having executed the deed after the extension was made, can not now complain that the road was built under the charter of another company.

2. *Competency of testimony*—For the purpose of supporting his statement as to representations made to him by the attorney who procured the deed it was not competent for an appellee to show by others what took place between them and the attorney as to their contracts.

3. *Grounds for cancellation of deed*—If it be true that the public is not getting the same train service on the extension of the road that they were getting on the original road when the bond was executed, that fact affords no ground for canceling the deed, as there was no provision in the bond or deed stipulating what kind of train service there should be on the extension.

Besides, appellee, by executing the deed with knowledge of the fact that the trains were not running regularly on the road, must be regarded as waiving the objection.

Wallace & Lackey for appellants.

James Goble and Thos. H. Hines for appellee.

Appeal from Johnson Circuit Court.

Opinion of the court by Judge Paynter.

Mollett, on the 6th of July, 1886, executed and delivered to Jay H. Northup and John Carlisle a bond, in which it is stated that "for and in consideration of the benefits and advantages which will result to me from the location, construction and extention of the Chattaroi Railway in a southerly direction, and the further consideration of $1 in hand paid," etc., he agreed to give, grant and convey to Carlisle and Northup the undivided one-half of all coal and other minerals, gasses and oils in, upon and under a certain tract of land.

It was further provided in the bond that it was given "upon the condition that the said railway extension is to be made on or before the 1st day of October, 1889, to Whitehouse Creek, otherwise not to be binding."

On the 29th day of May, 1889, Mollett executed and delivered to Northup and Carlisle, trustees, a deed for the interests in the land mentioned in the bond, in which the consideration is recited as follows: "For and in consideration of the sum of $1 and other valuable considerations paid by said Northup and Carlisle, trustees, the receipt of which is hereby acknowledged, and in compliance with a bond executed by the said parties of the first part on the 6th day of July, 1886, covenanting to convey the hereinafter-named property upon the consideration that a railroad was built," etc.

This action was brought for the cancellation of the deed, because it was obtained by fraud. It was not instituted until about three years after the deed was made. The southern terminus of the Chattaroi Railway was at Richardson, Ky. Whitehouse Creek was about nine miles south of that point. At the time the bond was executed Northup and Carlisle were interested in the Chattaroi Railway. Carlisle was one of its directors and Northup was its receiver. They were both interested in the Ohio, Kentucky & Virginia Railway; they were interested as trustees for a syndicate of persons who were interested in the construction of the road.

The C., C. & C. Railway was a road projected from the south, the purpose being to connect with the Chattaroi road. It had an option on the Chattaroi road, the C., C. & C. Railway, and also was part of the syndicate to build the extension from Richardson to Whitehouse Creek, and was interested in the mineral privilege in question. The Chattaroi being involved, it was deemed best, to avoid complication, to build the extension of the Chattaroi under the charter of the Ohio, Kentucky & Virginia. So after obtaining the bond from Mollett, and like ones from others, Carlisle, Northup and their associates, under the superintendency of Northup, proceeded to and did extend the Chattaroi Railway from Richardson to Whitehouse Creek long before the date in which the bond required it should be done. It is insisted that there was no consideration for the deed, because the Chattaroi Railway was not extended in the meaning of the bond because the extension was accomplished under another charter.

We do not think there is any merit in this contention. As a matter of fact the Chattaroi was extended. A line of railway was built between the points as required by the contract. The object of the proposed donation was to induce the building of a roilroad between the given points. Mollett received the consideration, for which he agreed to make the deed conveying the mineral privileges. The fact that Northup and Carlisle received the aid of other persons and corporations to enable them to perform the conditions of the bond in the extension of the Chattaroi Railway is not material. Mollett was interested in the completion of the road, not in the agency of its accomplishment. However, after the road was built, Mollett treated it as being in compliance with the contract and executed the deed, and he can not now complain that the road was built under a charter other than that of the Chattaroi Railway. He seeks to avoid the effect of this by claiming that the attorney who obtained the deed from him represented that it was the Chattaroi Railway extended and that he did not then know the extension was built under the charter of the Ohio, Kentucky & Virginia. This attorney testifies that he explained the matter to Mollett as to how the extension was made. No one save Mollett contradicts this statement. If it were material his testimony fails to establish the fact. He was not supported by the evidence of others as to what took place between them and the attorney as to their contracts. Such testimony is not admissible.

It is insisted that at a time more than three years after the extension was made, the public is not getting the same train service, etc., on the extension as they were getting on the Chattaroi when the bond was executed. Granting this to be true, it would be no cause for canceling the deed. There was no provision in the bond or deed stipulating what kind of train service there should be on the extension; besides, the only objection which Mollett urged for not executing the deed according to the uncontradicted testimony of Wallace was that the cars were not running regularly over the road.

If this had been a valid reason for not executing the deed he waived it by converting his executory into an executed contract.

Wherefore, the judgment is reversed, with directions to dismiss the petition.

The court delivered the following response to a petition for rehearing, June 24, 1896:

Counsel for appellee, in their disappointment and zeal, fancy they have discovered glaring errors in the opinion of the court in the statement of facts of the case. They criticise the court for the supposed errors which, if committed, would not be material, with the same degree of earnestness as they do those which would be material if they existed. They seem to be unable to distinguish between a statement of a facts and a deduction made from them. Wherein the court differs with counsel as to the effect of facts, it is gravely argued that, therefore, the court is inaccurate in the statement of facts.

The court said in its opinion that "the C., C. & C. Railway was a road projected from the south, the purpose being to connect with Chattaroi road."

Counsel seem surprised at the statement, and say that the record does not disclose such facts. The record does show that the Chattaroi road reached Richardson, the point from which the extension was to be built to Whitehouse Creek by running south. Northup

testifies that "*the extension was intended to be the connecting link between the Chattaroi and the C. C. C. Ry. companies.*"

Necessarily if the extension was to be the connecting link between the two roads it is reasonable to conclude that the C. C. C. Railway was projected from the south. It would seem that counsel, in their effort to find an error in the statement of facts in the opinion of the court, were not over critical in the examination of the record. Instead of saying the C. C. C. Railway had an option on the Chattaroi road it should have said in the opinion that the Massachusetts & Southern Construction Co., which was building the C. C. C. Railway, had an option on the Chattaroi.

The court it in its opinion said: "Carlisle, Northup and their associates, under the superintendency of Northup, proceeded to and did extend the Chattaroi Railway from Richardson to Whitehouse Creek long before date on the bond required it should be done." And again it said: "As a matter of fact the Chattaroi was extended."

Counsel again are surprised at the statement of the court. The undisputed testimony of Northup is that "*this extension was built as an extension of the Chattaroi Railway.*" Our conclusion was a legitimate deduction from the record. The court is not only correct in its statement of its deduction from the facts, but of the fact itself. The word "competition" is not used in the opinion, but the court said, to avoid "complications," the extension was made under the charter of the Ohio, Kentucky & Virginia. The court, in discussing the facts as they appear in the record, said: "The fact that Northup and Carlisle received the aid of other persons and corporations to enable them to perform the conditions of the bond in the extension of the Chattaroi Railway is not material." Counsel ask: "Why is this language used?"

The court is not responsible for counsel's failure to see why the court was considering the case from the point of view indicated by the language quoted. If the court made the case turn upon the question as to whether Wallace had told Mollett that the "Chattaroi" was completed to Whitehouse we would show that the testimony of certain witnesses, relied upon for the purpose of contradicting him on this question, did not have that effect. The court said in its opinion that it did not regard it material whether Wallace made the statement or not. Still being of that opinion, a discussion of the question would be profitless.

The criticisms of counsel are not justified by the facts. After a careful consideration of the case we adhere to the opinion.

The petition is overruled.

McWILLIAMS V. COMMONWEALTH.

(*Filed April* 25, 1896—*Not to be reported.*)

1. *Striking and wounding with deadly weapon—Question whether stone was deadly weapon should have been submitted to the jury*—Under an indictment for willfully and maliciously striking and wounding another with a deadly weapon with intent to kill it was error to instruct the jury that they must find the defendant guilty if they believed from the evidence that such striking and wounding was done "with rocks, clubs, bludgeons or other hard substances, deadly weapon or weapons," as the effect of this was to tell the jury that the stone with which the wounding was done was a deadly weapon, whereas it should have been left to the jury to determine whether or not, con-

sidering the character and size of the stone and the manner of its use, it was a "deadly weapon."

2. *Instruction as to lower degree of offense—Assault and battery*—As the striking and wounding was done with a stone, it was error to give an instruction as to the offense of shooting or cutting in sudden affray, described in section 1242 of the Kentucky Statutes, as that section does not embrace striking and wounding with a stone or club and such like instruments. In lieu of such an instruction the court should have given an instruction as to the offense of assault and battery, which is a lower degree of the offense charged in the indictment.

3. *Same*—The evidence shows that the defendant, if guilty of any offense, was guilty only of an assault and battery.

Evans & Owsley for appellant.

W. S. Taylor for appellee.

Appeal from Warren Circuit Court.

Opinion of the court by Judge Landes.

The appellant was indicted by the grand jury of Warren county and charged with the offense of willfully and maliciously striking and wounding James Corbin, a policeman, with a deadly weapon, with the intention to kill him. Upon the trial of the case in the Warren Circuit Court he was found guilty, as charged, and his punishment was fixed at two years' confinement in the penitentiary.

The case is brought before us by appeal upon exceptions to the instructions given by the court to the jury and upon the allegation that the verdict of the jury was against the law and the evidence, which were duly set out in the grounds filed with a motion for a new trial, which was overruled by the court.

The facts of the case, as brought out by the evidence certified in the bill of exceptions, are, briefly, these: The appellant, a negro, with a company of his own race, was waiting at the railroad station in Bowling Green to take an excursion train to Louisville; he was in a drunken condition, and, while in the waiting room, staggered or ran upon the wife of one of the company and tramped on her toe, which occasioned a difficulty in the waiting room, in which the appellant was struck a severe blow on the head by which he testified he was dazed; he was driven or escaped from the room, and, while running on the platform, was arrested by Corbin, who searched him and took from him two rocks, which he had in his left hand, and which was all that Corbin found on him. It seems there was a considerable stir and excitement among the crowd there; that appellant was trying to escape from the crowd, seeming to fear that he would be hurt by some one; that, in the excitement, a rock was thrown by some one; that the appellant had a small rock in his right hand, which Corbin had failed to discover, and with which Corbin and other witnesses stated appellant struck Corbin in the head, cutting a gash in it, from which the blood flowed freely. Appellant, however, denied that he purposely struck the blow, but, admitting that he had a small rock or stone in his right hand, claimed that he struck at some one that he thought was a negro advancing to assail him. There is a shade of doubt and uncertainty, from the testimony, whether the appellant struck Corbin, or whether he was struck by the rock that was thrown in the crowd, but the jury was justified in finding that the blow was struck by the appellant.

Corbin, in his testimony, produced several small-sized stones which he picked up in the railroad yard several hours after he was

struck, but he failed to identify positively as the one with which he was struck. He had one, however, about as large as a man's fist, which he expressed the belief was the rock with which appellant struck him. The appellant denied that it was the rock, claiming that the rock he had was smaller, and that he could not have concealed the rock produced in court so as to have escaped the observation of Corbin, who, as has been stated, searched him without finding it.

At the conclusion of the testimony the court gave instructions, all of which were excepted to by appellant, but we shall notice only two of them.

The first instruction was based upon the felony charge in the indictment, and is as follows: "If the jury believe from the evidence, beyond a reasonable doubt, that the defendant, Chas. McWilliams, alias Hindoo, in Warren county, Kentucky, and before the finding of the indictment, did unlawfully, willfully, maliciously, and feloniously, *not in his necessary or apparently necessary self-defense*, assault, strike and wound James Corbin upon his head with rocks, clubs, bludgeons or other hard substances, *deadly weapon or weapons*, with the felonious intent to thereby kill said Corbin, but without so doing, they should find him guilty as charged in the indictment, and fix his punishment at confinement in the penitentiary not less than one nor more than five years."

The objection made by counsel to the foregoing instruction is that it in effect assumes that the instrument with which the striking and wounding was done, which the evidence showed was a rock, was a "deadly weapon." The objection is well taken. There are many cases in which it may be assumed, from common knowledge, that the instrument used to perpetrate the felonious act of violence is a deadly weapon. But this is not a case of that kind. The statute (Kentucky Statute, section 1166) under which the indictment was found makes it a felony for any person, among other things, willfully and maliciously *to strike* and wound another *with a deadly weapon*, with intention to kill him, and, under the evidence in this case, the court ought to have left it to the jury to decide, considering the character and size of the rock or stone with which the striking was done, and the manner of its use, whether or not it was a "deadly weapon." The words in the instruction by which the court submitted to the jury the charge to be investigated as to the character of the punishable act of violence laid against the appellant and of the instrument with which it was perpetrated, viz, "assault, strike and wound James Corbin upon his head, with rocks, * * * *deadly weapon or weapons*," if they did not import a positive assumption that the instrument of violence—the rock—was a "deadly weapon," were calculated to mislead the average juror into believing that the court intended that the rock was to be so considered.

There are many authorities on this question, and a few of them are referred to: Am. & Eng. Ency. of Law, volume 1, page 816; Berry v. Commonwealth, 10 Bush, 15; Commonwealth v. Duncan, 91 Ky., 592; Woodson v Commonwealth, 14 KY. LAW REP., 797.

The second instruction, which is likewise objected to, was erroneous. It was based on section 1242 of the Kentucky Statutes. That section, as has often been decided, does not embrace striking and wounding with a rock or club and such like instruments. (Commonwealth v. Hawkins, 11 Bush, 603; Erwin v. Commonwealth, 96 Ky., 422.)

In lieu of this instruction, as was said in the case of Riggs v. Com-

monwealth, 17 KY. LAW REP., 1015. recently decided by this court, and just such a case as this, an instruction ought to have been submitted to the jury upon the offense of assault and battery, which is a lower degree of the offense charged in the indictment. But, as was also said in that case, the omission of an instruction in this case embracing that offense is not a reversible error, since the jury convicted the appellant of a felony when they had an opportunity, under the instructions, to convict him for *striking* in sudden heat and passion.

But, upon the whole case, after a careful examination of the evidence before us in this record, we are at a loss to perceive how the jury could have found that this appellant was actuated by the malicious intention to kill Corbin in striking him in the manner and under the circumstances detailed in the evidence, if he did in fact purposely strike him. As was said in Woodson v. Commonwealth, *supra*, a case in some respects similar to this, under the evidence the appellant was guilty, at most, of an assault and battery.

For the error indicated the judgment of the lower court is reversed and the cause remanded, with directions to award the appellant a new trial and for proceedings consistent with this opinion.

MASSACHUSETTS BENEFIT ASSOCIATION V. RICKART.

SAME V. PATRICK.

(*Filed April* 25, 1896.)

Pleading—Defects cured by verdict—In a suit upon a policy of life insurance, although its petition is defective in that its averments as to the performance of conditions precedent are too general, such defects are cured by a verdict for plaintiff, as the doctrine of intendment after verdict applies to this State as at common law, the rule being that where the declaration states facts sufficiently general to comprehend a fair and reasonable intendment the defective statement will be cured by the verdict.

Wright & Anderson for appellant.

L. J. Crawford for appellee Patrick; E. P. Simmons, J. W. Menzies and Otto Wolf for appellee Rickart.

Appeal from Campbell Circuit Court.

Opinion of the court by Chief Justice Pryor.

There seems to have been a trial in this case with a verdict and judgment for the plaintiff, and no bill of evidence with the record, so the entire case turns upon the question of pleading. Did the pleading authorize the verdict; and, if the pleading is defective, was it not cured by the verdict. There was no demurrer, general or special.

The doctrine of intendment applies after verdict in this State as at common law, and if the averments of the petition are too general, by reason of statements that all precedent conditions have been complied with on the part of the plaintiff, and proof satisfactorily offered of the death of the insured, as well as other general averments, such defects will be cured by verdict. These two actions are on policies of insurance, with an answer in the one case and a verdict and judgment in the other without any defense.

It is averred that the lives of the persons deceased were insured for the benefit of the plaintiffs, and the policies executed and delivered by the company to the insured, with a general averment of performance on the part of those interested in the policy or all entitled to its benefits. The rule is, where the declaration states facts sufficiently general to comprehend a fair and reasonable intendment, the defective statement will be cured by the verdict. There is enough in either petition to show the plaintiff had a cause of action.

The answer filed in the one case places in issue only the false statements alleged to have been made by the deceased when making his application for insurance. This is denied by the reply, and it was pleaded by the plaintiff that appellant's agent knew all about the matters of which the company now complains, and was the agent not only of the company sued, but was the agent of the company to which application for insurance had been made and refused, and the answer that no other insurance had been applied for was made by the agent who was cognizant of all the facts. The case went to the jury on the testimony that is not before us, and what was proven or the instructions are facts not disclosed by the record. There is no merit in either appeal.

Judgment affirmed in each case.

The Kentucky Law Reporter.

EDITOR:
WALTER G. CHAPMAN, ... Frankfort, Ky.

VOL. 18. AUGUST 15, 1896. No. 4

KENTUCKY COURT OF APPEALS.

STORY v. STORY'S ADM'R.

(*Filed April* 25, 1896—*Not to be reported.*)

Failure to prove claim against decedent's estate—Res judicata—Where a creditor appears in a suit to settle a decedent's estate and proves a claim against the estate, which is allowed, the judgment in that action is a bar to a suit by him against the personal representative upon another claim against the estate.

G. A. Cassidy, Jos. H. Power and Humphrey & Mayher for appellant.

W. G. Dearing and J. P. McCartney for appellee.

Appeal from Fleming Circuit Court.

Opinion of the court by Judge Paynter.

Jeremiah Story died intestate the owner of a large tract of land. His personal estate was insufficient to pay his debts. A creditor of the estate instituted an action to settle the estate, to which appellant, Mary Story (being the widow of decedent), the personal representative, and the heirs at law were made defendants. The personal representative filed an answer and made it a cross petition against his co-defendants, in which a settlement of the estate was asked. The case was referred to the master commissioner to ascertain and report on the claims against the estate. This he did, and the court had sold sufficient land to pay them. Mary Story presented a claim before the master commissioner against the estate, and she was allowed and paid by the personal representative the amount thereof, to wit, $1,015.80.

After final orders had been made in that case, Mary Story instituted this action against the personal representative to recover on a claim amounting to more than $5,000, as she claims, for money which she let her husband have some twenty-six years before. This claim was not mentioned in the suit to settle the estate, nor that she

had a claim against the estate other than the one presented and allowed.

The question for our consideration is as to whether she is barred by the judgment and orders in the suit to settle the estate. It needs no discussion or citation of authority to show that where a party has two distinct claims against another that a suit and judgment on one will not bar an action on the other. If she is barred it is because of the peculiar character of the action to settle the estate. Mary Story was made a defendant to the action. Besides, she presented a claim before the commissioner which, under the provision of section 432 of the Civil Code, thereby made her a party to the action.

Section 433 of the Code provides that "creditors failing to appear and prove their claims agreeably to such order shall have no claim against the executor or administrator who has actually paid out the estate in expenses of administration and to creditors, legatees or distributees."

Section 434 of the Code provides that, notwithstanding the failure of the creditor to appear and the discharge of the personal representative as prescribed in section 433, the legatees and distributees are liable in a direct action by such creditor to the extent of estate received by each of them.

There is no estate in the hands of the administrator. The fee in the parcel assigned Mary Story as administrator is the only part of the estate of the decedent undisposed of.

Chapter 3, title 10, Civil Code, of which the above sections are a part, not only contemplates that the action shall be but in terms requires the action to settle the estate shall be referred to a commissioner to hear proof of claim against the estate. The purpose of the sections in question was to protect creditors who, for some cause, failed "to appear and prove their claims."

Among other purposes an action to settle a decedent's estate is to ascertain the names of the creditors and the amount of their respective claims. It is not to ascertain a part of a claim which a creditor has against the estate, but the whole amount of such claim. When the creditor is made a defendant in the action, or appears before the commissioner to prove his claim, the issue is raised not only as to whether he has a claim against the estate but as to amount thereof. She appeared before the commissioner and proved what purported to be her claim against the estate, because the action in part was for the purpose of ascertaining the amount due her. The court through the commissioner made the direct inquiry as to the amount due her. She responded by proving a claim against the estate. The commissioner reported that a certain amount was due her, and the court in effect so adjudged.

We think the proceedings in the action to settle the estate bars her right to recover on the claim in suit.

In Stull v. Davidson, 12 Bush, 167, the creditor was a party to the suit to settle the estate, but did not "appear and prove" his claim. The court held he was not entitled to recover against the personal representative.

While the facts of the Hood case, 80 Ky., 39, are not exactly the same as in this case, yet the principle recognized in it sustains the conclusion reached in this case. In that the creditor was a defendant to the action. Plaintiff made allegations that the defendant was asserting a certain character of claim against the estate. The court held he should either set up the claim or abandon it against the estate. In this case there was an adjudication of her claim against the estate. The judgment of the court fixed the amount of it.

The judgment is affirmed.

ANDERSON V. COMMONWEALTH.

(Filed April 25, 1896—Not to be reported.)

1. *Verdict of guilty supported by evidence*—As there was evidence tending to establish the guilt of the accused under an indictment for feloniously breaking a dwelling house and feloniously taking a watch, ring, etc., this court can not disturb a verdict of guilty upon the ground that the evidence was insufficient to warrant a conviction, it being the province of the jury to determine the weight of the evidence and the credibility of the witnesses.

2. *Misconduct of Commonwealth's attorney*—It was improper for the Commonwealth's attorney to say in argument to the jury that "the defendant is no boy; he is no spring chicken; he has already served a term for the State at Frankfort." But as the court sustained defendant's objection to this statement, and the Commonwealth's attorney withdrew it, defendant was not prejudiced.

Blanton & Berry and J. H. Dorman for appellant.

W. S. Taylor for appellee.

Appeal from Harrison Circuit Court.

Opinion of the court by Judge Paynter.

The accused was indicted for feloniously breaking the dwelling house of W. D. Urmston and feloniously taking away a watch and ring, etc.

Upon the trial the jury found him guilty and fixed his punishment at confinement in the penitentiary for a period of six years and six months.

It is claimed the judgment should be reversed, first, because of the insufficiency of the evidence to warrant the verdict; second, misconduct of the Commonwealth's attorney in arguing the case before the jury.

Urmston on the trial testified that on his road to church he met the accused; that the accused seemed to be noticing who was in the conveyance which he was driving. On his return home he found that one of the up-stairs windows had been opened by hoisting it with a part of a pitchfork; that the wire screen in the window had been taken out, the room entered and the watch, ring, etc., taken out of the house. The witness could not say that the window was closed when they started to church, except that he knew he and his family were particular to fasten up the house when they started away.

The watch was shortly found in the possession of a boy who testified he obtained it from the accused by giving him in exchange for it a barlow knife, thirteen marbles and a promise of twenty cents; that the trade was made behind a stone house at Lair station. Kellar Brand testified the accused was working at his father's house and that he found the ring near a path leading from his father's house to the barn.

The accused testified that he did not break the dwelling house or steal the property, and that he did not let the boy have the watch, etc.

There was evidence tending to establish the guilt of the accused. The jury were the judges of the weight of the evidence and the credibility of the witnesses. We can not invade the province of the jury. Besides, we think the evidence warranted the jury in finding a verdict of guilty.

During the argument of the case the Commonwealth's attorney said: "He, the defendant, is no boy; he is no spring chicken; he has already served time for the State at Frankfort." The accused objected to the language of the Commonwealth's attorney. The court sustained the objection, and the Commonwealth's attorney withdrew the statements. It was certainly improper for the Commonwealth's attorney to use such language, but as the court held it was improper, and the Commanwealth's attorney withdrew the statements, we do not think the substantial rights of the accused were prejudiced thereby.

The judgment is affirmed.

SUBLETT V. COMMONWEALTH.

(Filed April 28, 1896—Not to be reported.)

1. *Indictment for "arson or barn burning"*—An indictment accusing the defendant "of the crime of arson or barn burning" is sufficiently direct and certain as to the offense charged, for while the technical offenses of arson and barn burning are charged in the alternative no one could be misled as to the actual offense intended to be charged.

2. *Arson*—It is arson at common law to maliciously burn another's barn stored with hay or grain.

J. A. Conyers and H. C. Martin for appellant.

W. S. Taylor and S. M. Peyton for appellee.

Appeal from Hart Circuit Court.

Opinion of the court by Judge Lewis.

Of the four or five indictments successively found by the grand jury in this case, it has been somewhat difficult to ascertain precisely under which of them appellant was finally tried and convicted, but after careful examination of the transcript, which is not well made out nor indexed, we have concluded it is the one which appears to have been found and filed in court September 19, 1895. We are, however, not entirely certain of being right, inasmuch as counsel for the Commonwealth assumes in his brief it is the one found on page 3 of the transcript, and purporting to have been filed January 16, 1895, while counsel for appellant does not seem to be fully satisfied which of them it is.

The indictment, which we will treat as the one under which appellant was tried, accuses him "of the crime of arson or barn-burning," and the question is thus presented whether it is substantially as required by section 124, Criminal Code, which provides that the indictment must be direct and certain as regards the offense charged.

The statute, section 1167, provides if any person shall be guilty of arson he shall be confined in the penitentiary not less than five nor more than twelve years, while by section 1170 the punishment prescribed for maliciously and unlawfully burning any dwelling house is confinement in the penitentiary not less than ten nor more than twenty years. The punishment prescribed by section 1169 for willfully and unlawfully burning a barn is confinement in the penitentiary not less than one nor more than six years.

The definition of arson, according to Blackstone, is the malicious

and willful burning of the house or outhouse of another man. But according to Wharton's Criminal Law, upon the authority of Hale's Pleas of the Crown, it is said to be arson at common law to maliciously burn another's barn stored with hay or grain. It would not, therefore, be in conflict with the statute, nor so uncertain or indirect to charge a person actually guilty of barn burning with the offense of arson as to render unavailable a plea in bar to subsequent prosecution for the same offense, especially if particular circumstances of the offense be distinctly stated, as appears to have been done in this case; for, while the technical offenses of arson and barn-burning are charged in the alternative, no one could be misled or misinformed as to the actual offense intended to be charged; and as the Criminal Code was not intended to defeat but rather secure due administration of justice, whenever it can be done without prejudice to substantial rights of the party accused, we think the indictment in this case should be held sufficient. As there was evidence tending to show appellant's guilt, we are not authorized to set aside the verdict upon the ground there was not sufficient evidence to support it.

Judgment affirmed.

FUQUA & JOHNSON V. FARMERS & MERCHANTS NATIONAL BANK, &C.

(*Filed April* 28, 1896—*Not to be reported.*)

1. *Fraudulent conveyances—Rights of assignee of purchase money notes—Receivers—Lien upon rents*—When a conveyance was set aside at the suit of attaching creditors of the grantor upon the ground that it was fraudulent as to creditors, the cancellation of the conveyance destroyed the lien of a creditor to whom the grantor had transferred the purchase money notes as collateral, leaving him in no better position than any other unsecured creditor. And the attaching creditors having had the land placed in the hands of a receiver in order that they might also subject the rents they thereby acquired a lien upon the rents, and the creditor to whom the purchase money notes had been assigned as collateral did not acquire a lien upon the rents by suing out an attachment and having process of garnishment served upon the receiver.

2. *Affidavit for attachment—Amount of recovery*—Where it is stated in an affidavit for an attachment that the plaintiff "believes" he ought to recover a certain sum, followed by an affidavit of his attorney (the plaintiff himself being absent from the county) that he "believes" the statements in the affidavit are true, this is sufficient as to the sum to be recovered.

E. P. Campbell and Petrie & Downer for appellants.

Joe McCarroll for appellees.

Appeal from Christian Circuit Court.

Opinion of the court by Chief Justice Pryor.

Thomas Herndon, being the owner of a tract of land, and also largely indebted, conveyed it to one Roach and took the notes of the latter for the purchase money. The appellees, the Merchants and Farmers National Banks, obtained attachments that were levied on this land, and assailed the conveyance to Roach by Herndon on the ground of fraud.

The court below held the conveyance to be fraudulent, and cancelled the conveyance in so far as it affected creditors. This branch of the case, however, is not before us. After this fraudulent sale was made, Herndon being indebted to the appellants, Lewis, Fuqua & Johnson, transferred to them as collateral the notes on Roach for the purchase money to secure his indebtedness to them. These two creditors came into the case as instituted by the appellees and were made defendants to the action. Before these appellants, Lewis, Fuqua & Johnson, were made defendants, the appellees, who had obtained their attachments and had them levied on the land, asked for the appointment of a receiver to take charge of the land and rent it out on the ground the land was not of sufficient value to pay their debts and report his action to the court.

These appellants, when this was done, obtained attachments or garnishments and served on the receiver that they might hold the rents as against the claims of the appellees, who brought the original action, and on whose motion the land had been placed in the hands of the receiver. The only question presented is the right of the appellants to intercept this rent by these proceedings and prevent its application to the payment of the debts due the banks.

The cancellation of the conveyance to Roach as to creditors destroyed the lien of the appellants and left the land subject to the claims of the attaching creditors. The appellants had no claim by way of lien on the land or its rents, nor did the appellees have any on the rent until the effort was made to place the land in the hands of a receiver that the rent might be applied to the payment of their debts. This having been done, and the land and its proceeds or rents being in the hands of the court, the attachment as to the rents by the appellants was improperly issued, and the court was powerless to divert the rents from the payment of appellee's debts unless the appellants had some superior equity. They were, it is true, *bona fide creditors*, but occupied no better position than any other unsecured creditor. No title passed to the fraudulent vendee as against creditors, and the appellees having a prior equity by reason of their attachments on the land, and a prior equity on the rents by reason of having it rented out that the rent might be applied to their debts, it becomes manifest the appellants have no claims on this rent, and the court acted properly in dismissing their attachment, and particularly when without leave of court they were attempting to oust the court of its right to adjudicate the question in the action there pending.

It is claimed the attachment should not have been issued in the original action for the want of an affidavit as required by the Code. All the grounds for an attachment are specifically and positively alleged with the statement, the plaintiff *believes* he ought to recover a certain sum, followed by an affidavit of his attorney that he believes the statements in the petition are true. This is sufficient as to the sum to be recovered, the Code expressly providing that the affiant, whether plaintiff or his attorney, if the plaintiff is absent, must state the sum he believed the plaintiff ought to recover.

Judgment affirmed.

Judge Landes not sitting.

BOARD OF EDUCATION OF SOMERSET PUBLIC SCHOOLS V. TRUSTEES COLORED SCHOOL DISTRICT NO. 1, PULASKI COUNTY.

(*Filed April* 30, 1896—*Not to be reported.*)

Taxation for school purposes—Apportionment of taxes between white and colored schools—The common school law provides that the railroad tax shall be apportioned between the white and colored schools in the same district, but this provision has no application to the tax upon the property of any other corporation. And in the taxation of private corporations for the support of graded schools the stock owned by colored persons is liable to be taxed only for the colored schools, and that owned by white persons only for the white schools. And an agreement between the trustees of the white and colored schools respectively for an apportionment of the taxes in any other manner than that required by the school law is a nullity.

O. H. Waddle for appellant.

W. O. Bradley and A. J. Crawford for appellee.

Appeal from Pulaski Circuit Court.

Opinion of the court by Chief Justice Pryor.

The Board of Education of Somerset Public Graded Schools was incorporated in April, 1888, with the power to tax all property within its school district for school purposes.

The appellees, the trustees of Colored School District No. 1, cover the same territory as that of the appellant's district. There is a large amount of capital invested in private corporations within the district, owned by white persons exclusively, except one-fourteenth of the capital stock of the Young Men's Loan & Building Co. For the year 1893 the appellant (white) levied a tax of sixty cents on each $100 worth of property within the district belonging to whites, and the trustees of the colored schools twenty-five cents on property belonging to colored persons.

It seems by the agreed facts the superintendent of public schools, there being a disagreement between the two schools as to the application of the taxes collected from the private corporations, advised both parties that a new law had been enacted by the Legislature requiring all taxes collected from such sources to be proportionately divided between the white and colored schools, and on this advice an arrangement in writing was signed by which the tax was agreed to be divided as they supposed the law required. The appellant (white school) insists that the agreement is not binding for two reasons. First, it was made under a mistake as to the law, and, second, they had no power (the board) to divert the tax fund or apply it in any other manner than that required by law.

The common school law, section 4101, provides that the railroad tax shall be apportioned between the white and colored in the same district; but this has no application to any other corporation, public or private, and we think it plain that the agreement entered into is a mere nullity and without binding force. Neither board has the right to say how the taxes shall be apportioned between the schools, if in any other manner than the school law requires. There is no warrant of law for such an agreement, and the appellees, on the agreed facts, can not enforce that contract. The railroad tax is to be apportioned in the manner suggested by the agreement, and the stock owned by colored persons in the private corporations is liable only to be taxed for the graded colored schools, and that owned by white persons for the white school.

Section 4487 of the Kentucky Statutes provides: "No white person shall vote at any election held by the colored people under the provisions of this law (the graded school law), nor shall the property of any white person be taxed to maintain any graded common school for colored children, nor shall the property of any colored persons be taxed for the benefit of any graded common school for white children," etc.

It seems to us, therefore, the court below erred in holding the agreement binding.

The judgment is reversed and remanded for a judgment as herein indicated.

BARCLAY V. DEPOSIT BANK OF RUSSELLVILLE, &C.

(*Filed April* 30, 1896—*Not to be reported.*)

Right of father to administer on son's estate—The county court having refused appellant's application to administer upon the goods and chattels of his deceased son after a trial had upon the issue as to his capacity to manage the estate, and that judgment having been affirmed by the circuit court, this court will not disturb the finding of those two courts, the testimony being conflicting, and the appellee having in the meantime been appointed administrator.

Thomas H. Hines, E. W. Hines and B. F. Proctor for appellant.

W. H. Holt and John G. Craddock for appellees.

Appeal from Logan Circuit Court.

Opinion of the court by Chief Justice Pryor.

This contest involved the right of the father to administer on the goods and chattels of his deceased son. There can be no doubt of his right under the statute unless for some cause therein mentioned he is incapacitated from managing the estate. On this issue a trial was had in the county court, and his application to administer refused and an appeal taken to the circuit court with a similar result, and the case now here. In the meantime the county court appointed the Deposit Bank at Russellville the administrator, and it is now acting as such.

It is sufficient to say the testimony is conflicting, and both courts, with a full knowledge of the parties in interest and the capacity of the appellant to manage the estate, have rejected his claim to administer, and without discussing the testimony we feel constrained to affirm the judgment.

MAJOR V. BARKER.

(*Filed April* 28, 1896.)

1. *Contested election—Ballots marked by clerk for the voter*—The requirement of the election law that the voter shall declare his disability "on oath" before his ballot can be marked for him by the clerk is mandatory to the voter, and a ballot marked by the clerk without such a statement of the voter "on oath" can not be counted.

2. *Marking ballots in the presence of another*—A ballot marked in the voting booth either by the clerk of the election or in his presence is a ballot "shown

to another person" within the meaning of section 1474 of the Kentucky Statutes, and if deposited should not be counted.

3. *Testimony of voter as to how he voted*—In an election contest the testimony of voters should not be received to show for what candidate they voted, although offered for the purpose of sustaining the charge that the officers of the election fraudulently counted for one candidate ballots which were cast for another, as the admission of such testimony would destroy the secrecy of the ballot.

4. *Fraud*—The evidence in this case is not sufficient to authorize the court to throw out the vote of a whole precinct upon the ground of fraud, although the conduct of the election clerk in behalf of his brother and other circumstances are calculated to give rise to grave suspicions.

5. *Directory and mandatory provisions of the law*—The fact that part of the officers of election at a particular precinct absented themselves during part of the election hours, and that during the absence of the clerk one of the judges of the election acted in his place and signed the clerk's name upon the back of the ballot, is not sufficient to authorize the court to throw out the vote of the precinct, for, while the requirements of the statute which were thus violated are mandatory as to the officers, they are directory only as to the voters.

J. I. Landes and Harry Ferguson for appellant.

Joe McCarroll and C. H. Bush for appellee.

Appeal from Christian Circuit Court.

Opinion of the court by Judge DuRelle.

The parties to this appeal were candidates at the November election, 1894, for the office of justice of the peace for the Longview district of Christian county. Upon the face of the returns the Board of Canvassers found that appellee Barker received 443 votes, and appellant Major 371 votes, showing a majority of 72 in favor of Barker. Appellant duly gave notice of contest of the election, setting forth three principal grounds of contest, and appellee gave a counter notice, in which he relied upon certain irregularities which he claimed to have produced results favorable to appellant. The county board decided the contest in favor of appellee, and its decision was affirmed by the circuit court.

Appellant's grounds of contest were based upon alleged irregularities occurring at the Gordonfield precinct (No. 10), which was one of five precincts included in the district, and were as follows:

1st. The officers of election permitted the ballots of four voters to be stamped openly on the table of the clerk of election without requiring them to state under oath any disability which prevented them from marking their own ballots, and all of these ballots were so marked as to be counted and were counted for appellee.

2d. The clerk of that precinct accompanied eighteen voters into the voting booths and stamped or assisted those voters in stamping their ballots so that they should be counted for appellee.

3d. The officers at that precinct fraudulently counted forty-eight ballots for appellee which had been cast for appellant.

On the other hand the appellee, in his counter notice, relies on the fact that at the Longview precinct, which gave a majority for the appellant, a part of the officers absented themselves during part of the election hours, and that during the absence of the clerk one of the judges of the election acted in his place and signed the clerk's name upon the back of the ballots.

There were some other grounds of contest urged by appellant, but

they are immaterial except in so far as they tend to support the charge of fraud at the Gordonfield precinct.

Upon the first ground stated we are of opinion that the court should have sustained the contention of appellant and excluded from the count the ballots which were marked openly by the clerk of the election, without the statement under oath of disability required by the statute (section 1475, Kentucky Statutes). In our view the statute imperatively requires that the voter shall declare his disability *on oath* before his ballot can be marked for him by the clerk, and to permit the officers to assume, either from the voter's appearance or from their own alleged personal knowledge, that he is so disabled as to be unable to mark his own ballot, would be to open a door for wholesale evasion of the requirement of secrecy in the ballot. This rule may result in hardship to the individual voter in cases where the officers are neglectful of their duty in requiring the oath of disability to be made, but the requirement that the voter shall take the oath before his ballot can be marked and deposited in order that he may be punished if he make a false declaration is in our judgment mandatory to the voter. A ballot so marked, without the declaration on oath being made, is an illegal vote and should be excluded.

So also with the ballots which were marked in the voting booths either by the clerk of election or in his presence. These ballots were clearly *shown to another person* within the meaning of section 1474, Kentucky Statutes. They were forbidden to be deposited in the box, and were illegal votes if so deposited.

The testimony of the clerk shows for whom they were marked, and they should, therefore, be excluded from the count. The conduct of the clerk was, moreover, a gross violation of official duty, which it is difficult to ascribe entirely to ignorance.

This brings us to the consideration of the testimony of forty-eight voters who, with greater or less degrees of clearness, testify that they voted for appellant at the Gordonfield precinct. But twelve votes were returned as cast for appellant there, and it is insisted that the remaining thirty-six should be deducted from appellee's majority and counted in favor of appellant, which, excluding the votes hereinbefore indicated, would give a majority in favor of appellant.

It was held in Commonwealth v. Barry, 17 KY. LAW REP., 1018, that such evidence was not admissible upon an indictment for making a false return, but it is insisted that a different rule should apply to a case like the present one, where relief is sought on the ground of fraud.

After full consideration of the question, we have concluded to adhere to the rule laid down in Commonwealth v. Barry. It is conceded that the voter can not be compelled by subpœna to appear and testify how he marked his ballot. If he were permitted to so testify he could then be subjected to a moral compulsion from his party associates. One party might obtain from willing witnesses testimony which the other party would be powerless to rebut because unable to compel a statement of the truth. It is admitted that injustice may be done in individual cases by the application of this rule, but the consideration mentioned and the evident policy of the law that the secrecy of the ballot should be inviolable outweighs the occasional hardships.

As was said in the Barry case, "the election law provides ample means to prevent frauds and forgeries" if it is adhered to and enforced by the authorities.

The contention of appellant that the vote of the whole Gordonfield precinct should be thrown out on the ground of fraud can not be sustained. While the conduct of the election clerk in behalf of his brother, and other circumstances are calculated to give rise to grave suspicions, there is no sufficient evidence of fraud to justify us in disfranchising the voters of the entire precinct. And the grounds stated in the counter notice of appellee can not be sustained. The requirements of the statute which were violated by the officers at the Longview precinct were mandatory as to them but directory as to the electors, and there was no fraud or attempt of fraud shown at that precinct.

Judgment affirmed.

Judge Paynter dissents.

Judge Landes did not sit in this case.

LITER, &C. V. SHERLEY, BY, &C.

(*Filed April* 29, 1896—*Not to be reported.*)

1 *Boundary—Location of division line*—In this action, in which the issue is as to the location of the division line between the lands of appellants and appellees, the evidence is sufficient to support the judgment of the chancellor fixing the line.

2. *Same*—The action of processioners in attempting to establish the line between the parties does not affect the right of the parties to have their claim determined in this action, as the appellees never joined in the application to have the processioners go upon the lands and establish the line in question, and never, verbally or in writing, consented to the acts of the processioners.

Junius C. Kline for appellants.

ONeal, Phelps & Pryor and Swager Sherley for appellees.

Appeal from Jefferson Circuit Court, Chancery division.

Opinion of the court by Judge Paynter.

The issue in this case is as to the location of the division line between the land of Mann Liter and Ben Trigg, who own tracts of land east, and the Sherleys, who own land immediately west of the disputed line. It is a line running a southerly course from the Ohio river.

The real controversy is as to the location of the line between Sherley's land and that of Ben Trigg. Wm. Trigg was formerly the owner of the tract of land now owned by Ben Trigg. Many years ago—much more than thirty years—a rail fence was built by Wm. Trigg along the disputed line, at any rate, and on it, as claimed by Sherleys, which remained there until more than twenty years before the institution of this action. This fence was owned entirely by Wm. Trigg.

About twenty years before this suit was instituted, by an arrangement between the owners of the Trigg land and the Sherleys, a partition fence was erected to replace the old fence, the Triggs building, one-half thereof and the Sherleys the other half. Some twenty odd years before this suit was brought the Sherleys built a roadway along and west of the fence. It was used by them and their tenants, with an occasional permissive use by others.

The Sherleys have been in the actual, adverse possession of the land west of the fence, including the roadway, and claiming it as their own for more than twenty years before the institution of this action. That they have so held and claimed the evidence is absolutely conclusive. Besides, the Triggs (from whom Ben Trigg derives his title) admitted that the Sherleys were the owners of and were in the possession of the land west of the division fence by uniting in building the division fence.

The foregoing conclusion renders it unnecessary to discuss the question as to the line as described in their respective deeds. If it were admitted that the Triggs' deed did and the Sherleys' did not cover the land in controversy, the erection of the division fence as stated, and the subsequent possession of the Sherleys, would conclude the rights of the Triggs and their vendors.

The court below adjudged that the division fence on the eastern boundary of Sherley's land, which, as now exists between the Sherleys' and the defendants' land, is the true division between them, and that the fee simple title to the land west of said fence which is in dispute is vested in the Sherleys, and that the defendants have no claim thereto.

In this conclusion of the court we fully concur. The action of the processioners in attempting to establish the line between the parties does not affect the right of the parties to have their claim determined in this action. (McIntire v. Getlings, 15 B. M., 177.)

Sherleys never joined in the application to have the processioners go upon the lands and establish the line in question. Neither did they consent thereto verbally or in writing, nor did they endorse on their report or sign one made by any one else consenting to the acts of the processioners.

The judgment is affirmed.

HUME & CO. V. MULLINS & CRIGLER.

(*Filed April* 30, 1896—*Not to be reported.*)

1. *Mandate of Superior Court—Dismissal of action*—As the plaintiffs, upon the return of this case to the lower court from the Superior Court after a former appeal, pleaded no new matter, there was left no alternative for the lower court under the mandate of the Superior Court but to dismiss the action on the pleadings and without further trial; but even if this court, on the present appeal, could ignore the decision of the Superior Court, it would not be inclined to do so because satisfied that decision was proper.

2. *Sales of personal property—Delay in asking enforcement of contract*—In this action to recover damages on account of defendant's failure to comply with their agreement to deliver to plaintiffs at a certain price 200 barrels of whisky of a particular brand, plaintiffs, by delaying more than a year before even signifying their intention to stand by the contract, lost their right to enforce it; besides, as they did not accompany their demand when made with a tender of the purchase price, they did not put themselves in a proper attitude to entitle them to enforcement of the contract.

James W. Bryan for appellants.

W. M. Fenley for appellees.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Lewis.

W. S. Hume & Co. brought this action on this alleged contract:

"COVINGTON, KY., January 24, 1889.

"MEMORANDUM OF SALE.—Mullins & Crigler agree to furnish 200 barrels, spring 1887, Hume whisky, to W. S. Hume & Co. at forty cents per proof gallon, O. G., in bond, and W. S. Hume & Co. agree to accept the same. MULLINS & CRIGLER,

"JOHN WHITE."

In their petition they stated the whisky was, at date of the contract, held in bond, subject to revenue tax by the United States government, which plaintiffs were bound to receive and pay for at the price of forty cents per proof gallon within a reasonable time after said sale; that the contract was made for them by John White, their agent, and delivered to him for them; that they were at all times thereafter able, ready and willing to pay defendants for said whisky at the price agreed upon, and February 5, 1890, by letter dated at Silver Creek, Ky., addressed to defendants at Covington, Ky., called on them for the whisky, and requested to know when they proposed to deliver same; that by reason of refusal of defendants to deliver the whisky they sustained damage to the extent of the difference between what the whisky was worth at the price of 40 cents per gallon and at 80 cents per gallon, the alleged market price February 5, 1890.

At the trial verdict and judgment were rendered in favor of plaintiffs for $1,692. But upon appeal to the Superior Court that judgment was reversed and cause remanded for new trial and further proceedings consistent with the opinion of that court.

The grounds upon which the judgment was reversed, as stated in the opinion, were in substance that as the contract specified no particular time or place for delivery of the whisky, or the warehouse receipts which represented it, the law fixed the time as reasonable time, and the place defendant's place of business, and that if plaintiffs desired to stand by the contract it was their duty to demand it within a reasonable time, unless, as alleged in the petition, there was a custom or usage of trade fixing the period, and which should be taken as part of the contract. It was further decided that *prima facie* a year's time in which to make the demand was unreasonable, and the demand when made should have been accompanied with the tender of the price unless the tender was waived.

Upon return of the case the lower court set aside previous orders sustaining demurrer to the first and second paragraphs of the original answer, and to the motion to strike out, and thereupon plaintiffs filed reply, simply putting in issue the allegations of the answer, but pleading no new matter.

It seems to us there was left no alternative for the lower court, obeying the mandate of the Superior Court, but to dismiss the action on the pleadings and without further trial; and even if this court on the present appeal could ignore the decision of the Superior Court we would not be inclined to do so because satisfied it was proper; for, admitting the contract was mutually obligatory, which is by no means plain, plaintiffs lost their right to have it enforced after having delayed more than a year before even signifying an intention to stand by it, and the circumstances of this case make it manifest they would not have asked performance at all if the price had not gone up, for the whisky was of their own manufacture, and had been previously sold by them. Besides, they did not tender the purchase price, or in any respect put themselves in a proper attitude to entitle

them to the enforcement of the contract. We can not conceive of any usage or custom of trade so unreasonable and unjust as would justify the court in enforcing the contract as it appears to us.

Judgment affirmed.

HARPER, &C. V. BAIRD, &C.

(Filed April 30, 1896—Not to be reported.)

1. *Construction of will*—Where a testator after devising his real estate to his children equally, and providing for a sale and re-investment in stock or land, provided that "should any of my children die without heirs it is to go to the rest equally," each of the children took a defeasible fee, and the land having been sold and the interest of one of the daughters invested in bank stock, upon her death without issue the stock went to the surviving children of the testator, and not to the husband of the deceased devisee.

2. *Res judicata*—A judgment to the effect that the children took a fee simple estate, which was rendered in a suit brought by their executrix for a construction of the will, is not a bar to this suit brought against the husband after his wife's death to recover the stock, for, while all the devisees were parties to that suit, the matter in issue here could not have been in issue in that suit because the contingency had not then happened, the prime object of that suit being to ascertain the powers of the executrix.

3. *Construction of will—Rights of husband of devisee*—The only rights which the husband has in this matter grow out of the marital relation, and must be held subordinate to the provisions of the will under which his wife held the property. A purchaser for value might occupy a stronger attitude.

Beckner & Jouett, J. M. Elliott, H. M. Woolford and J. S. Hurt for appellants.

Stone & Sudduth for appellees.

Appeal from Montgomery Circuit Court.

Opinion of the court by Judge Guffy.

This appeal is prosecuted by the appellants, Lizzie R. Harper, *et al.*, from a judgment rendered by the Montgomery Circuit Court in the action of said Harper, &c., against Geo. W. Baird, *et al.*

The plaintiffs sought to recover of the appellee, Geo. W. Baird, twenty-three shares of the capital stock of the Mt. Sterling National Bank, worth $120 per share, and ten shares of the capital stock of the Traders Deposit Bank, and to obtain a transfer of the same to the three surviving sisters of Lila B. Baird, deceased, late Anderson. Mary Jane Anderson, who is also an appellant, and the mother of said Lila B., was made party to the suit and asserted a claim to one-half of said stock. The appellants, Mrs. Harper and Mrs. Sutherland, and appellee, Emma D. Patterson, and Lila B. Anderson were the only children of J. W. Anderson. Lila B. intermarried with the appellee, Geo. W. Baird, while under twenty-one years of age, but lived until after she was twenty-two years old and died, never having a child. Appellee received from Mrs. Anderson, the mother and guardian of his wife, twenty-three shares of the bank stock in contest, and $—— in notes, which he collected, and invested it, or part thereof, in the other bank stock in contest, but at the time the notes were delivered to him it is claimed that he promised to invest the same in bank stock for the use of his said wife.

It is also claimed that the guardian directed the bank officials to

issue the twenty-three shares aforesaid in the name of the said Lila B. for her use. The claims aforesaid are all denied by appellee Baird and he claims all the property in contest as heir or distributee of his wife. The contention of the appellant, is that Mrs. Baird, by the will of her father, took only a defeasible fee in the property, and upon her death without children the property reverted to the three surviving sisters. The will of J. W. Anderson reads as follows:

"1876. MT. STERLING, January 21.

"Know all men by these presents: That I, John W. Anderson, of my own free will and study purpose of mind, make this, my last will and testament, knowing the uncertainty of life and the certainty of death, to better secure my wife and children from designing men, that they may enjoy my estate should I be able to have any, or they or any of them outlive me. My wife, Mary J. Anderson, I desire shall have one-third of my estate, real and personal, after my honest debts are paid, to use and enjoy as she may see fit during her natural life. At her death, should my children or any of them be living, the dower shall be divided equal between them or their heirs. My children all being girls, I desire that they be made equal and that their portion each remain in their own name, them and their representatives. By that I desire that it be entailed that they may not be left without a support when I am gone. If it becomes necessary and to their interest to sell and convey their interest it shall be reinvested in like manner, either in stock or lands, as may be to their interest and happiness. They can enjoy as they please the dividends accruing thereto. By this means they will always have a home, and not be thrown upon the cold charity of the world or a cold hearted man's charity. Should any of my children meet with an accident to cripple or maim them, or in any way disable or disfigure them, they are to have $1,000 more than the rest. I mean by this the single ones. Those that are not married. Should any of my children die without heirs it is to go to the rest equally. Two of them have already been educated. I wish the others to have the same chance. It takes this to make them equal. I know that they will agree amongst themselves, as peace is my desire with them. I leave it to them and them alone. No man has the directing of my property unless they may be appointed by the court. I desire that my wife, Mary J. Anderson, be my executrix. She can have some one to help her if she desires it. I do not wish by any clause here to make a difference unless there should be a difference in the children. Crippled and disfigured children have not a fair chance in this world. I think this will be understood—something real or sad to make a change in their appearance or business not equal. Mary J. Anderson I desire shall select some person who will not be disagreeable to any of the children, nor I do not desire the court to appoint any one unless he is acceptable to all. Peace in the family is my desire. My life insurance policy is to be divided equal between all—Mary and my children and their heirs. This I want them to put in stocks and do as they please with, never forgetting their churches and preacher. I would make this amendment to the last clause, in regard to their part of my policy. This they can have to do as they please with. It can never be taken for debts no way; but I make this suggestion that they put it in bank stock and keep it in that way, drawing your dividends twice a year, always giving you a little pocket change. I desire that you pay some of it to your church every year. Don't forget your church. My bank stock I wish to remain to the credit of each of you. Draw your dividends

and use them as you please. I desire that $100 (one hundred dollars) be kept at interest for me, the interest to be paid to my church or pastor of same every six months. If the laws of the State is 10 per cent. or 6 per cent, that I wish it loaned for. This I desire that my children will see to. They will put that part into any hands that best suits them. I do not desire that any one have any hand in winding up my estate if any of my children object to them. My wife will see to this if she be alive. If not the court will please be sure to look to this in his appointment. Should I have overlooked anything, equality is what I desire after paying my debts. Before division I wish my wife to buy each one of my children the best ring she can buy for $20 a piece, heavy, 18 karat gold ring, just alike. These I wish them to wear in remembrance of me and their ma. Put the initials of us, or some mark by which you may know them. Should she be dead some kind friend will see to that, say T. H. Summers or Howard French, do this for me. I will further, should it be the best to sell all my real and personal estate in order to get it equal or easier to divide, the same can be done if the best and worth the most. If my wife desire to keep house, be that as it may, she can live at the homestead and keep the single or any children with her she may please to do. I do not intend by this will to throw her out of a home. She can, if she desires it, sell all but the homestead and hold it for her dower. See J. M. Anderson's will with like manner selling and dividing the rest as before stated. It may be that there may be some minors. If so, she can be their guardian if that suits them. I have made arrangements with everything. Each child is entitled to a horse worth $150 and a cow worth $50; a bed and bedding. Some have got theirs already. Emma and Lou know what articles they have received. Having full confidence in my children doing as I request them, I am willing to leave it to them to settle. Everything being settled but my watch and jewelry, they know how I received it. The same way I will it to be kept in the family, the child paying the most for it to be the wearer, the money divided in a keepsake among the rest. See J. M. Anderson's will. I will that should Emma, my daughter, die before her child by James A. Hoffman dies that he (J. A. Hoffman) is not to have or to control in any way any interest he (Roger) may have in my (Roger) estate. He is not to have no say in the matter in any manner whatever. If he has anything to do with it the child may lose his interest by the hands of the rest of my children. This clause I wish to be enforced. He can not be the guardian of said child; or should he (J. A. Hoffman) take the child away from Emma, he (Roger A. Hoffman) is to have $100 (one hundred dollars) and no more. The court will see that the child's part is saved by not letting him have any hand in the matter for the peace of the family. I make this my last will and testament, this, the 21st January, 1876.

"J. WAYNE ANDERSON."

It may be conceded that the will of J. W. Anderson, written by himself, is not in all respects clear and explicit. But it is evident that the devisees took a perfect fee simple title to the insurance policy of the testator, and the same may be said of the $200 bequest in lieu of a cow and horse.

The intent of the testator respecting the bank stock owned by him is not so clear, but we are of the opinion that the devisees took a perfect title to it.

The will authorized a sale and reinvestment of the proceeds of the land, which was done, and it is clear to us that the title to the same

passed to the devisees was only a defeasible fee, and that upon the death of Lila B. Anderson childless that the title to the seventeen shares of bank stock, purchased with the proceeds of the land sold, vested in the surviving sisters of the decedent.

It appears that Mary J. Anderson, executrix, and as guardian to Lila Anderson and others, brought suit in the Montgomery Circuit Court for a construction of the will of J. Wayne Anderson, and that the other children were also parties to that suit, and that the judgment rendered in that action was that the children of the testator took a fee simple title to the property devised. Appellee Baird insists that that judgment is a bar to this suit. We do not think so. The matter in issue could not have been an issue in that suit, as the contingency had not happened. The prime object of that suit was to ascertain the powers of the executrix. It was practically an *ex parte* suit. (Freeman on Judgments, section 329, and cases cited.)

The only rights which appellee Baird has in this matter grows out of the marital relation, and must be held subordinate to the provisions of the will under which his wife held or became entitled to the property in contest. A purchaser for value might occupy a stronger attitude.

For the reasons indicated the judgment appealed from is reversed and cause remanded, with directions to render a judgment in favor of the three sisters of Lila B. Baird, or such of them as are asking for relief for one-third each of the said seventeen shares of capital stock of the Mt. Sterling National Bank, if to be had; if not, for the value of the same at the time of the institution of this suit, and for proceedings consistent with this opinion.

COMMONWEALTH V. HARDIN COUNTY COURT, &C.

(Filed April 23, 1896.)

1. *Conclusiveness of enrolled bill*—The validity of an "emergency clause" of an act of the Legislature is to be determined in the same way and upon the same evidence that the validity of other parts or sections of the act is determined, and, therefore, the court can not go behind the enrolled bill and look to the journals of the two houses to ascertain whether the "emergency clause," was adopted in the manner prescribed by the Constitution.

2. *Local option*—Where, at the time the Constitution was adopted and also at the time the local option law of 1892 went into effect, a prohibitory liquor law was in force in a town by virtue of a vote taken in the magisterial district of which the town formed a part, a vote subsequently taken in the town alone under the law of 1892 having resulted in favor of the sale of liquor, had the effect to render the former law inoperative as to the town. And while the submission of the proposition as to whether the local law should become inoperative as to the town may not have been authorized under section 61 of the Constitution, yet as the further proposition was submitted as to whether spirituous, vinous and malt liquors should be "sold, bartered or loaned" in the town, and the vote upon the proposition in that form was in favor of the sale, the effect was the same as if the proposition had been submitted in that form alone.

The question whether prohibition effected under the local option law of 1892 or under the present law by the vote of the people of any county or part of a county can be rendered inoperative in any subdivision of such territory by a vote in that subdivision alone is not determined.

3. *Repeal of statutes*—While the Constitution does not by its own force repeal any "local option" law in existence at the time of its adoption, it does not forbid the repeal of such laws by the General Assembly.

Hobson & O'Meara, W. J. Hendrick, Sprigg & Chelf and J. H. Vanmeter for appellant.

W. R. Haynes for appellees.

Appeal from Hardin Circuit Court.

Opinion of the court by Judge Landes.

This was an action in the Hardin Circuit Court for a "writ of prohibition" against the appellees, the Hardin County Court and the county judge of said county, and to restrain the county judge from entering or spreading upon the records of said court a certificate of the canvassing board of elections of said county, showing the result of an election held in the town of Elizabethtown on the 10th day of December, 1892, upon the propositions submitted to the voters of the town "whether spirituous, vinous and malt liquors" should be "sold, bartered or loaned" within the corporate limits of said town, and whether the prohibition law in force in Hardin county, Kentucky, shall become inoperative so far as it affects "the said town." The petition also sought to restrain the county judge "from granting license to sell said liquors in Elizabethtown."

These propositions were submitted to the voters of the town by the order of the county judge in pursuance of the provisions of the local option law, approved August 6, 1892 (chapter 89 of the Session Acts of 1891-2-3, page 214), and the result of the said election, as evidenced by the certificate of the canvassing board, was that a majority of the votes cast were in favor of the sale, etc., of liquors in the town, and that the prohibition law in force in Hardin county should become inoperative so far as it affected the town. On final hearing the lower court adjudged that the local option law of August 6, 1892, was valid; denied the writ of prohibition and dismissed the petition, and from that judgment this appeal is prosecuted.

It is earnestly and ably argued by the learned counsel of the appellant that the act of August 6, 1892, was not passed in accordance with the provisions of the Constitution, and is, therefore, invalid; but that, if the act was properly passed, the "emergency clause" was not adopted in the manner required by the Constitution, and that, therefore, the law did not go into effect until ninety days after the adjournment of the session of the Legislature at which it was passed, as provided in section 55 of the Constitution, and, consequently, was not in force when the propositions were submitted and voted on.

The same question respecting the validity of the act of August 6, 1892, was raised in the case of Lafferty, &c. v. Huffman, &c., *ante* 17. In that case it was held that the court could not go behind the enrolled bill, and, by tracing out, in the journals of the two houses of the General Assembly, the legislative history of the bill, ascertain whether or not it was passed in pursuance of the provisions of the Constitution on the subject, but that on that question this court was bound by the evidence furnished by the certificates on the enrolled bill of the presiding officers of the two houses, and the approval of the governor, that the bill had been enacted into a law in the manner prescribed by the Constitution. We adhere to the opinion in that case. There, however, no question was raised as to the validity of the "emergency clause;" but that clause is a portion of the enrolled bill as certified—a distinct section of the act as approved and promulgated—and its validity must be determined in the same way and upon the same evidence that the validity of the other parts or sections of the act is determined, and we hold that it became valid

and effective as a part of the whole act, and that by its operation the act went into effect upon the date of its approval by the governor.

The next contention is that the act did not authorize an election in Elizabethtown to make the Hardin county prohibition law inoperative so far as it affected the town. What is known as the "Hardin County Prohibition Law" was passed on the 5th day of May, 1884 (Session Acts, 1883–4, volume 2, page 901), under which, upon the vote of the people of the whole county on the 1st Monday in August, 1884, the sale of liquor was prohibited in that county. Afterwards, by an act approved March 15, 1890 (Session Acts, 1889–90, volume 1, page 696), the question was resubmitted to the people of the county by magisterial districts, at one election, held on the 10th day of May, 1890, and the sale of liquor was by that vote prohibited in all of the districts of the county except one, including the district, as then existing, which embraced the town of Elizabethtown, and no subsequent vote was taken in any part of the county under said acts. Prohibition was, therefore, in force in the whole county, save one magisterial district, at the time the present Constitution and the act of August 6, 1892, went into effect. (Kirkpatrick v. Commonwealth, 95 Ky., 326.)

By section *one* of that act provision was made for taking the sense of the qualified voters of any county, city, town, district or precinct in the proposition "whether or not spirituous, vinous or malt liquors shall be sold, bartered or loaned therein, or whether or not any prohibition law in force in any county, city, town, district or precinct, by virtue of any general or special act or acts shall become inoperative." And it was further provided in the same section that "counties, cities, *towns*, districts and precincts in which the sale, barter or loan of spirituous, vinous or malt liquors *are now prohibited*, may have a vote thereon under the provisions of this act." The contention of the learned counsel is that, under the provisions quoted from the act, the county judge had no constitutional authority to submit the question to the qualified voters of the town of Elizabethtown, whether the prohibition law of Hardin county, then in force in the magisterial district embracing the town by virtue of the vote under the act of March 15, 1890, should become inoperative in the town because the prohibition in force in the town was not effected by the voters of the town as such, but by the voters of the magisterial district. We are not prepared to say that the submission of the proposition in that form alone was authorized by section 61 of the Constitution, by which it was made the duty of the General Assembly to provide some means, by general law, "whereby the sense of the people of any *county, city, town, district or precinct* may be taken as to whether or not spirituous, vinous or malt liquors shall be sold, bartered or loaned *therein*, or the sale regulated." But it will be observed that the act of August 6, 1892, expressly provided for submitting the proposition relating not only to original prohibition, but also relating to then existing prohibition under "any general or special act or acts," and not only to the voters of districts, but also to the voters of precincts, *cities and towns*, without regard to whether, in the case of existing prohibition, it had been effected and made operative in city, town or precinct by the vote of the whole district or otherwise. In this case both propositions were submitted to and voted upon by the voters of the town at one election, and we hold that the vote on the former in favor of the sale of liquor in the town had the same effect, under the Constitution, to render prohibition, then in force in the town by virtue of the vote under the special act in the magisterial district, inoperative as if it

had been voted upon alone. The coupling of the latter proposition at the election with the former did not invalidate or render ineffectual the vote upon the former, although the latter may not have been authorized by the Constitution.

We do not undertake to decide here, as the question is not before us on this record, whether or not prohibition, effected under the act of August 6, 1892, or under any other act passed in pursuance of section 61 of the Constitution, by the vote of the people of any county, or of any city or town or other subdivision of a county, as a whole, could be made inoperative in any subordinate or minor part or subdivision less than the whole of the territory in which prohibition has been so effected by the vote of the qualified voters residing in such subordinate or minor subdivision. But we hold that it is the express requirement of the Constitution that the matter of what is called "local option" shall be provided for by general law, under which the people of the State, acting in their local divisions and subdivisions named in the Constitution, shall have the right to regulate and settle the matter for themselves. A new order of things is provided for by the Constitution, by which it is intended eventually, by general law, to do away with all local or special laws previously enacted on the subject. And while the Constitution does not, by its own force, repeal any "local option" law in existence at the time of its adoption, it does not forbid the repeal of such laws by the General Assembly. On the contrary, it expressly authorizes the repeal of "local or special acts." (Constitution, section 60; Brown v. Commonwealth, 17 KY. LAW REP., 1216.) And in this case the vote of a majority of the qualified voters of the town of Elizabethtown voting at the election held on the 10th day of December, 1892, in favor of the sale, barter or loan of spirituous, vinous or malt liquors in the town, had the effect to render the Hardin county prohibition law inoperative within the limits of the town.

Finding no error, the judgment of the lower court is affirmed.

CROZIER, &C. V. CUNDALL, &C.

(*Filed April* 29, 1896.)

1. *Construction of wills—Defeasible fee*—It is a general rule in the construction of wills that where an estate is given or devised with remainder over, but in the event the remainderman should die without child or children then to a third person, the words "dying without children or issue" are restricted to the death of the remainderman before the termination of the particular estate. Where, however, there is a devise over upon the dying of the first taker "without children or issue" those words have reference to a dying without issue at any period, and are not restricted to a dying in the lifetime of the testator, unless there is something in the will indicating a contrary intention. Therefore, under such a devise, the first taker upon the death of the testator takes a defeasible fee, subject to be defeated upon this dying at any time without issue. The cases which seem to hold otherwise have turned upon the peculiar language of the particular wills being construed.

2. *Devise over upon death of first taker*—Where a testator devised lands to two unmarried daughters "and their heirs forever," providing by a subsequent clause that in the event either of them "should die without issue then such portion of my estate as is devised to them shall revert back to and be equally divided between the rest of my children and the children of those who are dead," each daughter took a defeasible fee subject to be defeated upon her dying without issue at any time.

3. *Same*—the two daughters took the property devised to them jointly, but upon the death of one of them without issue the other did not take the whole of the property. Nor did the interest of both cease upon the death of one without issue, it being only the interest of the one dying that went to the testator's other children then surviving and the children of those who were dead, the latter taking *per stirpes*.

4 *Same*—The surviving sister having subsequently died without issue neither a will nor a conveyance executed by her passed any part of her original interest, which went to the other children and to the grandchildren of the testator under the will, but as her share of her deceased sister's one-half interest in the property vested in her absolutely that share passed by her will and conveyance.

W. O. Bradley and W. J. Landram for appellants.

R. P. Jacobs and Wm. Herndon for appellees.

Appeal from Garrard Circuit Court.

Opinion of the court by Judge Landes.

This case is before us by appeal from a judgment of the Garrard Circuit Court, construing certain clauses of the last will of Abner Baker, deceased, who, being domiciled in Garrard county, died in 1861. His will was executed on the 6th day of October, 1856, and after his death his will was duly probated and admitted to record in said county. He was the father of thirteen children, ten of whom survived him, three having died before his will was made, each leaving children, of whom there were five altogether. All of his children, prior to the making of the will, had married and moved away from him except two daughters, Almyra and Patsey, who were unmarried, the former being fifty and the latter thirty-seven years old at the date of the will. These two maiden daughters remained with him as long as he lived, and survived him many years—Patsey until December 24, 1891, and Almyra until December 14, 1893, and each of them died without ever having had issue.

The clauses of the will of the testator which are involved in this controversy are the fifteenth, the twenty-second and the twenty-fifth.

By the fifteenth clause he devised to his said daughters, Almyra and Patsey, a tract of about sixty acres of land in Garrard county, and a tract of about forty acres in Lincoln county, and both of said tracts were devised "*to them and their heirs forever.*"

Having, by the fourteenth clause of his will, directed his executors to sell certain other lands belonging to him, by the twenty-second clause he required his executors to collect all debts and demands due him from any source whatever, and to pay all of his just debts and all expenses incident to the final settlement of his estate, and all bequests made by him in his will. The following provision was then made, viz: "All my estate remaining after such settlement I will and bequeath to my daughters, Almyra Baker and Patsey Baker, *to them and their heirs forever*, with the understanding that they are to pay out of such remaining fund" certain sums to certain of his grandchildren.

The twenty-fifth clause is in the following words: "In the event that *either one* of my daughters, Patsey or Almyra, *should die without bodily issue*, then such portion of my estate as is devised *to them* shall *revert back to* and be equally divided *between the rest* of my children and the children of those who are dead; and if Kate Baker Denton or Harriet Baker Hopper die without issue, then that portion of my estate devised to them, or such one as shall die without bodily issue,

shall be vested in my daughters, Patsey and Almyra, to their use and benefit as above."

Kate Baker Denton is the wife of T. G. D. Cundall, and Harriet B. Hopper is the wife of W. P. McKee, and both, with their husbands, were made parties defendant to the action, and are appellees.

It seems that on the 23d day of December, 1879, the said Almyra and Patsey Baker, being at the time residents of Macoupin county, Illinois, each made a will in favor of the other, using precisely the same language, and also making their two nieces above named, in the event of the death of either, the ultimate beneficiaries. The language of each of these wills is as follows: "I give and bequeath to my sister" (one naming Almyra and the other naming Patsey) "all of my estate of every character, real, personal and mixed; but, should she die before I do, I give and bequeath all my estate, of every character, equally to my two nieces, Hallie B. Hopper and Kate B. Cundall, for their sole and separate use, free from the control of any husband that either of them may have.

"Given under my hand and seal this 23d day of December, 1879."

After the death of Almyra and Patsey, which occurred in Macoupin county, Illinois, where they still resided, each of said wills was probated and admitted to record in that county, and a copy of each of them was admitted to probate and record in Garrard county by the county court in pursuance of the statute, but this was not done until after the commencement of this action in the Garrard Circuit Court. Meantime Almyra Baker, by deed bearing date the 1st day of June, 1892, and which was acknowledged before and certified by the county clerk of Macoupin county, Illinois, and on such authentication lodged and recorded in the clerk's office of Garrard county on the 23d day of July, 1892, for the expressed consideration of $1,000, and the further consideration of love and affection, conveyed to Kate B. Cundall and Hallie B. McKee the sixty and forty-acre tracts of land "that were once owned by Capt. Abner Baker, now deceased, and by him willed to Almyra and Patsey Baker, to have and to hold the same, with all the appurtenances thereon, to the second party, their heirs and assigns, forever, with covenant of general warranty."

The two wills of Patsey and Almyra Baker, and the deed of the latter above referred to, were attacked in the petition, in which it seems all of the surviving descendants of Abner Baker joined, either originally or by amendment, except the appellees, Mrs. Cundall and Mrs. McKee and two others. They are set up and relied upon, however, in the answer of Mrs. Cundall and Mrs. McKee and their husbands in support of the title they claim to the two tracts of land, and the residue of the estate devised in the will of Abner Baker to his said daughters.

The questions at issue were raised by general demurrer of the plaintiffs to the answer of Mrs. Cundall and Mrs. McKee and their husbands, which was overruled, and by general demurrer of the latter to the reply of the plaintiffs to their answer, which was sustained; and in passing upon these demurrers the lower court held that the lands in controversy passed under the will of Abner Baker in fee simple to Almyra and Patsey Baker, and that by the wills of the latter and the deed of Almyra the said lands passed to appellees, Kate B. Cundall and Hallie B. McKee in fee simple. A judgment was accordingly entered dismissing the petition, and that judgment, on proper exceptions, is before us for review.

There is no doubt that the words in the fifteenth clause of the will

of Abner Baker, by which the lands in controversy were devised to his daughters, Patsey and Almyra Baker, "to them and their heirs forever," were sufficient to vest them with the absolute right and title to the lands at the death of Abner Baker, unless the title was made subject to be defeated by the twenty-fifth clause of his will, by which it was provided that, in the event of the death of either of his said daughters "without bodily issue," the portion of the estate devised to them should "revert back to" and be equally divided between the rest of his children "and the children of those who are dead."

The same question has been passed upon by this court in many cases involving the construction of similar testamentary provisions. In the case of Thackston v. Watson, 84 Ky., 206, the rule applicable in construing such provision is stated as follows: "The settled and well-understood construction in reference so such devises seems to be that where an estate is given or devised with remainder over, but in the event the remainderman should die without a child or children, then to a third person. the words 'dying without children or issue' are restricted or limited to the death of the remainderman before the termination of the particular estate; and it is equally as well settled that if an estate is devised to one in fee, but if he die without issue or without leaving a child or children then to another, the first devisee takes a defeasible fee, which is subject to be defeated in the event of his death at any period without issue."

In the case quoted from the cases of Birney v. Richardson, 5 Dana, 424, and Pool v. Benning, 9 B. Monroe, 623, are referred to, and they fully sustain the rule as stated.

The same rule is recognized in Moran v. Dillehay, 8 Bush, 434, in Parrish v. Vaughan, 12 Bush, 97, in Bayless v. Prescott, 79 Ky., 252, in Cleveland v. Cleveland, 5 KY. LAW REP., 56, and in many other cases decided in this State. Counsel on both sides in their briefs have referred to many of these cases, which we will not review in detail. It is sufficient to say that it will be found, upon examination of all of them, that the differences, if any, that exist between cases are apparent rather than real, and that they have resulted, not from a deviation from this rule, but from the application of it to the facts of each particular case, because it is a recognized principle that there can be no ironclad rule applicable alike to all cases, but that "the application of all rules of construction must necessarily be varied by the language used by the testator, the object being to arrive at his intention, to be gathered from the entire will." (Hughes v. Hughes, 12 B. Monroe, 115; Wills v. Wills, 85 Ky., 492; Bradley v. Skillman, 3 KY. LAW REP., 731.) The most recent case of the kind decided by this court is that of Hood, &c. v. Dawson, 17 KY. LAW REP., 880, in which the testator, after leaving all of his estate to his wife for life, at her death devised a certain farm to Jas. Wilson, son of Robert, with the provision that, if the devisee died "leaving no child or children of his own," the farm should go to certain nephews named in the will. The court, in construing this provision of the will, recognized and approved the rule referred to, and said that "cases involving similar or substantially similar language in other testaments have so often been before this court that the meaning to be attached to the one now under consideration is believed to be a question of authority and precedent rather than of argument."

In this case it is contended by the learned counsel for appellees that the provision in the twenty-fifth clause of the will of Abner Baker, for the disposition of the property devised to his two daugh-

ters, Patsey and Almyra, in the event either of them "should die without bodily issue," refers or is limited to the death of either before the death of the testator. And so the lower court, in effect, held. But, under the rule as stated, this can not be the proper construction of that provision. Patsey and Almyra were not devisees in remainder. They were to be the first takers of the portion left to them under the will, and by the rule, at the death of the testator, they took a fee in the property in terms absolute, but subject to be defeated in the event of their death without issue. This, it seems to us, is the plain meaning of the will thus ascertained, and there is nothing in the will or in the circumstances of the testator or of the objects of his care and bounty, as shown by the record before us, that affords any indication that the testator had any other purpose or intention in this regard.

But Patsey and Almyra Baker having, under the will of their father, been vested with a defeasible fee in the lands devised to them, the questions are raised, what was the character of their respective interests therein, and what effect, if any, did the death of Patsey have upon the interest therein of Almyra, who survived Patsey; and what interest, if any, in the property passed to the appellees, Mrs. Cundall and Mrs. McKee, by the will of Almyra and by her deed of June 1, 1892? The answer to these questions is not difficult. The property was devised to them jointly by the fifteenth and twenty-second clauses of the will, without any words of survivorship as between them, and there is nothing in the will upon which we would be justified in holding that it was the intention of the testator that, upon the death of one of them, the other should succeed to the whole of the property. But it is contended that, by the terms of the twenty-fifth clause of the will, the defeasance therein provided, upon the death of either of them, was intended to operate alike upon the title of both. We do not so construe this provision of the will. The words are, "in the event that *either one* of my daughters, Patsey and Almyra, should die without bodily issue, then such portion of my estate as is devised *to them* shall revert back," etc. Manifestly the use of the words "as is devised *to them*," in this clause, indicates that the testator understood fully that the interest his daughters would take in the property devised to them by the fifteenth and twenty-second clauses of his will would be a *joint* interest. But it would be too technical a construction to hold that he intended that the death of *either* of his daughters without issue should operate to divest the survivor of her interest in the property. Such a construction would be wholly inconsistent with any purpose the testator may have had to provide suitably for the comfortable support of *each* of his daughters after his death, because such a provision would have made it possible for the property intended for their enjoyment to be eventually divided, in the lifetime of the survivor, to others who had already been bountifully provided for by the testator during his life and by his will. We hold, therefore, that the titles of each of these daughters of the testator to her interest in the property devised to them jointly was a fee simple title, subject to be defeated alone by her death "without bodily issue."

It follows from the foregoing conclusions that Almyra Baker acquired no interest in the property in question under the will of her sister Patsey. But it also follows that, upon the death of Patsey, Almyra, being one of the children of Abner Baker, became entitled, under the twenty-fifth clause of his will, to an interest in the moiety of Patsey in the portion of the estate that was devised *to them*, her

title to which had been defeated by her death without issue. After the defeasance the words of the clause are "such portion of my estate as is devised to them *shall revert back to and be equally divided between* the rest of my children and the children of those who are dead." It is immaterial whether we construe the words "revert back to" to refer to the estate or to the descendants of the testator, since, in our view, the result, in either case, would be the same.

The material question to be settled is, who were to become entitled to the property in controversy upon the defeat of the title of the first takers under the will. We hold that the words "the rest of my children and the children of those who are dead" mean his children and the descendants of his dead children, *per stirpes*, who were surviving at the death of Patsey and of Almyra respectively; so that, at the death of Patsey, the three surviving children of Abner Baker (Almyra included), and the descendants, *per stirpes*, of such of his other children as were then dead, became entitled, under the will, to an equal division "*between*" them of Patsey's interest in the property, and at the death of Almyra the children of Abner Baker and the descendants of his dead children, who were surviving at that time, became likewise entitled to an equal division "*between*" them of the portion of said property to which Almyra was entitled under the will.

A different construction of this last provision of the clause is contended for by counsel for appellees on the authority of Purnell v. Culbertson, 12 Bush, 370. The construction we have given to it, however, is fully sustained by the case of Lackland's heirs v. Downing's ex'ors, 11 B. Monroe, 32, which we follow. The two cases are not inconsistent, as each case stands upon its own distinguishing facts, which is recognized and explained in the former.

But, as we have seen, Almyra became entitled under the will, as one of the surviving children of Abner Baker, to a share of the portion of her sister Patsey, at the death of the latter. Therefore, under the will of Almyra, and by the deed executed by her on the 1st day of June, 1892, the appellees, Mrs. Cundall and Mrs. McKee, are entitled to some interest in the property, but no more than was absolutely vested in her by virtue of the will of Abner Baker at the death of Patsey. It will be the duty of the lower court, in the progress of the action, to ascertain the extent of their said interest, and to make such orders as will secure it to them.

For the foregoing reasons the judgment of the lower court is reversed and the cause remanded, with directions to proceed in the cause consistently with this opinion.

COTTLE, &C. V. HOWERTON.

(*Filed May* 1, 1896—*Not to be reported.*)

Verbal division of land—Adverse possession—Where the joint owners of a tract of land without executing deeds of partition agreed upon a division of the land, fixing the line between them, persons claiming under one of them who have been in the actual, adverse possession of their part of the land for more than thirty years have acquired a possessory title.

O'Rear & Bigstaff and Jno. T. Hazelrigg for appellants.

Jno. P. Salyer for appellee.

Appeal from Morgan Circuit Court.

Opinion of the court by Judge Paynter.

James Howerton and Uriah Cottle owned and occupied lands in the same section of Morgan county. It appears there was vacant land between their respective boundaries of land. On the 20th of March, 1838, the Commonwealth of Kentucky issued to them a patent for a part if not all of this vacant land, which grant contained 400 acres, situated on the Licking river. The patentees sold some portions of the 400-acre tract. On the 27th day of April, 1848, they sold and conveyed to A. J. Howerton 169 acres of it. As to sales by the patentees for other parts of the tract the record is silent.

On the 20th of June, 1861, James Howerton executed and delivered a deed to A. J. Howerton, which purports to convey "all said James Howerton, sr.'s, right and title in a survey of 400 acres patented to said Howerton and Uriah Cottle."

By virtue of sales under execution, made in 1860, which executions were issued against Uriah Cottle, and a sheriff's deed made in 1867 in virtue of the sale, it is claimed that A. J. Howerton acquired the undivided interest of Uriah Cottle in the unsold part of the 400-acre tract.

A. J. Howerton, in 1887, made the appellee, Susan Howerton, a deed for a certain boundary of land which covers the land in dispute. She brings this action seeking to recover damages of the appellants for entering her boundary, cutting and removing timber therefrom.

The answer admits the cutting, etc., of the timber, but denies that the plaintiff is the owner of the land, and asserts that the title thereto is in the defendant, Berthena Cottle.

The land in controversy is covered by the 400-acre patent. The record does not show that James Howerton and Uriah Cottle, by a writing or suit, ever partitioned the land between them, neither does it show that the patentees, by themselves or tenants, ever had a residence on it. Howerton resided on a tract at the upper end and Cottle on a tract at the lower end of same.

A. J. Howerton, appellee's vendor, lived within the boundary of it for forty-seven years, but on the 169-acre tract which the patentees conveyed him in 1848; but testifies that, since the year of 1867, he has been using, occupying and claiming to the full extent of the patent boundary.

On the part of the appellants it is claimed that the patentees, Howerton and Cottle, agreed upon a division line running as follows: Beginning at the mouth of a drain, near the Cottle ford on the Licking river, and ran with the drain to the top of the ridge, and thence to a road, etc.; and that Cottle, under the agreement, was to have the land below this line and Howerton the land above it.

Cottle gave a mortgage on his lower place, and, as claimed by appellants, on all the land to the division line described. Appellee contends that it was only on his lower place. At any rate the mortgage was enforced, the land sold and the commissioner's deed to the purchaser, Barber, rightfully or wrongfully, as the case may be, covered the land in dispute.

The records of the proceeding to enforce the mortgage and the mortgage were destroyed by fire many years ago. The commissioner's deed to Barber was made on the 20th of November, 1857. On the 16th of February, 1859, Barber executed a deed purporting to convey to Susan Bailey the same land which the commissioner of the court conveyed him.

Appellant Berthena Cottle claims the land under the will of her mother, Susan Bailey.

It will be observed that the deed to Susan Bailey antedates the deed from James Howerton to A. J. Howerton for his right and title to the 400-acre tract.

A number of witnesses testify that the patentees told them the line running up the drain was the division line between their lands. Witnesses testify that at a "shooting-match," which had occurred forty years before they were giving their depositions (in 189–), the patentees were present and acknowledged the division line which ran up the drain. There is also in evidence that Uriah Cottle was in possession of the land below the drain and claimed it; that he surrendered the possession of the land to Mrs. Bailey; that she held it to her death and after that Berthena Cottle until this controversy arose.

It is in evidence that, while the negotiations were going on between Barber and Mrs. Bailey, Barber and A. J. Howerton pointed out the line running up the drain as the division line between the Howerton and Cottle lands.

There is evidence tending to prove that A. J. Howerton, after his purchases of the Cottle and Howerton interests in the 400-acre patent, cautioned persons working for him not to cut over this line.

There is no contradiction of the witnesses who gave evidence as to what the patentees told them as to the agreed line, nor is there any contradiction of the witnesses who prove that Barber and A. J. Howerton pointed out to Mrs. Bailey, when she was buying the Cottle land, that the drain was the line. A. J. Howerton does not deny that he was present and pointed out the line to Mrs. Bailey.

The conclusion is irresistible.

1st. That James Howerton and Uriah Cottle agreed upon the lines running up the drain as the division line of the 400-acre tract.

2d. That Uriah Cottle was in possession of the land below and to that line until Mrs. Bailey purchased it.

3d. That Mrs. Bailey's deed from Barker purported to convey her the Cottle lands, which embraced the part in controversy, and that she entered upon the boundary and claimed to the extent thereof, and at her death Berthena Cottle continued in the possession of it.

Uriah Cottle claimed it as his own and had possession of it with the knowledge and consent of James Howerton. A. J. Howerton appears to have known that to be true, because he pointed out the line up the drain when Mrs. Bailey bought the land. She succeeded Uriah Cottle in the possession of the land in 1859 under a deed, and from that time openly and notoriously claimed it as her own. From that time on it has been in the actual, adverse possession of Berthena Cottle and Mrs. Bailey, through whom she claims title.

After A. J. Howerton's purchases, to wit, in 1861 and 1867, he never did any act which deprived appellants or Mrs. Bailey of the actual possession of the parcel in controversy—never having, made any improvements on it or enclosed any part of it.

We, therefore, conclude that if Mrs. Bailey did not acquire the fee simple title to the land in dispute by her purchase from Barber she and Mrs. Cottle have acquired a possessory title by an actual, adverse possession for more than thirty years.

It follows that Susan Howerton had neither title nor possession of the land when the alleged trespass was committed.

The judgment is reversed, with directions to dismiss the petition.

CITY OF LOUISVILLE V. LEATHERMAN, &C.

(*Filed May* 2, 1896.)

1. *Common schools—Property not subject to assessment for street improvements*—The property of the Louisville School Board, held by it for the use of the State to carry on the system of common schools established under the Constitution, can not be subjected to pay assessments for the cost of street improvements, as to subject it to such assessment would be to appropriate the property to another purpose than that of the school system, which is forbidden by the Constitution.

2. *Liability of city for work contracted for*—The city having authority to contract for the work, but no authority to make it a charge upon the abutting property which belonged to the school board, it was liable to the contractor for the cost of the work.

H. S. Barker for appellant.

R. H. Blain and John M. Ramsey for appellees.

Appeal from Jefferson Circuit Court, Chancery division.

Opinion of the court by Judge DuRelle.

This record brings up for decision the question whether public school property, belonging to the Louisville School Board, can be subjected to the payment of an assessment for the original construction of a street.

Sections 2833–4, Kentucky Statutes, provide that the original construction of a street shall be at the cost of the owners of lots in each fourth of a square, and that a lien therefor shall exist on the land, which may be enforced by proceedings in court. The remedy, therefore, if any, is by a judgment for the enforcement of the lien and the sale of the property, and the question is whether the property of the school board held by it for the use of the State to carry on the system of common schools established under the Constitution is subject to execution levy or to decretal sale to satisfy a lien for street improvements.

In our opinion it can not be so subjected. The Constitution provides for a common school system and for the creation of a fund to maintain it, which shall be appropriated "to no other purpose." (Section 183–4.)

The statutes enacted in pursuance of these provisions of the Constitution provide for a board of education, a superintendent of public instruction, county superintendents and school trustees as agencies of the State to carry out the constitutional requirements. (Kentucky Statutes, section 4337, *et seq.*)

Both in the counties and the municipalities the school trustees hold the school property in trust for the State for the use of the public schools. Section 4437, *et seq.*, and 2949, *et seq.*)

The beneficial use of the property is the State's. The salaries of the teachers, being paid them for public purposes, are not subject to garnishment. (Allen v. Russell, 78 Ky., 105.)

The powers of the school board to sue and be sued, etc., are limited to doing so "*for school purposes.*" (Section 2949.)

Being State property there is no need of an exception in the law to exempt the property held in trust by the school board from subjection to a lien for taxes or assessments. (City v. Commonwealth, 1 Duvall, 296; 17 KY. LAW REP., 445.)

Moreover, it would seem that the appropriation of any part of the fund or the taxes which have been devoted to the purposes of the

common school system to the payment either of general taxation for the support of the State government or of special assessments to pay the cost of street improvements would be an appropriation thereof to another purpose than that of the school system, and, therefore, forbidden by section 184 of the Constitution. (Collins v. Henderson, 11 Bush, 88; Auditor v. Holland, 14 Bush, 151.)

As the city had authority to contract for the work, but no authority to make it a charge upon the abutting property which belonged to the school board, it was liable to the contractor for the cost of the work, and the chancellor correctly so held. (City v. Nevin, 10 Bush, 550; Crayeroft v. Selvage, 10 Bush, 698.)

Judgment affirmed.

RUSSELL & Co., &C. V. MARTIN, &C.

(Filed May 1, 1896—Not to be reported.)

1. *Judgment supported by evidence*—The evidence being conflicting, this court will not disturb the finding of the master commissioner and of the chancellor as to the cost of certain repairs upon sawmill property, and as to the rental value of the property.

2. *Priority of liens*—Where a mortgage was executed to secure outstanding notes for the purchase price of the mortgaged property, and subsequently a mortgage was executed upon the same property to indemnify sureties in a note executed for money borrowed to pay off one of the notes embraced in the former mortgage, the lien of the first mortgagees to secure the notes still unpaid is superior to the lien created by the second mortgage, there being no agreement upon the part of the holders of the first mortgage to release their lien.

J. J. Cornelison for appellants.

B. F. Day for appellees.

Appeal from Montgomery Circuit Court.

Opinion of the court by Judge Landes.

After a careful examination of the record of this case we have not been able to find any good reason for disturbing the judgment of the lower court confirming the report of the master commissioner, which ascertained the cost of the repairs on the sawmill property which were made by the appellees, and the reasonable amount of the rent of the same property during the time they had it in possession or after the execution sale up to the sale of it made by the master under the judgment of the court enforcing the mortgages upon it in favor of Russell & Co. and the Martins.

The testimony taken as to these matters is voluminous and conflicting, as is usually the case on similar questions, and as the master and the trial court were fully competent to estimate such matters, and had all of the facts before them and all of the parties and witnesses who testified, we will not disturb the findings and judgment in these matters.

This brings us to the material question to be determined, and that is, whose lien on the sawmill property was first? that of appellants, Russell & Co., or that of the appellees? The mortgage under which Russell & Co. claimed was executed by H. H. Hatton and others on the 17th day of May, 1889, and it was given to secure the outstand-

ing notes for the purchase price of the property, and that of the appellees was executed by H. H. Hatton on the 18th day of March, 1891, to secure not any part of the purchase price of the property, but a note executed by Hatton to the appellees for money paid by them as sureties for money borrowed to pay off one of the notes of Russell & Co., and which was embraced in their mortgage.

The lower court adjudged the property in favor of appellees, but after a careful examination of the question in all of its aspects we are constrained to hold that the court erred in so adjudging. Although it is alleged in their pleadings the appellees wholly failed to establish by the evidence and the court did not find that Russell & Co. ever released or agreed to release their lien on the property created by their mortgage of May 17, 1889, and at the time the mortgage of March 18, 1891, was executed to appellees, two of the notes owing Russell & Co., which were secured by their mortgage, were unpaid. It is true that by the mortgage of January 8, 1891, executed by H. H. Hatton and wife to Russell & Co., on the house and lot belonging to Mrs. Hatton, in or near Mt. Sterling, which was alleged to have been the homestead of Mrs. Hatton, these two notes were secured, but this was done with the agreement set forth in the mortgage that the time for the payment of the notes should be extended, and the evidence is conclusive that before and at the time it was executed it was the understanding between Russell & Co. and Mr. and Mrs. Hatton that the mortgage upon the house and lot should not be enforced until Russell & Co. had exhausted their said lien on the sawmill property. If there had been an agreement on the part of Russell & Co. to release their lien upon the sawmill property, on the faith of which appellees took their mortgage, it would have been different, as Russell & Co. would in that event have been estopped from asserting priority. But, as we have said, the evidence wholly failed to establish the claim that such an agreement was made, and there was certainly no actual release of their said mortgage lien by Russell & Co.

It follows that the lower court ought to have adjudged the priority in favor of Russell & Co., and that the judgment must, therefore, be reversed.

Upon the return of the case, if it shall be found that the amount for which the said mill property was sold by the master under the judgment to enforce the mortgages is not sufficient to satisfy the lien debt adjudged to Russell & Co., they will be entitled to have the proceeds of the sale of the lot, which was sold under the decree to enforce the mortgage of January 8, 1891, on the house and lot, as far as may be needed, applied to satisfy the remainder thereof, and the court will make such orders as may be required for that purpose, and to secure what is left of the proceeds of the sale of the house and lot to Mrs. Hatton as directed in the said decree.

The judgment is reversed and the cause remanded for proceedings consistent with this opinion.

LOUISVILLE & NASHVILLE R. R. CO. v. QUEEN CITY COAL CO.

(*Filed May* 5, 1896.)

1. *Common carrier—Must acquire facilities for transporting commodities—Insufficiency of rolling stock—Liability*—It is the duty of a common carrier to acquire facilities for the transportation of commodities which he gives the public to understand he is engaged in transporting. But he is not required

to anticipate an unexpected press of business and to keep extra rolling stock to meet such contingency.

Where a railroad company by reason of a "strike of miners in the coal mines on a certain division of the road, upon which it depended to obtain coal used in the operation of its road, was compelled to take much of its rolling stock from that division of its road in order to transport coal from more distant fields for its own use, these facts, which are established by the evidence, constitute a sufficient excuse for its refusal to furnish the owners of a coal mine on that line of its road with engines and cars for the transportation of their coal., And, therefore, a verdict against the carrier for damages on account of such refusal is not supported by the evidence.

2. *Second appeal—Res judicata*—The measure of damages laid down by the Superior Court upon a former appeal in this case would control if the evidence were sufficient to authorize a recovery, regardless of the view of this court as to the correctness of the opinion of that court upon that question.

J. A. Craft and J. W. Alcorn for appellant.

Appeal from Laurel Circuit Court.

Opinion of the court by Judge Paynter.

East Bernstadt is a station on the Knoxville branch of the L. & N. R. R. Co., and situated within the territory wherein coal mining is carried on, known as the Laurel district. The Queen City Coal Co. operated a mine and shipped its coal from East Bernstadt on appellant's road. After the middle of August, 1887, until some time in the following September the appellant refused to furnish appellee coal cars for the shipment of coal. It had been the custom of the appellant to so furnish coal cars to the appellee previous to that time. On or about the 16th of August, 1887, appellant's agent gave the appellee notice that no cars would be furnished for the shipment of coal to private persons.

This action was instituted by appellee to recover damages of appellant on account of such refusal. The appellant is a common carrier, had provided itself with cars and engines suitable for the transportation of coal, and by that method and in receiving and carrying coal had notified the puplic it was engaged in the business of carrying coal. The fact that it carried such coal as was offered for shipment before and after the time mentioned showed it had provided itself with reasonable facilities and appliances for the transportation of coal from the Laurel district. It is the duty of a common carrier to acquire facilities for the transportation of commodities which he gives the public to understand he is engaged in transporting. In doing so he is only required to place himself in such situation as will enable him to carry the quantity of such commodities as may be ordinarily expected to seek transportation. He is not required to anticipate an unprecedented and unexpected press of business and to keep extra rolling stock to meet such contingency. (Hutchison on Carriers, section 292.)

"He may refuse goods beyond the facilities he possesses for transporting them. When, by reason of unusual pressure of business, the rolling stock of a railroad is inadequate for the transportation of freight the company may decline to receive without incurring any liability." (Lawson's Rights, Remedies and Practice, section 1804.)

The same doctrine is enunciated in H. & T. C. Ry. Co. v. Smith, 63 Texas, 322, and Thayer, &c. v. Burchard, 99 Mass., 508.

A strike of the coal miners in the Laurel district (except the mines

of the appellees) began between the 1st and 15th of August, 1887, and contined until some time in the following September. The uncontradicted testimony in this record shows that the L. & N. R. R. Co. procured the supply of coal from this district for the use of the engines on certain parts of its road; that when the strike began this supply failed; that it was then compelled to take much of its rolling stock used for transportation of coal from the Laurel district to the Henderson division to transport coal from the mines on that division to supply coal for its engines; that the rolling stock which had been used on the Knoxville branch for the transportation of coal was necessarily used for the purpose for carrying coal for the use of its engines, for carrying cross ties for its road, etc.; that the change of the base of supplies caused delay in getting the coal cars from the Knoxville branch to the Henderson division; that the distance from the Laurel mines to Louisville, where the coal was carried for distribution to the engines, was 150 miles, and from mines from which coal was carried over the Henderson division it was 220 miles, thus requiring more cars and engines to transport the needed coal; that soon after the strike ended the railroad began to furnish the appellee and others coal operators in the Laurel district with cars necessary to transport their coal.

These facts excused the appellant in its refusal to furnish appellee with cars to carry coal while the conditions existed which we have related. The only testimony introduced to contradict the undisputed testimony for the appellant is the testimony of some witnesses to the effect that on occasions during the strike some empty coal cars were seen in switches on the Knoxville branch. Admitting this to be true, it does not contradict the testimony of the witnesses of the appellant materially. Some of these cars might have been out of repair, others awaiting engines to haul them to other coal mines on the Henderson division, and the others awaiting the necessary business of the appellant. After the strike began all local coal trains were discontinued.

The appellant was not bound to take an engine, gather up coal cars and transport the coal of the appellee. The appellant owed a duty to the public to keep its freight and passenger trains on its lines of road running. It could only do this by obtaining the necessary fuel for its engines. To obtain this it was necessary, as appears from this record, to change rolling stock from the Knoxville to the Henderson division. It was far more important that the appellant should continue its general freight and passenger business on such lines as were supplied with fuel from Louisville than to transport the coal for the appellee. The evidence offered by the appellee did not in a material degree contradict that of appellant, and the verdict is not supported by the evidence. For that reason a new trial should be granted.

We have not considered the question as to the measure of damages had the plaintiff's evidence sustained the verdict, because the rule as stated in the opinion of the Superior Court must control in this case, regardless of our view as to the correctness of the opinion of that court on that question.

The judgment is reversed, with directions to grant the appellant a new trial, and for further proceedings consistent with this opinion.

The Kentucky Law Reporter.

EDITOR:
WALTER G. CHAPMAN, ... Frankfort, Ky.

VOL. 18. SEPTEMBER 1, 1896. No. 5

KENTUCKY COURT OF APPEALS.

MOORE v. COMMONWEALTH.

(*Filed April* 15, 1896—*Not to be reported.*)

1. *Practice in criminal cases*—The question of duplicity in an indictment can be raised properly only by a demurrer and not by a motion to quash. Such a motion raises only the questions named in section 158 of the Criminal Code.

2. *Motion to set aside indictment*—Even if the motion to set aside the indictment be treated as having the effect of a demurrer it came too late after the conclusion of the testimony for the Commonwealth.

3. *Practice in criminal cases*—Where the facts charged in an indictment do not constitute an offense the court during the trial may quash the indictment, or the defendant may move in arrest of judgment.

4. *Deadly weapon*—Under an indictment under section 1166 of the Kentucky Statutes it was proper to submit to the jury the question whether an ax-handle, when used as it was in the particular case, was a "deadly weapon."

5. *Instructions*—As there was no testimony tending to show either that the wounding was the result of a sudden affray or was done in sudden heat and passion, an instruction requiring the jury to believe that the wounding was done under both of these conditions, in order to find the defendant guilty only of a misdemeanor, did not prejudice the defendant, as the court might properly have omitted the instruction altogether.

R. C. Rives for appellant.

W. S. Taylor for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Hazelrigg.

Upon the calling of the indictment in this case for trial the appellant, who stood charged with maliciously wounding one O'Daniel with a deadly weapon and with intent to kill him, neither demurred to the indictment nor moved to set it aside, but pleaded "not guilty."

Upon the conclusion of the State's testimony he moved to set aside the indictment for want of certainty, and to the order of the

court overruling his motion he saved an exception, and complains here that the court should have quashed the indictment for its uncertainty.

The action of the trial court was proper for two reasons:

1st. Because the question of duplicity in the pleading could be raised properly only by a demurrer, and not by a motion to quash. (Section 165 and article 11 of chapter 11 of Title 6, Criminal Code.)

By such a motion only the questions were raised of whether a substantial error had been committed in the summoning or formation of the grand jury which found the indictment, or whether some person, other than the grand jurors, was present when it was found, or whether the indictment was found and presented in the manner required by the Code. (Section 158, Criminal Code.)

In the second place, even if the motion be treated as having the effect of a demurrer, it came too late.

Under section 157 the defendant, upon his arraignment or upon the call of the indictment for trial, must either move to set it aside or plead thereto.

It is not contended here that the facts charged in the indictment do not constitute an offense. In such case the court during the trial may quash the indictment (section 233), or the defendant may move in arrest of judgment. (Sections 275–6.)

The second contention of appellant is that an axe handle, the instrument with which the wounding was inflicted, is not a "deadly weapon" within the meaning of the section under which the indictment was found (section 1166, Kentucky Statutes), and, therefore, that the submission of the question to the jury whether it was such a weapon, used as it was in this case, was an error to his prejudice. A different conclusion, however has been repeatedly announced by this court. (Commonwealth v. Duncan, 91 Ky., 592; Erwin v. Commonwealth, 96 Ky., 422; Riggs v. Commonwealth, 17 KY. LAW REP., 1015.)

It is also contended that the instruction permitting the jury to find the defendant guilty only of a misdemeanor if they believed that the wounding was "the result of a sudden affray, and was done in sudden heat and passion," was prejudicial because it required the wounding to have been the result of both a sudden affray *and* of sudden heat and passion, when the statute uses these expressions disjunctively (section 1242, Kentucky Statutes). There is not the slightest evidence, however, that the wounding was done under either of these conditions, and no error would have been committed if the instruction had been withheld entirely.

Judgment affirmed.

THROCKMORTON V. COMMONWEALTH.

(*Filed May* 1, 1896—*Not to be reported.*)

1. *Local option—Sufficiency of indictment—Negativing exceptions*—An indictment under the special act of the Legislature prohibiting the sale of spirituous, vinous and malt liquors in Robertson county should negative the exceptions contained in the statute. The indictment in this case under that statute is defective in failing to charge that the defendant was not a practicing physician, and, as such, did not prescribe whisky alleged to have been sold; but the allegation that the liquor sold was whisky was sufficient to negative the exception as to the sale of wine for sacramental purposes. And the allegation that the quantity sold was a pint was sufficient to negative

the exception as to the sale by distillers or their agents in quantities not less than ten gallons.

2. *Indictment—Local option—Recording certificate of election*—**As the statute provides that it shall be in full force when the clerk of the county court shall have recorded the certificate of the canvassing board to the effect that a majority of the votes at an election to take the sense of the voters as to the sale of liquor have been cast against the sale, the indictment in this case is defective in failing to allege that the certificate was recorded as required. The statement that the act was in force is a mere conclusion of the pleader.**

3. *Elections—Validity of*—**The fact that the act fixed as the day for holding the election to take the sense of the voters a day on which, under the law, an election for school trustees was required to be held did not render it violative of the requirement of the Constitution that "all elections shall be free and equal."**

O. S. Deming, Samuel Holmes and W. H. Holt for appellant.

W. S. Taylor for appellee.

Appeal from Robertson Circuit Court.

Opinion of the court by Judge Paynter.

This indictment is under an act of the General Assembly (volume 2, Acts 1887–88, page 554), prohibiting the sale of spirituous liquors, etc., in Robertson county.

The act contains exceptions which this court held in Commonwealth v. Hildreth, &c., 17 KY. LAW REP., 1124, should be negatived in the indictment. Some of the exceptions are negatived in the indictment. Exceptions other than those which were negatived are found in section 2 of the act in question, which provides the act does not apply to the procuring or use of wine for sacramental purposes or to a regular practicing physician, who in good faith prescribes the same as a medicine to his patients, or to a distiller or his agent who sells in quantities not less than ten gallons, which is not to be drank on the premises where sold or those adjacent thereto. The indictment charges that the liquor sold was whisky, and the quantity sold was a pint.

This charge sufficiently negatives the exception which authorizes the procurement and use of wine for sacramental purposes because it charges that whisky was sold; therefore it could not be wine for sacramental purposes which the accused sold. It likewise negatives the exception as to the distiller and his agent, because they are only authorized to sell in quantities not less than ten gallons. If the accused were a distiller or an agent of a distiller he was not, therefore, authorized to sell a pint, hence would not be protected by the exception in the statute. The indictment does, however, fail to charge that the defendant was not a practicing physician and as such did not prescribe the whisky to Hitt as his patient. For this omission the indictment is defective.

The act under consideration was not to become operative until approved by a majority of voters, etc. If a majority of the votes cast were against the sale of liquor the certificate of the board canvassing the votes should be to that effect, "and the clerk of the county court shall at once record the same in his office, and *then* the provision of this act shall be in full *force*."

The indictment fails to charge that the certificate was recorded by the clerk of the Robertson County Court. As the act did not go in force until it was so recorded it is necessary to state that fact to show

the act was in force. If it were not in force the prosecution could not be maintained.

To state the act was in force was a mere conclusion of the pleader; but to say the certificate was recorded by the county court clerk of Robertson county would be an allegation of a fact, together with the allegation of other essential facts, would show the act was in force. (Commonwealth v. Day, 15 KY. LAW REP., 385.)

The act required the election to take the sense of the voters on the question of the approval of its provisions should be held on the 2d day of June, 1888.

It is contended that as under the law there was an election on that day of school trustees in Robertson county, the election to put the act in force was violative of the Constitution, because it is declared in the Bill of Rights that "all elections shall be free and equal."

The declaration that all elections shall be free and equal does not mean that every person shall have the right to vote, regardless of mental condition or sex, or that there shall be no restriction upon the right to vote or a qualification prescribed for the voter. It does not mean that every person, regardless of age, sex, mental or moral condition, shall have the right to be elected and hold an office. It means there shall be no restriction placed upon the right to vote or to be a candidate for office because of wealth or social position; that *caste* can not give to or deprive anyone of the right to vote. This view might be elaborated, but it is profitless to do so in this case. It is certain that when the General Assembly gives the electors the right to exercise the elective franchise twice on the same day it can not be said the elections are not free and equal.

The judgment is reversed, with directions that a new trial be granted the defendant, and that the court sustain the demurrer to the indictment for the reason we have given.

HILL, &C. V. CREEL CO.

(*Filed May* 1, 1896—*Not to be reported.*)

1. *Husband and wife—Settlement upon wife—Preference of creditor—Rights of partnership and individual creditors*—Where a married woman, empowered to trade as a *feme sole*, bought a stock of merchandise with her own money, the business, by her permission, being conducted by her husband and brother under a firm name consisting of the name of the husband and the words "and company," the husband and brother having no interest in the property except what profits they might make, and the possession of the property upon the subsequent dissolution of the alleged firm was restored to the wife, an individual creditor of the husband can not complain of that transfer to the wife as a fraudulent preference, for if the wife was a creditor at all she was a creditor of the firm, the debts of which, including the wife's debt, exceeded the value of the stock; so whether the wife be treated as the real owner of the property all the while, or as a creditor of the firm, and as thus becoming the possessor of it, the individual creditor of the husband has no ground of complaint.

2. *Same*—If it should be conceded that the rule is that the whole of the wife's personal property, except her separate estate, becomes upon her marriage the property of the husband, that rule has no application in this case for the reason that the property with the proceeds of which the property in question here was bought was by a judgment of court settled upon the wife as her separate estate, and no creditor of the husband then complained of that settlement.

John M. Wilkins, R. Rodes and W. G. Bullitt for appellants.

W. B. Gaines, E. W. Hines and B. F. Proctor for appellee.

Appeal from Warren Circuit Court.

Opinion of the court by Judge Hazelrigg.

The appellee company is a creditor of the appellant, P. J. Hill, and at its suit the court below subjected to sale in satisfaction of its debt a china store, which was claimed by the appellant, Nellie R. Hill, wife of her co-appellant. Whether she was in fact such owner is the chief question on this appeal. Ordinarily this would be a question of fact, and in case of a conflict of testimony we should affirm the finding below. But it can scarcely be said that such a conflict exists here. The facts are rather easily determined from the proof. The resulting legal effect, however, is of somewhat more difficult solution.

It is argued that the whole of the wife's personal property, upon her marriage, unless it be her separate estate, becomes her husband's, the common law rule, it is said, not having been changed by statute. But conceding this rule it has no application here. By a judgment of the Warren Circuit Court in 1888 certain personal estate, of the value of some $2,000 was settled upon the wife, Nellie R. Hill, as her separate property, and she was empowered to act as a *feme sole*. This property was given her in lieu of money she had received from her mother's estate, and which she had loaned her husband. No creditor of the husband then complained of this settlement, and it appears moreover that his debts were then satisfactorily adjusted and subsequently paid. This personally consisted of two jacks, one jennet, two stallions, one mare and four milch cows, and the history of its disposition is traced with more than usual clearne-s in this record. It is indisputable that the china store was bought with the very money and property of the wife. This was in 1892. It is true that she permitted her brother and husband to do the business of the store as P. J. Hill & Co., but she testifies that they had no interest in the property, save what profits they might make, and she is the witness of the appellee, having been called by it. No creditor of that firm, it may be observed here, is complaining, it being conceded that by the agreement of transfer the property as well as Mrs. Hill individually is liable for any such indebtedness.

Prior to the suit of the appellee this alleged firm was dissolved, and Mrs. Hill, the real owner of the property, reasserted her right of possession therein. This is held to be a fraudulent preference of the creditor by P. J. Hill, and hence the judgment of sale on behalf of the attaching creditor, the appellee. If Mrs. Hill was a creditor at all she was a creditor of Hill & Co., and if preferred it was by that firm. This the firm had the right to do, so far as appellee is concerned, because its property was first liable for the firm's indebtedness. Its debts, including Mrs. Hill's, exceeded the value of the stock, and the individual creditors of P. J. Hill are not prejudiced. So whether we treat Mrs. Hill as the real owner of the property all the while, or as a creditor of Hill & Co., and as thus becoming the possessor of it, the result is the same, and no ground of complaint is given the individual creditor of P. J. Hill. The judgment below does not purport to affect any creditor of the firm, and none such are parties here.

The judgment, so far as it affects Mrs. Hill, is reversed for proceedings consistent herewith, and is affirmed on the cross appeal and as to P. J. Hill.

SMITHER, &C. V. MCGINNIS.

(Filed May 6, 1896—Not to be reported.)

Estoppel—The mere silence of one whose property is sold under attachment against another does not estop him from reclaiming his property, the purchaser knowing all about the title at the time he purchased.

Lindsay & Botts for appellants.

Chas. Strother and J. J. Orr for appellee.

Appeal from Owen Circuit Court.

Opinion of the court by Chief Justice Pryor.

The appellee, C. T. McGinnis, was the owner of three-fifths of a crop of tobacco he had raised on the farm of the appellant, Smither. His brother had planted the crop and rented the land upon which it was raised from Smither, and becoming involved in trouble and landed in jail sold the crop in the field to the appellee.

By the terms of the contract the appellee agreed to pay certain claims or debts that were owing by his brother to these defendants, and specifically mentioned in the agreement. When the tobacco was purchased by the one brother from the other the appellee took possession, worked the tobacco, hired hands for that purpose, cut and housed it. The parties to whom B. McGinnis was indebted, and whose debts the appellee had agreed to pay, obtained an attachment against B. McGinnis prior to the sale to the appellee and had it levied on the tobacco after it was cut and then sold under the attachment to satisfy the debts due them by B. McGinnis.

The appellee was not a party to that action. At the sale of the tobacco the landlord, Smither, purchased it, took it to Louisville and sold it for greatly more than he gave for it. The appellee then instituted this action below to recover the value of the tobacco, less the amount of the debts he had assumed to pay.

Smither, the purchaser of the tobacco, defends on the ground that appellee is estopped from setting up any claim because he stood by and saw the tobacco sold without making any objection. The proof shows that he said to Smither at the time of the sale that he intended to get his pay out of it for the work he had done, and, besides, Smither knew it was appellee's tobacco. It had been cultivated on his farm by the appellee. The latter had hired hands with the knowledge of Smither, and in fact Smither knew of the contract and so did all the parties to the transaction.

The doctrine of estoppel applies in cases where the party seeking relief has, by his conduct or acts, induced others to act, and of which he afterwards complains

In this case the parties knew it was appellee's tobacco, and the court told the jury such being the case they must find for the plaintiff, unless they believed that plaintiff, after his purchase and at and before the time of sale, by his statements and acts to and in the presence of Smither gave Smither reasonable grounds to believe the plaintiff had abandoned his purchase, and shall believe Smither was deceived thereby, they will find for the defendant.

It seems to us this presented the law of the case as favorably as the defendants were entitled to have it. Smither bought the tobacco with his eyes open, and it was needless for the appellee to have given the information the appellants already had. It is not pretended they have lost anything. Their debts have been paid, and

the only question here is, shall the defendants get not only their debts but several hundred dollars over, or shall the plaintiff recover what his tobacco sold for, less the costs and expenses of sale? The question is readily answered in the absence of proof showing an estoppel, and, mere silence on the part of the owner is not an estoppel where the party purchasing knows all about the title.

Judgment affirmed.

SIMRALL V. WILLIAMSON, &C.

(*Filed May* 7, 1896—*Not to be reported.*)

Transfer of stock procured by fraud—Cancellation of contract—Laches—In this action to cancel the transfer made by plaintiff of certain shares of stock in a corporation to the president of the corporation, upon the ground that the transfer was procured by false and fraudulent representations and concealment of material facts, the chancellor properly held that the representations of the defendant were such as would entitle plaintiff to relief, but erred in holding that he had been guilty of such laches in asserting his right as to preclude him from recovering. The evidence shows that plaintiff had no knowledge of the fraud until a short time before he instituted this suit.

William Goebel for appellant.

W. W. Cleary and George Washington for appellees.

Appeal from Campbell Circuit Court.

Opinion of the court by Judge Hazelrigg.

The appellant was the owner of five per cent. of the capital stock of the Central Railway and Bridge Co., a corporation organized to construct a bridge over the Ohio river between Newport, Kentucky, and Cincinnati, Ohio, and avers in his petition that on March 20, 1890, the appellee, Williamson, then president of the company, by false and fraudulent representations and concealment of material facts, induced appellant to transfer his stock to him for a nominal consideration. The chancellor held the representations of Williamson such as would entitle appellant to a cancellation of the transfer, but denied him relief, and dismissed his petition because of his *laches* in asserting his right thereto.

It appears that various efforts by the interested parties had been made since the organization of the company to effect a contract for the construction of the bridge, all resulting in failure, when, by a resolution of the board of directors, the appellee was empowered to negotiate the bonds and securities of the company for the purpose of securing funds for such construction, and while occupying that relation to the stockholders he approached the appellant and induced him to surrender his entire interest in the enterprise by representing that he had failed altogether to negotiate the stock or bonds of the company, and had despaired of obtaining any contract by which there would be any profit whatever to the stockholders and promoters, but that he was then negotiating with certain parties whose names were not disclosed, and would be able to effect an arrangement by which all who had advanced money would have it reimbursed or repaid to them, provided he was able to turn over to those parties all the capital stock of the company, and unless he was able to do this the parties would not touch the securities at all.

Appellant testifies that Williamson asked him to turn over his inter-

est to him, as all the other stockholders had done save one, and whose transfer he would get, in order that he might turn the whole capital stock and securities over to the parties who would build the bridge; otherwise it would not be built, and the money advanced by him (Williamson), amounting to some $12,000, would be lost to him, as well as the small sums advanced by the other stockholders; that no one connected with the company would be allowed to retain any interest whatever in the enterprise. Upon these representations, and mainly to save Williamson from so great a loss, the appellant testifies that he at once transferred his interest.

This account of the transaction is denied by Williamson, but it is substantially corroborated by two other witnesses, and we agree with the chancellor that Simrall's version of the affair must be taken as the true one.

It develops that within a few days after this transfer contracts were closed between the president, Williamson, and another officer acting with him, and the King Bridge Co., at Cleveland, Ohio, by which some $800,000 of the capital stock was retained for the company, Williamson and his associate; and for the balance of the stock, viz, $700,000, and the bonds of the company to the extent of $1,000,000, less $300,000 to be given Williamson and two associates for obtaining rights of way, the King Bridge Co. agreed to build the structure.

Upon this state of case it requires no citation of authority to show that Simrall is entitled to a cancellation of his transfer. Williamson was acting in the capacity of trustee, and it was not so much the duty of Simrall to inquire into the facts for himself as it was the duty of the trustee to disclose them in full; and, manifestly, he could not make any statement of fact to mislead or deceive the stockholder. Certainly there were no negotiations pending at the time of the transfer by which certain parties had agreed to build the bridge upon the conditions named by Williamson. This alone was a material and misleading fact, inducing the transfer.

As we have seen, the learned chancellor so found, but based his finding against the appellant upon the fact that the latter learned within a few weeks that Williamson had not obtained the interest of any one of the stockholders, and had accepted employment as attorney from Williamson or the Central Bridge Co. in certain proceedings to condemn the rights of way for the bridge.

We fail to see the force of this reasoning. It is true he must then have known that Williamson still retained his position as president of the Central Bridge Co., but as the proceedings to condemn must have been by that company, there was nothing in Williamson's retention of the office of president inconsistent with his former representation that his only compensation was to be the money he had advanced, and as to Krohn it was known that negotiations were still pending to have him transfer his interest.

It is not contended that Simrall had any definite knowledge of the terms of the Cleveland contracts when he accepted employment, and he testifies he did not have any knowledge of them until a short time before the institution of this suit to cancel the transfer.

The material facts of this case are reviewed by Judge Taft in the suit of Krohn, another complaining stockholder, against Williamson, in Krohn v. Williamson, 62 Fed. Rep., 869, and in the same case by Judge Severens on an appeal to the Circuit Court of Appeals, 66 Fed. Rep., 655. The conclusions we have reached are in accord with those reached in the Federal courts.

To the end that the transfer of March 20, 1890, may be set aside

and the prayer of the petition be granted, the judgment below is reversed and cause remanded for further proceedings consistent with this opinion.

BRENT V. LONG, &C.

(*Filed May* 8, 1896.)

1. *Suit to recover land—Conveyances—Pleading*—Under a deed conveying land to husband and wife for life, with remainder to their "right heirs," both husband and wife having died without issue, the land passed to their collateral heirs as remaindermen. And in an action by the heirs of the husband to recover the land the defendant, who does not by his answer assert claim to the land, can not complain in this court for the first time that the heirs of the wife were not joined as plaintiffs.

2. *Pleading*—The requirement of the Code that in an action for the recovery of land "the answer of the defendant must state whether or not he claims it or any part of it" is imperative, and without such a statement in his pleading he can not be allowed to avail himself in defending the action of any advantage derived from any claim he may have to the land, but is to be treated as a trespasser.

3. *Instructions*—The court properly refused an instruction to the jury telling them what would not be evidence sufficient to establish the true line between the lots of plaintiffs and the defendant, as such an instruction would wave been error, for the reason, if for no other, that it would have been making the court instead of the jury the judge of the weight and effect of the evidence.

4. *Same*—It would have been improper to instruct the jury with regard to the abstract proposition of law that where both parties to an action for the recovery of land claim title through the same person, or from the same source, neither party is required "to show title back of that person" or source, and as to what would be the result of that proposition of law as bearing on the rights of the parties to this action, as that would have been to submit to the jury the question of defendant's title, which, under the pleadings, could not be permitted.

Thornton & Kerr for appellant.

Z. Gibbons and Nelms & Bickers for appellees.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Landes.

The appellees sued the appellant in the Fayette Circuit Court to recover a small strip or parcel of land fronting on Third street, between Broadway and Mill street, in the city of Lexington, and described as running back at right angles with third street "one hundred feet, more or less, to Frazier's line." They alleged that they were the owners and entitled to the possession of this strip or parcel of land, and that the appellant "now holds and has for the last three years wrongfully held said land, and kept plaintiffs out of possession thereof."

The chain of title under which they claimed the land was not set out in the petition, but the title papers introduced in evidence and the testimony of witnesses tended to establish the fact that the land sued for was a part of a lot that was conveyed by William W. Whitney to Samuel Long, by deed bearing date the 28th day of May, A. D. 1844, in trust for Henry Long and Harriet Long, his wife, with re-

mainder over after their death, which deed will be more particularly referred to hereafter.

In his answer the appellant denied that the plaintiffs were "the owners or entitled to the possession of the strip, parcel or lot of land" described in the petition. This was followed by the further denial "that he *now holds* or for the last three years, or for any length of time, has *wrongfully held* the said land, or that he has *wrongfully kept the plaintiffs out of possession* thereof for any length of time." No claim was made by the appellant in his answer that he was the owner of the strip of land sued for, or of any part of it, or that he was for any reason entitled to the possession of it.

The Whitney deed of May 28, 1844, under which the appellees claim, describes the lot conveyed to Samuel Long in trust as follows: "Beginning on the southwest side of Third street, thirty-five feet from the lower side of an alley running from Third to New street, being the corner of what was formerly Henry Cassell's lot; thence with Third street thirty five feet, more or less, towards Main Cross street, now Broadway; thence parallel with Broadway eighty feet, more or less, towards New street; thence parallel with New street thirty-five feet, more or less, to said Cassell's lot; thence with said Cassell's lot eighty feet, more or less, to the beginning."

The trust declared was in substance for the use and benefit of Harriet Long during her natural life, who was to be permitted uninterruptedly to use and enjoy it as her separate property during her life, with power in the trustee, on her request, to exchange or sell it, and to re-invest the proceeds in other property upon the same trusts, etc., "and, after the said Harriet Long, remainder to said Henry Long for and during his natural life; and, after the death of said Henry, remainder to said Caaroline Long and the heirs of the body of said Henry, of his said wife Harriet begotten; or, in case of the death of said Caroline during the life of either the said Henry or the said Harriet, and in default of said heirs of the body of said Henry, *remainder to the right heirs of said Henry and Harriet* in fee simple forever."

Caroline Long, whose name appears in the foregoing extract, was named at the beginning of the deed as one of the beneficiaries, and was the only child of Harriet by a former husband, and died before the death of either said Henry or Harriet. Henry died before Harriet, without issue, and, although the latter married again after the death of Henry, she died without ever having had other issue besides Caroline.

By the deeds offered in evidence the title to this lot was traced regularly back to Thomas January, who, by deed bearing date the 2d day of December, A. D. 1817, conveyed it to Stephens & Winslow, every deed giving "thirty-five feet, *more or less*," as the frontage of the lot on Third street, except the last-named deed, which gave it as "*thirty-five feet.*"

The testimony also showed that the appellant was the owner of a lot adjoining the lot claimed by the appellees under the chain of title running back, as stated, to Thomas January, and lying between the said lot and Broadway, and the deeds in the chain of his title describe his lot as fronting eighty feet on Broadway, and running back from Broadway, with Third street, towards Mill street, *one hundred feet.* His title is traced back to the said Thomas January, who, by deed dated the 12th day of November, A. D. 1821, conveyed the said lot to William Macbean.

It appears from the face of this deed that the grantor, several years before it was made, had given his bond to the grantee for a

title to this and another lot embraced in the deed, as the statement is made that the deed was executed "in conformity with my bond to said Macbean, dated 14th January, 1814."

The evidence further shows that the appellant purchased this lot during the lifetime of Harriet Long, and while she was in possession of the lot claimed by the appellees, and that, in enclosing his lot, in order to get the depth of one hundred feet called for in his deed, he took within his enclosure a few feet of ground that had been within the enclosure of and that were claimed by Harriet Long, and that are now claimed by the appellees as part of the lot embraced in the deeds from Thomas January in 1817, down to that of William W. Whitney in 1844.

As we have seen under the Whitney deed the "right heirs" of Henry and Harriet Long—that is, those who under the law of descent would inherit the property of each of them in case he or she died intestate—were made the ultimate remaindermen, contingent upon the death of Caroline, during the life of either of them, and upon the death of Henry without heirs of his body. Consequently, at the death of Harriet, the last survivor, Caroline having previously died, and Henry having left no heirs of his body, the title to the lot vested absolutely in their "right heirs." The evidence in the case tended to show, and there was no conflict on that question, that the appellees were the only surviving collateral heirs of Henry Long; but there was no testimony showing that any of the appellees were the collateral heirs of Harriet, who died in the year 1887, or who were her heirs.

The issues raised and presented by the pleadings which we have quoted were narrowed down to the questions:

1st. Whether the appellees had any title under which they had the right to claim the possession of the strip of ground sued for; and,

2d. Whether the appellant was in possession of it, or of any part of it.

No question was raised in the pleadings, or at all so far as the record shows, as to any defect of parties, nor does it appear that any resistance was made in the court below to a recovery by the appellees on the ground that the "right heirs" of Harriet Long were not joined as plaintiffs with the appellees.

At the conclusion of the testimony the court, on its own motion, gave four instructions to the jury, all of which were excepted to by the appellant. In the first instruction the court submitted in proper form the question of the relation of the appellees as heirs of Henry Long, and told the jury in substance that if the heirship was established by the evidence, and if the strip of land in controversy was embraced in the said deed from Thomas January to Stephens & Winslow, and if the appellees derived their title to the land sued for from those claiming under the latter, and if the appellees, or those or any of them under whom they claimed, were in the possession of the said land at the time the appellant enclosed it, or if the land in controversy was not embraced in the said deed from Thomas January to Stephens & Winslow, but was embraced in the deed from said January to William Macbean, and that the appellees, or those under whom they claimed had the land in controversy in their possession and claimed it as their own continuously, notoriously and uninterruptedly for a period of fifteen years before the appellant took possessiod of it, that the law was for the appellees, and that they should so find.

In the second instruction the jury were told that they should find

for the appellant unless they believed from the evidence that the appellees were entitled to recover under the state of facts submitted in the first instruction. They were then told that if they found for appellees they should state in their verdict the amount of land they were entitled to recover, and find for them a sum which would fairly compensate for being deprived of the land by appellant from the time it was wrongfully taken to the date of the trial. By the last instruction the jury were directed, in case they found for appellant, to so state, and no more.

The testimony was conflicting as to the number of feet of ground claimed by appellees that were enclosed by the appellant as part of his lot, but under the foregoing instructions the jury in their verdict found the number to be three feet and three and one-half inches; and, as their finding on that question seems to be sustained by a preponderance of the evidence, the verdict ought not to be disturbed on account of the conflicting testimony.

The material question to be decided is as to the correctness of the first instruction. Unquestionably if Harriet, who was the wife of the said Henry Long, and who survived him, left heirs surviving her, they became entitled at her death, under the Whitney deed, as joint tenants with the appellees to an interest in the lot embraced in said deed, including the strip of ground sued for in this action, if it was a part of said lot and embraced in the deed.

It is insisted that the heirs of Harriet ought to have been joined as plaintiffs in the action with appellees; but, no objection having been made in the court below on account of the failure to join them, we hold that, although they would have been proper parties to the action upon the issues made in the pleadings, the attitude of the appellant is such that he can not be allowed to make the objection for the first time in this court. The Civil Code (section 125, subsection 22) provides that, in an action for the recovery of land, "the answer of the defendant must state *whether or not he claims it, or any part of it.*" This requirement, we hold, is imperative—the defendant "*must state,*" etc.

In Bailey, &c. v. McConnell, &c., 12 KY. LAW REP., —, which was an action to recover land, this court held that the answer of the defendants was defective because it did not contain the statement required by the Code above quoted. Without such statement, if a defendant claims the land he is sued for, he can not be allowed to avail himself, in defending the action, of any advantage derived from any claim he may have to the land. He can not be allowed to assert his title to the land in such an action as against the conflicting claim of the plaintiff on the mere denial that the plaintiff's title or claim of right of possession is not good. In this case the appellant, in his answer, saw proper only to deny the right and title of the appellees to the land sued for and that he then held it. The denial that he had wrongfully held the land or that he had wrongfully kept the appellees out of possession for the time alleged in the petition, or for any length of time, can not be considered as a sufficient denial of anything alleged in the petition, and no more can it be considered an assertion of his right to the land. So that, upon the issues made, the appellees could not be held to prove anything more than that they had such a title to the land they were suing for as would give them the right of possession, and that the appellant was in possession of the land they claimed in the action. If the evidence established their right to the land as right heirs of Henry Long under the Whitney deed, they certainly had the right of possession as against a wrongdoer, even though they were joint tenants

with the right heirs of Harriet. It was upon this view, evidently, that the first instruction was based, and we hold that, upon the issues made in the action, the court did not err in giving it, and that the substantial rights of the appellant were not prejudiced by the fact that the heirs of Harriet were not made parties to the action. In this view of the case the other instructions that were given are free from error.

Certain instructions were asked for by the appellant and refused by the court, and this is also complained of as error. They are not numbered, and, therefore, must be considered as a whole.

After carefully examining them we are not able to see that there is anything, either in the pleadings or the evidence, that would have justified the court in giving them. What was requested in respect to an estoppel would have been clearly erroneous, because an estoppel was not set up in the answer as a defense to the action, and also because there was no evidence upon which to base it. The proposed instruction as to what would not have been evidence sufficient to establish the true line between the lots of plaintiffs and the defendant would have been error, if for no other reason, that it would have been making the court, instead of the jury, the judge of the weight and effect of the evidence. And then it would have been improper to instruct the jury with regard to the abstract proposition of law that, where both parties to an action for the recovery of land claim title through the same person or from the same source, neither party is required "to show title back of that person" or source, and as to what would be the result of that proposition of law in this action as bearing on the rights of the parties to the action, because that would be submitting the question of appellant's title to the jury, which, as we have seen, could not be permitted upon the issues made by the pleadings.

What we have held with reference to the first instruction is decisive of this case, and the alleged errors with regard to the testimony allowed or refused need not be noticed; and, finding no error prejudicial to the substantial rights of the appellant, the judgment is affirmed.

WARREN V. COMMONWEALTH.

(*Filed May* 8, 1896.)

1. *Prejudicial error*—Upon the trial of appellant for murder he was not prejudiced by testimony to the effect that the deceased left a wife and four children, and that his wife had been sick ever since her husband's death; nor was he prejudiced by the appeal made by the prosecuting attorney to the jury to have regard to the reputation of the State and county in arriving at their verdict, especially as the lowest penalty for voluntary manslaughter was imposed, showing these things did not have the effect to influence the minds of the jury.

2. *Impeachment of defendant in criminal case when offered as witness*—A defendant in a criminal case who offers himself as a witness in his own behalf submits himself to the same cross-examination to which any other witness may be subjected, and may, under control of the court, be cross-examined as to specific facts tending to disgrace or degrade him, although such facts are irrelevant to the main issue; and while the court should protect him from unnecessary annoyance, and especially from inquiries into discreditable transactions of a remote date, yet the court in this case did not abuse its discretion in requiring the defendant to answer upon cross-examination whether he had any employment, and how long since he had had work, the

purpose being to show that he was a trifling person with no fixed employment.

3. *Same*—It was not improper to allow a witness to be asked upon cross-examination how often he had been in jail, and if he did not make it a business to lie around drunk during elections and to "bleed" candidates.

4. *Same*—The defendant having introduced testimony to show that a witness for the Commonwealth was a "tough negro," it was proper to permit the Commonwealth to introduce a witness to sustain his moral character.

5. *Involuntary manslaughter*—As there was no evidence of a shooting without the intent to kill, although there may have been no intent to kill the deceased, there was nothing to justify an instruction as to involuntary manslaughter.

6. *Instruction upon self defense*—As the instructions given fully covered the law of self-defense the court did not err in refusing an instruction asked by the defendant upon that subject.

Hobson & O'Meara for appellant.

W. S. Taylor for appellee.

Appeal from Hardin Circuit Court.

Opinion of the court by Judge DuRelle.

This appeal is prosecuted from a judgment of conviction for voluntary manslaughter.

The first ground urged for reversal is that the Commonwealth, against objection by the defense, was allowed to prove that the deceased left a wife and four children, and his wife had been sick ever since her husband's death, and that the Commonwealth's attorney was permitted in his argument to the jury to comment upon the fact that the defense had objected to an explanation of the absence of the widow from the trial.

The evidence does not seem to be particularly material, but in our judgment did not operate to the prejudice of the substantial rights of the defendant. Neither this evidence nor the speech of the prosecution to the effect, customary in such cases, in regard to the reputation of this State for crimes of violence and the disgrace which it was claimed would come upon the county in the event of a failure to convict the defendant, appear to have had the effect to inflame the minds of the jury, for the penalty imposed was the lowest permitted for voluntary manslaughter.

The next objection is that upon cross-examination of the defendant, who was sworn as a witness in his own behalf, the prosecution, against objection, was permitted to ask questions, the effect of which was to discredit him as a witness before the jury. These questions were as to whether he had any employment, how long since he had had work, and whether his cripple foot had prevented his working four or five years before it became injured. Undoubtedly these questions were asked for the purpose of discrediting him as a witness by showing from his answers that he was a trifling person, with no fixed employment. The questions were entirely irrelevant to the commission or circumstances of the homicide, and if he had denied the facts suggested by them he could not have been contradicted. When a defendant puts himself on the stand as a witness he thereby submits himself to such cross-examination as any other witness may be subjected to. (Burdette v. Commonwealth, 93 Ky., 77.)

A witness may, on cross-examination, be asked any questions which tend "to shake his credit by injuring his character," and may be compelled to answer such questions, though it is said that "the court

has the right to exercise a discretion in such cases, and to refuse to compel such questions to be answered, when the truth of the matter suggested would not, in the opinion of the court, affect the credibility of the witness as to the matter to which he is required to testify." (Am. and Eng. Ency. Law, section 7, page 109, quoting from Stephen's Digest of the Law of Evidence.) And it is said in Taylor on Evidence, section 1462, that "it seems to be generally conceded that, where the answer which the witness may give will not immediately and certainly show his infamy, but will only *indirectly tend* to disgrace him, he may be compelled to reply." (See also Greenleaf on Evidence, section 456.)

We are not to be understood as holding that counsel are to be allowed unrestricted liberty in cross-examination of this character, or that a witness is to be compelled to submit to an exploration of the most remote passages of his past life by means of fishing questions in regard to scandalous or discreditable acts. As said in Wharton on Evidence, "every man is entitled to such a measure of oblivion for the past as will protect him from having it ransacked by mere volunteers." And in Taylor on Evidence, section 1460-61, it is said: "No doubt cases may arise where the judge, in the exercise of his discretion, would very properly interpose to protect the witness from unnecessary and unbecoming annoyance. For instance, all inquiries into discreditable transactions of a remote date might, in general, be rightly suppressed, for the interests of justice can seldom require that the errors of a man's life, long since repented of and forgiven by the community, should be recalled to remembrance at the pleasure of any future litigant. So questions respecting alleged improprieties of conduct, which furnish no real ground for assuming that a witness who could be guilty of them would not be a man of veracity, might very fairly be checked. But the rule of protection should not be further extended; for, if the injury relates to transactions comparatively recent, bearing directly upon the moral principles of the witness and his present character for veracity, it is not easy to perceive why he should be privileged from answering, notwithstanding the answer may disgrace him."

And so this court, in the case of Burdette v. Commonwealth, before referred to, citing with approval Kansas v. Pfefferle, 30 Kansas, 90, arrived at the conclusion that according to the tendency of modern authorities, as well as upon principle, a witness may, for the purpose of impairing his credibility, "be cross-examined as to specific facts tending to disgrace or degrade him, although such facts are irrelevant and collateral to the main issue, and we see no good reason whatever why such test may not, in a proper and pertinent manner, *and under control of the court*, be applied." In our opinion the questions complained of do not call for revision by this court of the exercise of discretion by the trial judge. What has been said upon this objection applies also to the objection made to the questions asked of another witness, namely, how often he had been in jail, and if he didn't make it a business to lie around Elizabethtown drunk during elections and bleeding candidates. The answer given that he had been in jail something less than a thousand times, and that he had been in town and gone home without getting full when he had money to get whisky with, would indicate that the question was a proper one on the cross-examination of that witness.

It is further objected that the State was permitted to introduce a witness to sustain the moral character of the negro, Franklin. The objection is based on the ground that the defense had not attempted

to impeach his general moral character, "but only his character for peace and quiet, and being a tough negro." In response to this it may be said that the statement of the witness that Franklin was a tough negro would undoubtedly be understood by jurors generally as putting in issue his general moral character.

This brings us to the errors alleged in the instructions. The defense asked an instruction as to involuntary manslaughter upon the theory that there is no distinction in principle between the unintentional discharge of a pistol and bullet from a pistol glancing where it could not reasonably be anticipated to strike. The distinction lies in the intent. There is no evidence in this case of a shooting without the intent to kill. (Conners v. Commonwealth, 13 Bush, 718.)

The defendant either did not kill Vittitoe at all, or killed him while defending himself against Franklin, or killed him while attempting to kill Franklin. There was nothing in the case to justify an instruction upon involuntary manslaughter. (Trimble v. Commonwealth, 78 Ky., 178.)

The defense also complains of the refusal of the court to give the following instruction:

"*B.* If at the time defendant shot and killed Vittitoe, if he did so shoot and kill him, he believed and had reasonable grounds to believe that his life was in imminent danger, or that he was in imminent danger of receiving great bodily harm at the hands of Sheed Franklin, and that he had no other apparently safe means of escape except by shooting him, and in attempting to shoot said Franklin he accidentally shot said Vittitoe, then the law is for the defendant and the jury should so find."

In lieu of the instruction asked the court gave instructions 4 and 5, which seem to us to fully cover the law of self defense as applicable to the evidence adduced in that behalf in this case.

Judgment affirmed.

FISH V. WEST'S ADM'R.

(*Filed May* 9, 1896—*Not to be reported.*)

Vendor and vendee—Quit-claim deed—In this action upon one of two notes executed for the purchase price of land, the other having been paid, as it appears from the evidence that the title to a part of the land is in another than the vendor, and the vendee has never accepted any conveyance, only a quit-claim deed being tendered, the court should have dismissed the petition, the land to which the vendor has no title being worth as much as the amount of the note sued on. The defense that by the contract the vendor was only required to convey by quit-claim is not sustained by the evidence.

J. R. Burnam for appellant.

J. A. Sullivan for appellee.

Appeal from Madison Circuit Court.

Opinion of the court by Judge Hazelrigg.

Appellant bought from R. B. West, administrator of W. W. West and agent of his heirs, a tract of some 240 acres of land in Rockcastle county, for which he executed his two notes of $480 each, due respectively on the 25th of June and December, 1890.

No other writings were executed. The first note appears to have

been promptly paid; but after the appellant had moved a sawmill on the land, which was unenclosed, and known as forest or "wild" land, one Segaser notified him that of the alleged West tract he was himself the owner of some 135 acres by older patent, and exhibited his title therefor. West having died his successor, Long, the present appellee, was notified of the trouble.

It seems clear from the record that Segaser and not West is the owner of this land; still if the contract only required the Wests to convey by quit claim, as contended by the appellee, the collection of the note now sued on must be enforced.

It appears that four persons were present, and only four when the contract was made, viz: "R. B. West, who died shortly after that and before the deferred payment became due; W. C. Fish, the father of the appellant, Ned McHone, and the appellant. McHone proves only that the sale was by the acre and not in gross, and does not speak of the character of the title to be made. Appellant and his father say that the Wests were to make a deed of general warranty.

There is nothing in the record contradicting this positive and unequivocal testimony.

It is true that the deed which Moore afterwards prepared at the instance of West and when Fish was not present only warranted the title specially, and it appears that this deed was thereafter left with appellant, who was a deputy county court clerk, for the purpose of taking the acknowledgements of such of the grantors as might appear before him as such officer, and some of them did acknowledge it before him. However, when he discovered the difference between the deed which he says he prepared at the time of the contract and gave to West and the one to which he was taking acknowledgements, he testifies he at once notified the remainder of the parties interested who had not signed it that they could sign if they liked, but he would not accept, and he mentions the names of those he so informed.

This statement is not contradicted but is corroborated by C. A. Moore, one of the heirs. It is not contended that Fish has accepted any conveyance, and the one tendered is a quit claim deed. We are convinced that the appellant ought not to be made to pay for this 135 acres.

The proof is clear enough that the land embraced by the Segaser title was worth as much as the amount of the unpaid note, and the petition should be dismissed.

Judgment reversed for that purpose.

LYNCH V. COMMONWEALTH.

(*Filed April* 16, 1896—*Not to be reported.*)

Former conviction—Bar—Former conviction for a breach of the peace is a bar to a subsequent prosecution for assault and battery, based upon the act constituting that breach of the peace.

A conviction before a police court under a warrant charging the defendant with disorderly conduct under a municipal ordinance is a bar to this prosecution for assault and battery based upon the same act, the act complained of as disorderly conduct being nothing less than a breach of the peace and the warrant having been issued and trial had in good faith, and not for an apparent purpose to defeat or forestall justice.

Price & Vinson for appellant.

W. S. Taylor for appellee.

Appeal from Boyd Circuit Court.

Opinion of the court by Judge Lewis.

It has been held by this court that former conviction for a breach of the peace is a bar to a subsequent prosecution for assault and battery, based upon the act constituting that breach of the peace. (Commonwealth v. Foster, 3 Met., 1; Commonwealth v. Hawkins, 11 Bush, 604; Commonwealth v. Bright, 78 Ky., 238.)

It was, therefore, error on trial of this prosecution to exclude from the jury evidence showing that appellant had been previously arrested, tried and convicted before the police court of Catlettsburg for the same act constituting the assault and battery, for which he was indicted, tried and convicted in the case before us. It is true his trial and conviction before the police court was under a warrant charging him with disorderly conduct under a municipal ordinance, and the punishment therefor was prescribed by such ordinance; still the act was none less than a breach of the peace, although called disorderly conduct; and as the warrant was issued and trial was had in good faith, and not for an apparent purpose to defeat or forestall justice, we do not see why the conviction should not be held a bar to the present prosecution.

Wherefore, the judgment is reversed for a new trial conforming with this opinion.

RAGSDALE V. EZELL AND WIFE.

(*Filed May* 6, 1896.)

Damages for criminal assault—Instructions—In this action by husband and wife to recover damages for an alleged criminal assault by defendant upon the wife, only one witness being introduced upon each side, it was error after instructing the jury that the burden of proof was on the plaintiff to tell them that "this does not necessarily mean that the plaintiff must have two witnesses to the wrongful act, but that the case in all its facts and circumstances given in evidence must preponderate in their judgment in favor of the plaintiffs." While the instruction is not objectionable as an abstract proposition, it is misleading. The court should simply have told the jury that if they believed from the evidence that the defendant assaulted the plaintiff, as charged in the petition, the plaintiffs are entitled to recover not only the actual damage sustained, but such further sum by way of exemplary damages as the case may warrant, not exceeding the amount claimed.

2. *Instructions*—The word "preponderance" should be omitted from such instructions, as it is calculated to mislead.

3. *Evidence*—It appearing that a short time after the alleged assault defendant returned to the house of plaintiffs and left a message for the husband to the effect that a certain person named had agreed to let him have the tobacco plants he desired, it was not competent for plaintiffs to prove that the person named had no tobacco plants to spare.

W. G. Bullitt, C. H. Bush and Fenton Sims for appellant.

J. E. Kelly for appellees.

Appeal from Trigg Circuit Court.

Opinion of the court by Chief Justice Pryor.

This case was appealed originally to the Superior Court, and the judgment below reversed because of an erroneous instruction.

On the return of the case the identical instruction was given and the plain mandate of the Superior Court disregarded. The action is for an alleged criminal assault made on the plaintiff, a married woman, her husband being also a party to the action. The assault is proven by the testimony of the plaintiff (the wife), and disproven by that of the defendant. Facts and circumstances are detailed by each witness in support of their testimony, all of which went to the jury and were doubtless considered.

The court below, as there was but one witness establishing the assault, took occasion to say to the jury that no greater amount of testimony than that of one witness was necessary to make out the plaintiff's cause of action, and this, as the Superior Court held, was calculated to impress the jury with the belief that, in the opinion of the trial judge, the case had been made out for the plaintiff and a recovery must follow. The court on the first trial, in telling the jury the burden of proof was on the plaintiffs, said that "this does not necessarily mean the plaintiff must have two witnesses to the wrongful act, but that the case in all its facts and circumstances given in evidence must preponderate in their judgment in favor of the plaintiffs."

On the return of the cause on the second trial this identical instruction was given without any qualification or explanation. As an abstract proposition the instruction is not open to objection, but where a trial court undertakes to place the right of recovery upon the preponderance of testimony in favor of the plaintiffs or those holding the affirmative of the issue, it often becomes necessary to explain what is meant by the preponderance of proof, and in doing so a jury is often misled by the trial court. On an issue of fact the party holding the affirmative or making the charge must make out his case, and when testimony is introduced on both sides as in this case the jury should be told: "If they believe from the evidence the defendant, Ragsdale, assaulted the plaintiff as charged in the petition the plaintiffs are entitled to recover not only the actual damage sustained, but such further sum by way of exemplary damages as the case may warrant, not exceeding the amount claimed."

If it required only one witness to make out plaintiff's case it required only one witness to make out the defense, and, therefore, the jury should be left to determine from the evidence in connection with the facts and circumstances detailed by each which of the two is to be believed. Facts and circumstances in support of the main issue when proper go to the jury as evidence, and it is unnecessary for the court, after the admission of these facts, to call the attention of the jury to them by saying they must be considered or they may decide for the plaintiff, although he has but two witnesses to the main transaction and the defendant has three or more. The manner of the witness, the circumstances detailed by him may lead the jury to believe that he is mistaken or that no credence is to be given his statements. At least it is for the jury to determine from the evidence whether or not the plaintiff is entitled to recover, or has the defendant by his testimony shown that no cause of action exists. The word preponderance should be omitted from such instructions, as it is only calculated to embarrass the jury when considering the issue.

There is another serious error commited by the court below in the

admission of testimony. On the same day and in a short time after the alleged assault it is shown the defendant returned to the home of the plaintiffs in company with his brother, and told the family to say to the husband of the plaintiff that he had seen a man by the name of Cooper, who had agreed to let him (the husband) have tobacco plants. It seems the husband was a tenant of the sister of the defendant, and was scarce of tobacco plants.

In order to show that the return to the house by defendant was for some other purpose, or with a view of contradicting Cooper, the court permitted the introduction of two witnesses over the objection of defendant to state that one Henry Dawson, who lived on Cooper's farm, told them that Cooper had no tobacco plants to spare. That this testimony should have been rejected is too manifest to discuss.

Reversed and remanded for a new trial, and proceedings consistent with this opinion.

The court delivered the following response to a petition for rehearing May 27, 1896:

If as contended the instructions were not excepted to, and this seems to be the case, still there is left the objection to the incompetent testimony that must necessitate a reversal.

Petition overruled.

TRADERS DEPOSIT BANK V. HOFFMAN, &C.

(*Filed May* 7, 1896.)

1. *Preference of creditors*—Where it is sought to have an act of preference committed by an insolvent debtor declared to operate as an assignment under the statute, both the debtor and the preferred creditor are necessary parties to the action.

2. *Commencement of action—Warning order*—It is not sufficient that the petition in such an action be filed within six months after the act complained of. The action must be commenced within that time, as required under section 39 of the Civil Code, and it is not commenced until a summons is issued or a warning order is made; nor is it commenced by the issuing of a summons against a defendant who is known by the plaintiff to be a nonresident, a warning order being the process provided for bringing nonresidents before the court.

Although this action was commenced as to the debtor within six months, yet as no warning order was taken within that time against the preferred creditor, who was known to be a nonresident, the action was properly dismissed. The issuing of summons against the nonresident defendant within six months was not sufficient.

O'Rear & Bigstaff for appellant.

J. J. Cornelison and Collins & Fenley for appellees.

Appeal from Montgomery Circuit Court.

Opinion of the court by Judge Paynter.

The petition was filed on the 18th day of July, 1891, against G. W. Goodpaster and Chas. L. Gray, and H. H. Hoffman seeking to have the property of Goodpaster and Gray, who were partners under the firm name of G. W. Goodpaster & Co. subjected to a *pro rata* distribution among their creditors, including the plaintiff. As a ground therefor it is alleged that Goodpaster and Gray, in contem-

plation of insolvency and with a design to prefer Hoffman to the exclusion of the plaintiff and their other creditors, procured Hoffman to institute a suit on the 16th of March, 1891, in the United States Circuit Court against them, to sue out an attachment therein against them and to levy it on their property; and that by another consent suffered a judgment against them and a sale of all their property in satisfaction of Hoffman's debt.

A summons was issued to Montgomery county against Goodpaster and Gray and executed on them.

We will assume that a summons was issued, when the petition was filed, to Kenton county against Hoffman, and from time to time thereafter until the warning order was made against Hoffman April 11, 1893. It appears that Hoffman during this time was a nonresident of the State, and known to be such by the plaintiff.

Section 3, article 2, chapter 44, General Statutes, is as follows: "Any number of persons interested may unite in the petition, but it shall not be necessary to make any persons defendants except the debtor and transferer, and the action and proceedings as to the mode of proving claims and otherwise shall be conducted as actions and proceedings for the settlement of the estate of deceased persons are now required to be conducted, as far as the same are applicable."

It is necessary that the debtor and the transferer shall be made parties to the action which seeks to have the debtor's estate assigned and distributed. (Savings Bank v. McAllister, 83 Ky., 151.)

The transfer, which inures to the benefit of creditors generally, is subject to the control of a court of equity upon the petition of any person interested, filed within six months after the act which operates as the transfer. It is not sufficient that the petition be filed within the six months, but the action must be commenced as required under section 39, Civil Code. (Cecil v. Howard, 10 Bush, 97.)

It it not commenced until a summons is issued or a warning order made thereon.

In Hoffman v. Brungo, &c., 83 Ky., 404, it was urged that the action was not commenced in the meaning of the statute because no summons was issued against the nonresident, Hoffman. A warning order had been made in proper time.

The court held that it was not necessary to have had issued a summons against Hoffman, and said: "The only summons known to the law by which he could have been brought before the court, where no actual service could be had, was adopted—that is, a warning order."

The court did not decide the question involved in this case as to whether a summons issued on the petition against the nonresident within six months from the act in contemplation of insolvency, etc., would have been sufficient to constitute a *lis pendens*. Had the plaintiff relied upon the summons in this case to bring Hoffman before the court, and it could never have been executed on Hoffman, then however much property Goodpaster & Co. may have had, other than that which Hoffman received by the judgment, the court was powerless to pass upon the question as to the effect of the acts, which it is claimed operated as a transfer of their property for the benefit of all their creditors, because the transferee was not before the court.

The question to be determined by the action was as to the effect of the acts of Goodpaster & Co., of which complaint was made.

When the court decided that the acts of Goodpaster & Co. constituted a transfer of their property for the benefit of all their creditors then Hoffman's liability for the property, the proceeds of which he received, was determined. He was interested in the trust estate, and the disposition of it, as well as the personal liability. He had such an interest in the estate and proceedings as enabled the plaintiff to bring him before the court by warning order.

The Code gave the plaintiff the means by which the nonresident, Hoffman, could be brought before the court in its action. The one that was intended to enable a party to proceed against a nonresident. In fact it was the only summons known to the law by which he could be brought before the court when actual service could not be had. From the nature of the proceeding the questions should be speedily determined.

Where the plaintiff chose to have a summons issued against one known to it to be a nonresident it did so at its peril. When it failed to avail itself of the process which was intended to bring the nonresident before the court its suit was not commenced in time to have determined the question as to the effect of the act of which it complained. This conclusion renders it unnecessary to discuss the question as to whether the judgment in the United States Circuit Court would have been a bar to this action.

The judgment dismissing the petition is affirmed.

BANNON V. HAWKINS, &C.

(Filed May 8, 1896—Not to be reported.)

1. *Settlement of partnership—Necessity for reply*—In this action for an accounting between partners, in which the plaintiff alleges in his petition that defendant was to keep the accounts and has refused to permit plaintiff to examine the books or to make a settlement with him, an answer setting up the condition of the partnership and the liability of the one to the other in the conduct of the partnership business required no reply.

2. *Entries on partnership books—May be corrected*—While the entries in partnership books are *prima facie* correct, yet when an error is shown to have been committed it should be corrected, and the error may be established by other books connected with the partnership.

3. *Judgment not disturbed*—This court, in the absence of the firm books, will not disturb the judgment of the chancellor based upon the report of a commissioner stating in detail the partnership transaction, neither the settlement nor the proof on which it is based showing any error.

Lane & Burnett for appellant.

O'Neal, Phelps & Pryor for appellee.

Appeal from Jefferson Circuit Court, Law and Equity division.

Opinion of the court by Chief Justice Pryor.

This action is for an accounting between partners, and that a settlement be made between them, with the averment that the appellant was to keep the accounts and has refused to permit plaintiffs to examine the books or to make a settlement with them. The answer setting up the condition of the partnership and the liability of the one to the other in the conduct of the partnership business required no reply, and the case having gone to the commissioner we perceive no error in the adjustment of the accounts between them.

It is true the books of a firm or the entries are *prima facie* correct; but when an error is committed, either on the debit or credit side, the entry, if improper, can be corrected, or if an omission to make entries is shown the error should be corrected, and the error may be established by other books connected with the partnership, as was done in this case.

There is a complete statement in detail of the partnership transactions by the commissioner, to whom the case was referred, and this being sustained by the chancellor must be sustained by this court in the absence of the books of the firm, and when neither the settlement nor the proof on which it is based shows any error.

The claim made that there is no charge against the appellees for the $15 they were entitled to each week is unfounded, as we understand they were charged with that sum, $7.50 each, and the defendant allowed the same sum, as agreed upon by the written contract between them, and the only correction made by the commissioner was in refusing to allow the defendant this weekly sum after the work terminated.

We find no exception to the report for the failure to charge the plaintiffs with the sums received by them, viz, $15 per week, under the contract, nor do we find where the appellant has been charged with what he was entitled to under the contract, $7.50 per week, and must, therefore, assume that these sums were properly entered on the book as charges against the parties, resulting in the profits as reported by the commissioner.

Judgment affirmed.

OIL CITY LAND & IMPROVEMENT CO. v. PORTER.

(*Filed May* 9, 1896.)

Corporations—Subscriptions to stock—Subscriber presumed to know provisions of charter—Concealment of facts—A subscriber for shares in a corporation must, at his peril, inform himself with regard to the provisions of its charter or of its articles of incorporation. Therefore, where at the time a subscriber executed his notes for the amount of his subscription the company had been regularly incorporated, he was chargeable with notice of a provision in the articles of incorporation authorizing the company "to subscribe for stock in other companies or corporations," and can not escape liability upon the ground that at the time he verbally agreed, prior to the incorporation of the company, to make the subscription, the fact was concealed from him that it was contemplated that the proposed corporation should subscribe for 1,000 shares of the stock of another corporation, which subscription was afterward made, there being nothing to show that the person who solicited his subscription was then the agent of any of the promoters of the corporation, or that any of the promoters or other subscribers knew that any concealment had been made. And the fact that his name was, without his knowledge or authority, signed to a subscription paper setting out the fact that the proposed corporation was to take the 1,000 shares of the stock of another corporation does not affect the question of his liability, which exists by reason of the execution of the notes, whereby he actually subscribed for the stock he had prior to that time verbally agreed to take.

Stone & Sudduth for appellant.

Lewis McQuown and E. W. Hines for appellee.

Appeal from Barren Circuit Court.

Opinion of the court by Judge Landes.

The appeal in this case was certified to this court by the Superior Court, which court had reversed a judgment rendered by the Barren Circuit Court in an action in which the appellant company was plaintiff against the appellee upon two promissory notes executed by the appellee for stock in the appellant company, for which he had subscribed or agreed to take. The company was incorporated and organized in November, 1889, under chapter 56 of the General Statutes, and the articles of incorporation were recorded in the office of the clerk of the county court of Jefferson county.

The general nature of the business of the corporation, as provided in the articles, was to buy, lease, sell and improve lands, and to acquire timber, mineral, oil and natural gas privileges. Besides, by one of the provisions of the articles, the company was authorized *to subscribe for stock in other companies or corporations*. By a prospectus or "subscription list," bearing date the 16th day of October, 1889, many of the promoters and proposed stockholders of the company then in contemplation pledged themselves respectively to take certain amounts of the capital stock, which was to be fixed at $100,000, in shares of a par value of $100 per share, but which the subscribers were to take and pay for at the rate of $25 per share. This paper contained the following paragraph: "It is proposed to organize a town company, purchase these lands and build a town. The Kentucky Southern Oil and Gas Co. have agreed to locate, within ninety days, a large refinery on the property, this company agreeing to donate ten acres for this purpose, *besides subscribing for one thousand shares of the said Kentucky Southern Oil and Gas Co. at $5 per share, to be paid upon completion of said refinery.*"

The lands which it was proposed to purchase for the contemplated town site were situated in Barren county, on the railroad between Glasgow Junction and the city of Glasgow. The lands were eventually purchased and laid off into lots, the oil refinery built on the land donated for the purpose, and one thousand shares of the Kentucky Southern Oil and Gas. Co. taken by the appellant company, and paid for at $5 per share, with the money received from the subscribers to the capital stock of the appellant company.

About the 19th of October, 1889, three days after the date of the "subscription list" above referred to, appellee, through the solicitation of Judge Ritter, then of Barren county, and one of the promoters of the organization of the appellant company, and a subscriber to said preliminary or subscription paper, agreed to take forty shares of the stock of the proposed company, which was communicated to one of the promoters in Louisville by Ritter by a letter written by him, and the name of the appellee was signed to the paper by the person to whom the letter of Ritter was addressed, thus apparently pledging the appellee in writing, in advance of the actual incorporation and organization of the company, to take and pay for forty shares of the stock of the company at $5 per share.

The proof does not show that the appellee authorized, either verbally or in writing, the signing of his name to this paper, and there is nothing in the record to show that he even knew that it was expected that he would sign the paper. But it satisfactorily appears from the evidence that he recognized that he was pledged to take forty shares of the stock of the company on the terms named, for when it was necessary that there should be a meeting of those who were pledged to take the stock for the purpose of organizing the company, which meeting was called for and held on the 4th day of

November, 1889, he verbally authorized Ritter, who attended the meeting at Louisville, to represent him and vote his stock, for which he was pledged, in the organization of the company under the articles of incorporation, which it seems were formulated and recorded on the 2d day of November. And afterwards, in the month of January, 1890, he executed his three notes to the organized company for $333.33⅓ each, covering the amount of stock which he had verbally agreed to take, one of which notes he subsequently paid off. Failing to pay the other two notes after they fell due, the company commenced action on both of them in the Barren Circuit Court on the 18th day of September, 1891.

Defense was made to the action on the alleged ground that he was not aware, when he told Ritter that he would take forty shares of the stock of the company, that it was proposed to subscribe for the one thousand shares of the stock of the Kentucky Southern Oil and Gas Co., which fact he averred was fraudulently concealed from him by Ritter, and he alleged that the expenditure of $5,000 of the cash of the appellant company for the stock of said Oil and Gas Co. was made without his knowledge or consent, and was unlawful and without authority, and was a misappropriation of the assets of the appellant company to the extent of $5,000. It was also alleged that the Kentucky Southern Oil and Gas Co. had become insolvent, which was true, and that the appellant company was also insolvent, which latter insolvency was brought about principally by the alleged unauthorized expenditure of the $5,000 aforesaid, while it was claimed in behalf of the appellant company that it was necessary that it should recover the money due on the notes of appellee in order that the company might be able to pay its debts. The case having been transferred to equity, the appellee sought to have a receiver appointed, and, having made his answer a cross petition against the directors of the company, he prayed that they might be compelled to account for the said $5,000, that the affairs of the company might be settled up, and the company restrained from collecting the notes sued on.

The allegations of fraudulent concealment and of unlawful and unauthorized expenditure of the money of the appellant company were denied both by the company and the defendants in the cross petition. These were the principal matters in issue, and there was much testimony taken, especially on the charge of fraud. But while the testimony was conflicting the court below found on the issues made in favor of the appellee, and by its judgment cancelled the appellee's subscription to the capital stock of the appellant company, and dismissed the petition of the plaintiff and the cross petition against the directors, but gave a judgment over against the appellant company for the amount paid by the appellee on the note paid by him for the one-third of his subscription.

Conceding that the appellee never saw the subscription paper to which his name was signed as above stated before he was sued on the notes, and that Ritter did not tell him that it was the purpose of the company when organized to subscribe for one thousand shares of the Kentucky Southern Oil and Gas Co., and that he even intentionally concealed that purpose from him, still it would not follow that the appellee was entitled to have the notes he executed for the stock he agreed to take, or his subscription for the stock, which was made binding on him when he executed the notes, if not before, cancelled, or to have the money he paid on the first note repaid to him by the company. There is not the slightest evidence in the record that Ritter was the agent of any of the promoters of the proposed

corporation at the time he solicited the appellee's subscription, or that any of the other promoters or subscribers knew that any concealment had been made, if indeed it was purposely made by Ritter, of the fact complained of by the appellee. He was not legally bound on the subscription paper, because it does not appear that any one had authority from him to sign his name to it, and if he had been thus bound it would have been only by reason of the fact that it was a mutual undertaking on the part of all of the subscribers. But when the company was regularly incorporated and its organization completed there was a different condition of affairs. It was not until nearly two months after this that the appellee did actually subscribe for the stock which he had previously agreed to take, and thus became legally bound to the body corporate for his subscription. There is no evidence that the company or any of its officers or agents deceived him, or induced him by any fraudulent means to execute his notes for the price of the stock, or to pay for any part of it. It must be presumed that at the time he executed the notes and paid one of them he knew the provisions of the charter or articles of incorporation of the company under which his subscription was made and of which he thus became a member. (Wight v. Shelby R. R. Co., 16 B. Monroe, 4; Parks v. R. R. Co., 23 Ind., 572; Jenkins v. Prewitt, 7 Blackford, 329; Walker v. R. R. Co., 34 Miss., 255; Ellison v. Mobile & Ohio R. R. Co., 36 Miss., 572.)

He must, therefore, be charged with knowledge that the articles of incorporation contained the provision which has been referred to, and which authorized the purchase or subscription for stock in other corporations. And we hold that this applies as well to charters formed under the general law authorizing the organization of corporations as to those enacted directly by the Legislature. The rule on this subject is well stated in the opinion of the Superior Court in the following language: "It is a general rule that when a person is induced to become a stockholder of one of these associations by false representations fraudulently made by an agent thereof or by the fraudulent concealment of any material facts touching the condition of the company the contract is voidable at the option of the subscriber, and may be annulled by him. Such fraudulent representations or concealments, however, must be concerning facts not within the knowledge of the subscriber. Where they touch the powers of a corporation under its charter they are matters of law and will not vitiate the subscription. Where a party makes a contract he must at his peril inform himself of the legal consequences of his undertaking. So a subscriber for shares in a corporation must at his peril inform himself with regard to the provisions of its charter or of its articles of incorporation."

The appellee has failed to show a state of fact that would authorize the court to decree the cancellation of his contract of subscription for the stock of the appellant company.

The judgment of the lower court cancelling his subscription, dismissing the petition and recovering against the appellant in favor of appellee the amount of the note paid by him for one-third of his said subscription is, therefore, reversed and cause remanded, with directions to render a judgment against the appellee for the amount due on the two notes sued on. And if further proceedings are necessary to settle the affairs of the appellant company they may be had, but to be consistent with this opinion.

DAISY REALTY CO. V. BROWN.

(*Filed May* 9, 1896—*Not to be reported.*)

1. *Breach of covenant—Dedication of street—Pleading*—In this action to recover damages for breach of a covenant in a deed that the grantor "is lawfully seized in fee simple of the property conveyed," that he "has good right and full power to convey," and that the "property is free from all incumbrances," it being alleged in the petition that a part of the parcel of ground conveyed had been dedicated as a street by the recording of a plat, designating it as such, a denial in the answer of knowledge or information sufficient to form a belief as to the making of the plat and the recording of the same is not good, as the plat being a matter of public record is presumptively within defendant's knowledge; and there being no sufficient denial of the acts constituting a dedication, a denial that there was a dedication is but a conclusion of the pleader, and, therefore, not good.

2. *Pleading*—A pleading is to be construed most strongly against the pleader, therefore, when there is an allegation of want of knowledge or information sufficient to form a belief as to certain facts, followed by a denial of those facts, it must be concluded that the denial was based upon the alleged want of knowledge or information, and if the facts are such that they are presumed to be within the knowledge of the pleader the denial is not good.

3. *Dedication of street*—It is immaterial in this case whether or not the city accepted the dedication of the street, for as the defendant's grantor and others who joined in making and recording the plat made conveyances to various persons based upon the plat, those grantees acquired an interest in the streets, and they could not, therefore, be appropriated to private uses. Therefore, the defendant's covenant of seisin was broken.

O'Neal & Pryor for appellant.

N. G. Rogers for appellee.

Appeal from Jefferson Circuit Court, Chancery division.

Opinion of the court by Judge Paynter.

In a deed from the Daisy Realty Co. to Brown, purporting to convey a certain parcel of ground in Louisville, in addition to a covenant of general warranty, there appears the following language, to wit: "And the said first party further covenants with the said second party, his heirs and assigns, that it is lawfully seized, in fee simple, of the property herein conveyed; that it has good right and full power to convey the same; that the said property is free from all incumbrances."

This action is to recover damages for the alleged breach of the covenants of warranty in the deed in this, that the ground which the deed attempts to convey is part of Twenty-first street in the city of Louisville, and was so at the time this deed was made.

The petition alleges that B. H. Bristow owned 8 acres, of which the ground described in the deed is a part; that others owned land adjoining; that in 1875 some of them, together with Bristow, caused to be prepared a plat dividing the land off into lots, by streets and alleys, and in proper numbers; that the plat was signed by the parties, acknowledged and recorded; that Twenty-first street, from Dumesnil south, was laid out as a public street; that it was dedicated to public uses; that the ground which was attempted to be conveyed to Brown was the eastern half of Twenty-first street, from Dumesnil street south, to a depth as named in the deed.

An attested copy of the plat is made part of the petition.

Appellant attempts to traverse the allegations of the petition as to the platting of the land and a record of same and as to the allegation that Bristow was its grantor, by saying it has no knowledge or information sufficient to form a belief, etc. This is no traverse of these allegations of the petition. The plat is a matter of public record and presumptively within its knowledge. (Barrett v. Godshaw, 12 Bush, 598.) Certainly it was presumed to know whether or not Bristow was its immediate or remote grantor.

While the answer follows these allegations of want of information or knowledge, etc., with denials that the street was dedicated to public uses or that the city of Louisville ever accepted the dedication or became entitled to the use thereof, these denials are insufficient to traverse the allegations of the petition, because we must conclude that, as the defendant disclaimed information or knowledge of the facts, the denials were therefore made. As the pleadings must be strongly construed against the pleader it is proper to so interpret the pleading as we have in this case. Besides, where there was no traverse of the facts which, if true, showed a dedication of the street, a mere denial that there was a dedication of it to public uses would be insufficient to make the issue as to whether the ground was dedicated to public uses. It would be a conclusion of the pleader.

It is alleged in the petition, and not denied, that Bristow and the others, who joined in making and recording the plat, made conveyances to various persons of lots based upon the plats, and relying on Twenty-first street, from Dumesnil street south, as being a public street.

We accept this as being true, as it is not denied. The parties to whom such conveyances were made have an interest in the street, and Bristow and his vendees are estopped from denying that it was dedicated to public use. Bristow could not, after such conveyances, nor his vendees, appropriate the street to private uses; therefore it would be immaterial whether or not the city accepted the dedication. The instant the deed was made there was a breach of the covenants of warranty contained in the deed, and the plaintiff was entitled to maintain the action.

There was a warranty that the grantor was "seized in fee simple" of the property; that it had "good right and full power to convey the same," and that it is "free from all incumbrances." (Mercantile Trust Co. v. South Park Resident Co., 94 Ky., 271.)

The judgment is affirmed.

WELL, &C. V. DEPOSIT BANK OF EMINENCE.

(*Filed May* 9, 1896—*Not to be reported.*)

Fraudulent conveyances—Where a father collected and retained money belonging to his children, who were adults, under an agreement with them to convey to each of them a town lot, conveyances subsequently executed pursuant to that agreement are neither actually nor constructively fraudulent as to creditors. In the absence of any evidence as to the value of the lots, the court can not assume that the price was an inadequate one.

L. C. Willis and J. C. Beckham for appellants.

G. G. Gilbert for appellee.

Appeal from Shelby Circuit Court.

Opinion of the court by Judge Hazelrigg.

In this action to settle the estate of W. T. Hardin, deceased, the Deposit Bank of Eminence obtained a judgment against the administrators, and an execution thereon to be levied of assets, which was returned in substance "no property found." They thereupon filed additional pleadings seeking to set aside conveyances made by Hardin to his children, of certain lots of ground in Parkland, Jefferson county, upon the ground that the grantor was insolvent in 1887 when the grants were made, and the conveyances were wholly voluntary, and, therefore, void as to the bank's debt, which was then subsisting.

The action was abandoned as to all save the appellants, Caldwell & Lewis, sons-in-law of the grantor.

Upon final hearing the court adjudged a sale of the property to satisfy the debts of the bank, but adjudged the grantees the sum of $200 each of the purchase money upon the ground that they had in fact paid that much to the grantor for the lots in question.

It appears indisputably that in 1887 W. T. Hardin, then supposed to be solvent by his business associates, including the appellee, collected and retained the sum of about $1,500 which belonged to his children, and did so upon an agreement between him and his children, who were adults, to convey to each of them a lot in the town in question. In pursuance of that agreement he conveyed to the appellants the lots now sought to be sold for the bank's debt.

There is no proof whatever of the value of the lots at the time of their conveyance, and we can not assume even that the price was an inadequate one.

It is entirely manifest from the record that the conveyancas were neither voluntary nor fraudulent either in fact or constructively.

The judgment is reversed, with directions to dismiss the appellee's "supplemental counterclaim and cross petition" against the appellants, and for proceedings consistent with this opinion.

FRISTOE, &C. V. LAYTHAM, &C.

(*Filed May* 12, 1896—*Not to be reported.*)

1. *Vendor and vendee—Defective title—Fraud*—Where actual fraud on the part of the vendor is shown the vendee is entitled to relief on account of a defect in the title, although he is in the undisturbed possession of the land under a conveyance with covenants of general warranty.

2. *Construction of clause of will—Life estate with power of disposition*—A devise of land by a father to his children for life, with power to dispose of same by will, there being no devise over in the event of their failure to exercise the power, vests in each one the fee simple title to his part of the land, and, although the alienation of the land is expressly forbidden, a sale and conveyance by one of the children passes a good title to his share, the restriction upon alienation being void.

G. R. Gill and E. L. Worthington for appellants.

T. C. Campbell for appellees.

Appeal from Mason Circuit Court.

Opinion of the court by Judge Guffy.

This action was instituted in the Mason Circuit Court by Frank Laytham, &c., against the appellant, Silas F. Fristoe, to recover judgment on a note executed for balance due on purchase money for a tract of land sold and conveyed by said Laytham and wife to said Fristoe, and also seeking to enforce a lien on the land given to secure the payment of the purchase money.

The appellants resisted the recovery, and sought a rescission of the contract upon the ground that the appellee did not have a good and sufficient title to the land so sold and conveyed to Fristoe.

The court below sustained a demurrer to the answer, and, appellant failing to amend, judgment was rendered for the amount claimed and also for a sale of enough of the land to pay same, and the land has been sold, and to reverse the judgments aforesaid this appeal is prosecuted.

The answer of appellants sufficiently charges that the vendors were guilty of knowingly and fraudulently misrepresenting the title to the property conveyed; and it is also averred in the answer that appellant relied upon the false representations, and but for the representations and statements of vendors that they had and could convey a clear and unencumbered title appellants would not have made the purchase.

It was incumbent upon appellants to point out the defects in the title, and this they have attempted to do, and the principal question for decision is whether or not the facts stated in the answer show that appellee did not have a good title to the land sold.

It is alleged in substance in the answer that the vendor, Laytham, obtained such title as he had by virtue of a sale made under judgment of the Mason Circuit Court, in the suit of Joel Laytham v. McElwain; that Walter E. Neal had sold the land to one Kumlong, and he to McElwain, and to satisfy the purchase-money notes of McElwain the land was bought as above stated; that Walter E. Neal derived his title solely under the will of his father, Elias Neal, and that under said will he only owned a life estate in his father's land, and such other life estate of his brothers and sisters as he could purchase or as might come to his hands through inheritance by the death of a brother or sister, and could own no more and could convey no other estate than that which he held under the will or by inheritance, and such purchase would be subject to the conditions and limitations of the will.

It is further alleged in the answer that Walter E. Neal attempted to buy out, and did buy out, a number of the heirs of Elias Neal, and to rent their respective life estates from them, but all of such vendors of Walter E. Neale made the distinct reservations made in Elias Neale's will, and specially declare that should Walter E. violate the same in any way the title to the land conveyed to him shall revert to the respective vendor's legal heirs; that some of Elias Neale's children are living, and many grandchildren; that between thirty and forty acres of the land so sold is covered by the will of Elias Neale, and includes all the improvements, orchard and two springs, dwelling house, barn and garden; that it is worth in the proportion of three acres to one of the other part; that the balance of the land would be of comparatively little value without the said thirty or forty acres.

Elias Neale devised all his property to his wife during her life, and after her death all his land is bequeathed to his children, Thomas, Martha, Waller, George and Tabitha, to each an equal quantity, as exhibited in a plat accompanying the will. He then describes each parcel by numbers, each containing sixteen and one-half

acres. Then follows the following clause in the will, viz: "It being expressly understood that I give and bequeath the above-described parcels of land to my said several-named children for and during the term of their natural lives, without the power to sell or convey any right to the same during said period; and with the further condition that they are not to rent to nor allow to be occupied by any person or persons, except a brother or sister or their families, any part or parcel of said lands during the time for which it is bequeathed to them severally. Further than that I choose to exercise no control, but leave them at liberty to dispose of the same at the expiration of their several lives as they may think proper."

Appellee's contention is that, inasmuch as the answer failed to allege that the vendor is insolvent or a nonresident, it was for that reason insufficient; also that under the will Elias Neale's children took a life estate under the will as devisees, and took the fee as heirs at law of Elias Neale, and that the restriction on their power of alienation is absolutely void.

This court has often held that where actual fraud was shown on the part of the vendor the vendee was entitled to relief, although he was in the undisturbed possession under a conveyance with covenants of general warranty. Hence the contention of appellees in that respect can not avail, but it seems to us that, inasmuch as the children of Elias Neale took under his will a life estate, with full power to dispose of the land at their death, they became invested with a complete and perfect title.

It will be seen that no provision is made in the will respecting the land in the event the power given should not be exercised. It is true that the will forbids the sale during life, also forbids the occupancy or use of the land by any person except some of the devisees or their families, but these provisions were manifestly intended for the benefit of the several devisees, and it is not claimed that any of the devisees are complaining or seeking to interfere with appellants' enjoyment or possession of the land; hence it seems to us that the answer failed to show a valid defense.

The judgment of the court below is, therefore, affirmed.

MARION NATIONAL BANK V. PHILLIPS' ADM'RS, &C.

(*Filed May* 13, 1896—*Not to be reported.*)

1. *Cross appeal*—An appellee can not complain by cross appeal of a judgment in favor of his co-appellee, as a cross appeal can affect only the appellant.

2. *Misappropriation of proceeds of note*—Where notes were executed to a bank to be substituted in renewal of other notes upon which the sureties were bound, and, notwithstanding the cashier knew this, the proceeds were otherwise appropriated, the chancellor properly refused to render judgment in favor of the bank upon the notes. While it is not entirely clear that the cashier knew the purpose for which the notes were executed, the finding of the chancellor to the effect that he did have such knowledge will not be disturbed.

3. *Protest—Notice of dishonor*—As the parties were joint makers of the notes and the paper was not placed on the footing of a foreign bill of exchange, there was no necessity for protest or notice of dishonor.

W. J. Lisle for appellant.

S. A. Russell, Samuel Avritt and J. P. Thompson for appellees.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Hazelrigg.

On this appeal the bank is the only appellant, and complains that the trial court ought to have given it judgment against the appellees, Lee and others, on various notes signed by them as the sureties of Warren. It does not complain because the conveyance by Warren to Lee of the Spalding avenue property was not set aside as fraudulent, and, therefore, the co-appellees of Lee can not complain of this feature in the judgment for the reason that their cross appeal affects only the appellant and not their co-appellee, Lee. (McKay v. Mayes, 17 KY. LAW REP., 827.)

For the same reason the judgment giving to Lanham & Barr a preference for their claim as mechanics can not be disturbed. Indeed while a brief is filed for them they are not in fact parties to this appeal.

It appears that while a judgment was given the bank on some of the notes it was referred on others, for the reason that they were executed to be substituted in renewal of other notes to the bank upon which the sureties were bound, and, notwithstanding that the cashier knew this, the proceeds were otherwise appropriated.

It is not entirely clear that the cashier knew the purpose for which these notes were executed by the appellees, but the finding of the chancellor to the effect that he did have such knowledge must be given much weight, and his judgment on the facts will be approved. On the cross appeal it is the contention of counsel that judgment should not have been given on any of the notes against the sureties, because they were entitled to notice of the dishonor of the paper at maturity, and as no such notice was given or the paper protested they are released. Such is not the law. The parties were joint makers of the notes, joint obligors and primarily liable to the bank. There were no endorsers and the paper was not placed on the footing of a foreign bill of exchange.

Judgment affirmed, both on the original and on the cross appeals.

The Kentucky Law Reporter.

EDITOR:
WALTER G. CHAPMAN, ... Frankfort, Ky.

VOL. 18. SEPTEMBER 15, 1896. NO. 6

KENTUCKY COURT OF APPEALS.

AMERICAN ACCIDENT CO. v. FIDLER'S ADM'X.

(Filed May 12, 1896—*Not to be reported.)*

1. *Accident insurance—Plea in abatement*—In an action upon an accident insurance policy which provided that no action should be instituted until thirty days after proof of loss, a plea that the action was instituted within that time was a plea in abatement, and as it was not offered until the next term after a plea in bar had been filed it came too late.

2. *Waiver of notice—Question for jury*—The requirement of the policy that immediate notice of the accident or death shall be given may be waived by the company or its general agent; and the evidence in this case as to whether there had been such waiver being conflicting, it was a question for the jury.

3. *Expert testimony*—The opinions of nonprofessional witnesses are never received where the inquiry is into a subject-matter, the nature of which requires some peculiar habit, study or scientific knowledge to enable one to understand it and form a correct judgment thereon.

It is not competent for persons who are neither professional nurses nor physicians to testify that a person died from the effects of a fall and not from typhoid fever.

4. *Same*—Where the cause of the death of a person is in question nonprofessional witnesses may detail his symptoms as they appeared to them from day to day, where they are such as one of ordinary observation could detect, and on those statements a hypothetical case can be presented to those skilled in diseases, and their opinions given as to the cause of death.

C. A. Hardin and Phelps & Thum for appellant.

Bell & Bell for appellee.

Appeal from Anderson Circuit Court.

Opinion of the court by Chief Justice Pryor.

This action is on a policy of insurance against death by accident from external causes.

The main question is, did the insured die from typhoid fever or was his death from a fall, caused by his body coming in contact with

a telephone wire that threw him some ten feet on his back and seriously injuring him?

There are some preliminary questions to be determined before going to the merits of the controversy.

The appellant offered to file a plea in abatement after pleading to the merits, and at a term subsequent to the filing of the plea in bar. That plea came too late, and the fact the policy provides that no action shall be instituted until thirty days after proof of loss is in abatement of the action only, and will not be heard after making up the main issue by proper pleading.

It is also insisted the appellee is not entitled to recover because of her failure to give immediate notice of the accident or death as the policy required. Such a notice may be waived by the company or its general agent, as well as the necessity of proof of loss, which seems to have been done in this case. At least the jury so found. The agent advised the widow and administratrix she had twelve months in which to make this proof and give the notice, and in this she is sustained by other testimony. The agent denies any such waiver or that he gave such advice, and it became a question for the jury as to whether or not there was a waiver, and from the defense in this case if the proof had been made, a refusal to pay would have followed.

This judgment must, however, be reversed, because of the admission of testimony of nonexperts to prove the deceased died from the effects of the fall and not from typhoid fever. The widow of the dead man, her sister and mother, also J. C. Willis, were each and all permitted to testify, not only to the symptoms of the patient such as would necessarily come to their knowledge when nursing him, but from those symptoms to give it as their opinion the deceased did not have typhoid fever. They did not pretend to be experts in medical science, or to have nursed more than two or three typhoid patients. The attending physician said the deceased died of typhoid fever, and the fall was not the cause of the death or the cause of the disease, and in this he is sustained by other testimony from learned medical men, and we know of no rule of evidence that would permit the testimony of those unskilled in the profession to speak as experts on such a subject. The symptoms manifested by the patient from day to day, and such as one of ordinary observation could detect, were properly allowed to be detailed by the witnesses and to go to the jury as evidence.

On these statements a hypothetical case could be, as was done in this case, presented to those skilled in the character and treatment of diseases, and their opinions given as to the cause of the death of plaintiff's intestate.

The case of Accident Ins. Co. v. Thomas, 13 KY. LAW REP., 593, where the opinion of the nurse was received, it appeared the witness had been a professional nurse for half a century, and his familiarity with the disease was unquestioned, and entitled his opinion to great weight; but in this case the opinions of the four witnesses are not based on any such knowledge of diseases as would entitle their opinions to be considered by the jury.

In Rogers on Expert Testimony, section 6, page 10, it is said: "But the opinions of nonprofessional witnesses are never received where the inquiry is into a subject-matter, the nature of which requires some peculiar habit, study or scientific knowledge to enable one to understand it and to form a correct judgment thereon."

The witness may state the facts in relation to the issue raised, and his opportunity for forming an intelligent opinion as to the condition

of the sick man, but where the witness is not versed by reason of his want of study or skill in regard to the subject about which he is asked to form an opinion, such testimony is incompetent and should not be permitted to go to the jury.

When the question involved does not lie within the range of common experience or common knowledge, but requires special experience, then the opinions of witnesses skilled in the particular science must be resorted to, and it is manifest in this case the opinion of nonexperts was clearly inadmissible. (Rogers on Expert Testimony, 8.)

Reversed and remanded for proceedings consistent with this opinion.

The court delivered the following response to a petition for rehearing June 17, 1896:

If counsel had taken the pains to examine Rogers on Expert Testimony in the library he would have found the citation made by the court to be correct. In rendering the opinion page 6 was given instead of page 10.

It will be conceded that from the necessities of the case, as said by the same author, it is sometimes essential that the opinions of ordinary witnesses should be received, and this court has gone so far as to permit the opinions of witnesses (nonexperts) as to the sanity or insanity of those alleged to be incompetent to transact the business affairs of life where the witness has known the habits, character and conduct of the party, and from ordinary observation would be able to judge of the condition of his mind, but this court has never adjudged, when the character of the case requires scientific knowledge to enable one to form a correct judgment, that one not an expert and who has never studied or investigated the question at issue, nor whose personal observation and experience has not been sufficient to enable the witness to understand the question, is a competent witness to prove that which can only be acquired by a scientific knowledge of the subject, or from an experience that enables one to understand the issue. The opinion of one having no experience in the science of surgery should have no weight when eminent surgeons are present and have testified that a limb was improperly amputated, or that it was not necessary to save the life of the patient, nor where the disease is pronounced to be typhoid fever by educated physicians is it competent to prove by one inexperienced in the treatment of diseases, and who had never made a study of medicine, that the physicians were mistaken.

It is said in Rogers on Expert Testimony that "the testimony of experts is inadmissible upon a matter concerning which, with the same knowledge of the facts, the opinion of anyone else would have as much weight. It is admissible when the facts are obscure and can only be made clear by and through the opinions of persons skilled in relation to the subject-matter of inquiry."

It is insisted that this rule is not to be followed, and that one unskilled in the treatment of diseases, either as nurse or otherwise, will be permitted to contradict the testimony of an expert by giving an opinion adverse to his. Such is not the law.

Petition overruled.

THOMAS v. LOUISVILLE & NASHVILLE R. R. CO.

(*Filed May* 13, 1896—*Not to be reported.*)

Negligence—Pleading—If the petition in an action for negligence specifies the negligence complained of, the plaintiff can not recover upon showing a different character of negligence; and the same rule applies if the plaintiff specifies the particular officer or agent who is charged with the negligent act.

In this action against a railroad company to recover damages for personal injuries, the petition alleging that the injuries were caused by the negligence of the engineer, there can be no recovery on account of the negligence of the fireman.

B. F. Proctor and Thos. H. Hines for appellant.

J. A. Mitchell, H. W. Bruce and Wm. Lindsay for appellee.

Appeal from Warren Circuit Court.

Opinion of the court by Judge Hazelrigg.

While attempting to effect a coupling of cars at Guthrie the appellant, a brakeman, was somewhat seriously injured by the backing of the live part of the train on him without notice, and, as he testifies, without any signal from him.

On the other hand the fireman, who was receiving his signals, testifies that the appellant signaled for the train to move back slowly, and this signal was communicated to the conductor, who obeyed it as directed, and that while the train was being moved according to the appellant's signal he was hurt by his own negligence.

It appears that the engineer was at his post and attended to his duties with all proper care. It is not contended otherwise. In his original petition the appellant attributes his injury to the gross negligence of the agents and servants of the company who were his superiors, but in an amendment filed to make his original pleading more definite he avers that his injury was caused by the gross negligence of the engineer in backing the train on him without a signal so to do, and that this is the negligence complained of in his original petition.

This averment was put in issue, and manifestly furnished the only issue which the defendant was called on to meet. The instructions properly confined the jury to a consideration of this issue and forbid a recovery for negligence on the part of the fireman.

It is well settled that if the petition specifies the negligence complained of the plaintiff can not recover upon showing a different character of negligence, and the same rule applies if the plaintiff specifies the particular officer or agent who is charged with the negligent act. Any other rule would put the defendant at a disadvantage and mislead it by tendering a false issue.

The verdict of the jury, after proper instructions, was against the plaintiff, and the judgment must be affirmed.

TAYLOR V. HARRISON'S EX'TX.

(*Filed May* 13, 1896—*Not to be reported.*)

Judgment supported by the evidence—The evidence is sufficient to support the judgment of the chancellor disallowing appellant's claim against the estate.

of a deceased attorney for an amount which was allowed to decedent as additional compensation for his services, as appellant's attorney, for which services, as appellant alleges, he had already been paid in full. The evidence fails to establish the charge that the order of court directing the payment out of funds belonging to the estate of appellant's deceased husband was surreptitiously obtained by the attorney, and also negatives the claim that appellant was in ignorance about it.

J. P. Thompson for appellant.

Finley Shuck for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Landes.

In an action commenced in the Marion Circuit Court by Mrs. Octavia Harrison, who is the widow as well as the executrix and sole devisee of W. B. Harrison, deceased, the appellant was made a party defendant, to whom it was alleged the said W. B. Harrison was indebted at the time of his death upon two notes, aggregating the sum of $2,000.

The appellant is the widow of Bannister Taylor, deceased, and after the death of her husband employed the said W. B. Harrison as her attorney to represent her in the proceedings to establish a paper which was alleged by her to be his last will. The probate of this instrument was resisted by some of the heirs of Bannister Taylor, and after a long and bitter contest, which was carried from the county court of Marion county to the circuit court, and finally to this court, extending over a period of eight or nine years, the contestants were successful, and the paper was decided not to be the last will of Bannister Taylor. In the meantime the appellant was appointed curatrix of the estate of her husband, and after the final determination of the contest over his alleged will she was appointed administratrix of his estate. During the whole time, from the beginning of the proceedings to establish the will to the final judgment in those proceedings, W. B. Harrison acted as the attorney of the appellant, both in the contest over the will and in advising her as to the management of the estate which she had charge of as curatrix, consisting of both real and personal property, and worth probably no less than $50,000. In all of this business he was for most of the time her sole attorney, and after this he was employed by her to defend an action against her which was brought to surcharge her accounts as curatrix and administratrix of the estate, and was pending at the time of his death in April, 1891.

The claims which the appellant held against W. B. Harrison were for money which she had in hand belonging to the estate of her husband pending the action to surcharge her accounts, and the indebtness was evidenced by two notes or acknowledgments executed by W. B. Harrison to her, one for $1,500, bearing date the 23 day of September, 1887, the other bearing date the 14 day of October, 1887, for $500, and both were made payable, with interest at the rate of 6 *per centum* per annum, at the termination of the said action to surcharge.

These notes were properly verified by J. P. Thompson, administrator *de bonis non* of Bannister Taylor, deceased, who was made a party defendant on his petition, in which he set them up as claims against the estate of W. B. Harrison, deceased. He claimed them, too, as belonging to him as administrator of the estate, but it was afterwards conceded that they belonged to the appellant. In addi-

tion to these claims the appellant set up a claim for $750 which she alleged W. B. Harrison had, without right and without her knowledge and consent, procured, to be allowed and paid to him by order of court as additional compensation for his services as her attorney, when she alleged he had been paid in full for all of his services except an amount due him and which was admitted to be a proper credit on the said note or acknowledgment for $1,500 for services rendered in the Court of Appeals of date the 15th day of June, 1890.

As an offset the appellee set up a claim for the services rendered by her husband as attorney of the character and for the period above described, and for an amount which the testimony tended to establish was just and right for the amount and character of services rendered, credited by what the proof showed he had received during the time from the appellant or from the estate of Bannister Taylor. The amount claimed for the whole service was $3,750, and the sum actually received by W. B. Harrison therefor, admitted or proved to have been $1,550, and the balance it was sought to have allowed as a credit on the two notes, aggregating $2,000, thus leaving a balance still going to the estate of W. B. Harrison on said account. On final hearing the lower court adjudged that the appellee was not entitled to any further credit on the two notes aforesaid on account of her claim for the services of her husband as attorney set up by her, and gave a judgment against appellee as executrix for the full amount of the said notes, with a credit on the $1,500 note for $100 "for legal services in the Court of Appeals of date the 15th day of June, 1890." At the same time the court adjudged that the appellant take nothing on her claim set up by her for $750 alleged to have been wrongfully received by W. B. Harrison under said order of court procured to be made by him without right and without her knowledge and consent. Both parties excepted to the action of the court upon their respective claims, and each of them prayed an appeal to this court.

The case now before us is on the appeal of Mrs. Taylor. It seems that the court based the disallowance of the claim of the appellee for additional services of her husband as attorney for the appellant on the fact that although the claim was fully proved as to the amount of services and their value, Mr. Harrison, as the proof warranted the court in finding, had himself placed a value of $1,550 on his said services, and that the court and all parties were bound thereby.

The only question that the court had to decide on that claim was one of fact. But that branch of the case is not before us, because although the appellee prayed an appeal from the judgment disallowing her claim for additional services of her husband for the appellant, she has not prosecuted her appeal, either by original or cross appeal. Consequently the judgment on that branch of the case can not now be reviewed. The question respecting the claim of the appellant for the $750 was also a question of fact, and it appears that the whole case was very carefully considered by the lower court. The evidence wholly failed to establish the charge that the order of the court directing the payment of this sum out of funds belonging to the estate of Bannister Taylor was surreptitiously obtained by W. B. Harrison, and on the other hand it negatived the claim that the appellant was in ignorance about it. True she may not have known personally, and doubtless did not know about it at the time, or for a long time afterward, but her son-in-law and agent, who, the evidence showed, was very careful in attending to the litigation for her, certainly had the opportunity to know all about it, and he testified

to facts showing that he did know of it some time previous to the death of W. B. Harrison. And this $750 was part of the $1,550 which W. B. Harrison received for his many years of professional service for his client, and the incident was an important part of the evidence to the lower court of the estimate of W. B. Harrison as to the value of his services.

The judgment disallowing this claim accords with our view of what was right and just, as does also the judgment requiring the appellant to pay all the costs accruing or arising out of the contest over the said claim, and upon the whole case the judgment is affirmed.

PETTIT V. MARBLE.

(*Filed May* 13, 1896—*Not to be reported.*)

1. *Second appeal—Res judicata*—The conclusions announced by the Superior Court upon a former appeal in this case must be accepted as the law of the case, however erroneous they may appear to this court.

2. *Practice—What is part of record*—An amended petition filed in vacation, and upon which summons was issued and served, having been treated as part of the record by counsel for defendant in his brief filed with the trial court, and also considered by the court as part of the record, as evidenced by special reference thereto in its opinion, it must be treated as a part of the record here, although never noted of record, and, although no answer was filed, the plaintiff having sought by evidence to sustain its allegations, and no allegation which it contained being taken as true in the preparation of the case or on the trial.

3. *Practice in Daviess Circuit Court*—Although the plaintiff could not have forced a trial of the case at the time when it was tried because he did not make a request of the clerk of the court to place the case on the equity trial docket before the first day of the trial as required by the special act regulating the practice in the Daviess Circuit Court, yet the consent of the defendant to a submission and trial authorized the court to proceed with the case as if it had regularly been placed on the equity trial docket by the clerk.

4. *Conversion*—The Superior Court having held on the former appeal that the sale by defendant of timber which he and plaintiff owned jointly could be treated by plaintiff as a conversion of his interests, the fact that defendant rescinded the contract of sale did not change the legal effect of the act which the Superior Court had held to be a conversion of the timber, and even if it did the subsequent sale by defendant to another was, under the law as determined on the former appeal, still such a conversion of plaintiff's interest as entitled him to maintain this action.

Sweeney, Ellis & Sweeney for appellant.

C. S. Walker for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Paynter.

By the opinion of the Superior Court on the former appeal it was determined that Marble was the owner of one-half of all the timber on the 1,400-acre tract suitable for manufacturing purposes; that Marble is not liable to render services in converting timber into lumber because, in the language of the opinion, "the dissolution of the firm of Pettit & Marble, and the placing of their property in the Owensboro Lumber Co. (except this timber which was expressly re-

served) was a sufficient consideration for releasing Marble of his duty to render service without compensation;" that Marble had the right to treat the sale of timber by Pettit to Kerr "as an absolute conversion—a complete destruction of his estate."

The Superior Court had complete jurisdiction of the appeal, and the conclusions which it enunciated must be accepted as the law of this case, however erroneous they may appear to this court. This case is not here on appeal from the Superior Court.

The amended petition which was filed by Marble on the return of this case, in which it was alleged that Pettit and Kerr had rescinded the contract of the sale of the timber; that Pettit had sold the land, including the timber, to Hill, and that Hill had sold the timber, etc., must be treated as part of the record in this case. It does not appear to have been filed on a rule day under the provisions of the special act relating to the filing of pleadings in vacation with the clerk of the Daviess Circuit Court, but was filed in vacation, and upon which a summons was issued and served on Pettit and Hill. They did not file an answer to it, nor does it appear to have been noted of record.

Testimony was taken in relation to the allegations which it contained. In the brief filed by counsel for Pettit with the trial judge it was treated as part of the record. In the opinion of the court it was regarded as part of the record by special reference thereto. No allegations which it contained were taken as true in the preparation of the case, nor by the court on the trial of it.

The appellee sought by evidence to sustain the allegations of the amended petition. The appellee could not have forced a trial of the case at the term when it was tried because appellee does not seem to have made a request of the clerk of the court to place the case on the equity trial docket, as required by the special act *supra*, before the first day of the term during which the judgment was rendered.

The appellant seemed to have desired a trial of the case as well as did the appellee, so, by consent, the case was submitted and tried. His consent to the submission and trial of the case certainly was a waiver of any right he had to have required before trial that the case be placed on the equity trial docket in the manner provided by the act. The consent authorized the court to proceed with the case as if it had been regularly placed on the equity trial docket by the clerk.

The fact that Pettit rescinded his contract of sale with Kerr did not nor could it change the legal effect of his act which the Superior Court held to be a conversion of the timber. However, if it did, the sale to Hill under the law as determined on the former appeal as to the effect of Pettit's act in selling the timber, there was still such a conversion of Marble's interest in the timber as entitled him to maintain this action.

Certainly a voluntary rescission of the contract of sale by Pettit and Kerr (to which Marble was no party) pending the suit, and a sale by Pettit to Hill of the timber, does not remove the case from the conclusive effect of the law as determined by the Superior Court. The testimony abundantly sustains the judgment of the court fixing the amount of recovery.

The judgment is affirmed.

MUIR, &c. V. PETTIT.

(*Filed May* 13, 1896—*Not to be reported.*)

Execution sale set aside—Inadequacy of price—Failure to divide property—Where the life estate in real property was sold under execution for $29.60, the fee in the property being worth from $2,500 to $3,000, and the execution debtor being only thirty-seven years of age, the chancellor properly set aside the sale and sheriff's deed, the property, which was susceptible of division, having been sold by the sheriff as a whole without any examination and without any knowledge of its condition, and the amount for which it was sold being in excess of the amount of the execution, including interest and costs.

Z. Gibbons for appellants.

R. J. O'Mahoney and T. T. Forman for appellee.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Hazelrigg.

This action was brought by the appellee to set aside a deed of his life interest in certain real property in Lexington, made by the sheriff in virtue of a sale under an execution against the appellee, and at which sale the appellant, G. W. Muir, became the purchaser at the price of $29 60.

The value of the fee in the property is shown to have been from $2,500 to $3,000, and the age of the execution debtor was thirty-seven. Steps looking to the redemption of the property miscarried, probably because of the state of imbecility under which the debtor then labored, and, at the expiration of the time for redemption—the equity of redemption having also been sold and bought by appellants—conveyance was made in due form by the sheriff.

The property was covered by two houses—one a two-story brick, of the rental value of some $18 per month, and the other a small frame, of the value of about $6 per month, with a fence conveniently dividing the premises, and they were, in fact, so rented and occupied at the time of the sale in 1886 by tenants of the appellee; yet for this pittance the sheriff, without an examination of the property and without knowledge of its condition and capacity for division, levied on and sold the whole to one of the appraisers of the property. It further appears that the amount for which the property was sold was in excess of the amount of the execution, including interest and costs. The chancellor promptly set aside the deeds on final hearing, and ordered an accounting between the parties for the value of rents, improvements, etc., since the occupancy by appellants.

This judgment meets with our approval and is affirmed.

MYERS' ADM'R V. DOUGLASS.

(*Filed May* 15, 1896.)

Verification of pleading—Waiver of objection—An objection to a pleading upon the ground it is not verified by oath must be made before the commencement of the trial, otherwise it will be regarded as waived.

In an action upon a promissory note an answer pleading *non est factum* should have been verified by oath, but an objection to it upon the ground it was not so verified came too late after trial and verdict.

Hill & McRoberts for appellant.

W. G. Welch and R. C. Warren for appellee.

Appeal from Lincoln Circuit Court.

Opinion of the court by Judge Paynter.

This action was on a promisory note. The plea was *non est factum*. After a trial and verdict for the defendant the plaintiff moved the court for a judgment for him, notwithstanding the verdict, because the answer was not verified.

Until after the verdict no question seems to have been made that there was no verification of the answer. There is no question made nor could there be that the answer did not contain facts sufficient to constitute a good plea of *non est factum*.

Section 473, Kentucky Statutes, provides that "the execution of a writing on which a suit or defense is founded or its assignment shall only be denied by answer or other pleading verified by oath."

It is obvious that the answer should have been verified by oath. The court, on having its attention called to the want of verification of the answer, could have refused to allow it to be filed; or, having permitted it to be filed without verification, then certainly on defendant's refusal to verify it would have authorized the court to have stricken it from the record. There was no objection to the filing of the answer, nor was there any motion to require the defendant to verify it.

Section 138, Civil Code of Practice, provides that "no objection shall be taken after the commencement of the trial to any pleading for the want of or a defect in the verification."

While the statute requires the verification of the answer, yet the Code provides when the objection shall be made. If not then made it is waived.

The judgment is affirmed.

AULTMAN & CO., &C. v. SMITH.

(*Filed May* 15, 1896—*Not to be reported.*)

Verdict supported by evidence—In this action by appellant to recover of appellee the price of a separator and a straw stacker sold to him by appellant, the testimony conduces to sustain appellee's contention that the stacker, which was bought by him some time after he bought the separator, was bought upon condition that if the separator, of which complaint had already been made, failed, after a further test, to do satisfactory work, appellant would take both back, and, the testimony being conflicting, this court will not disturb the finding of the jury upon that issue.

Hobson & O'Meara for appellants.

W. H. Marriott for appellee.

Appeal from Hardin Circuit Court.

Opinion of the court by Judge Hazelrigg.

The appellee bought a separator, and later on a straw stacker of the appellants, and declining to pay for them this suit followed.

The proof conduces to show that the separator proved substantially worthless during the season of 1892, and appellee offered to surrender it, but was induced to keep it for further trial upon a contract that it would be made entirely satisfactory to him. Thereupon appellee, at the solicitation of the local agent, executed his note for a sum less than the original purchase price, but had put in it the words "signed under attached guarantee."

This guarantee was to be executed by the company and sent to the appellee, which, however, was never done, nor was the machine ever made fit for service, though notice of the unfitness was given the agent.

This note was executed in February, 1893, and in the spring or early summer of that year the appellee bought the stacker upon the condition, as he testifies, that if the separator failed to do satisfactory work the company would take them both back, the appellee having the season of 1893 within which to test the separator. The appellant contends that he sold the stacker to the appellee for $150, and at the same time settled the controversy over the separator by appellee agreeing to pay $250 therefor, provided only that the separator worked all right, and if it did not then appellee was to give the company immediate notice; that the company not having received any such notice, the purchase price of both machines was due under the terms of the agreement.

The proof is conflicting, but it certainly conduces to sustain the appellee. The court carefully submitted the theory of the plaintiff to the jury in its first instruction, under which, if the jury had adopted the company's contention, a verdict for $400 would have resulted, and in subsequent unobjectionable instructions submitted the law looking to the release of the appellee or to his right to damages for breach of the warranty set up by him.

There was no error of a substantial kind in the rulings of the court on the introduction of testimony.

Judgment affirmed.

HARLAN, &C. V. BRAXDALE'S ADM'R.

(*Filed May* 15, 1896—*Not to be reported.*)

1. *Appellate practice—Motion for new trial*—Judgment having been rendered on the 24th day of the month, a motion for new trial made on the 27th day of the month was too late, and therefore the case is to be treated as if there had been no motion for new trial.

2. *Same*—In the absence of a motion for new trial in an ordinary action in which the law and facts have been submitted to the court, nothing can be considered by this court except the question whether the pleadings stated a cause of action and whether the evidence heard and properly presented by a bill of exceptions authorized the judgment, and, there being no bill of exceptions in this case, the only question for review is as to the sufficiency of the pleadings.

3. *Reversible errors*—In the absence of the evidence this court can not say that the lower court erred in refusing to allow certain credits indorsed on the note sued on.

R. J. Breckinridge for appellants.

R. P. Jacobs for appellee.

Appeal from Boyle Circuit Court.

Opinion of the court by Judge Paynter.

This action was brought on three promissory notes, the execution of which is admitted.

The law and facts were submitted to the court. The parties did not request it, and the court did not state the conclusions of fact found separately from the conclusions of law.

The judgment was rendered on the 24th day of January, 1894, and on the 27th day of January, 1894, the motion and ground for a new trial were entered. The application for a new trial was not made within three *judicial* days after the judgment was rendered; therefore, the case must be considered as if no application for a new trial had been made. (White v. Crutcher, 1Bush, 472.)

It follows that nothing could have been brought to this court for review except the inquiry as to whether the pleadings stated a cause of action, and whether the evidence heard and properly presented by a bill of exceptions authorized the judgment. (Helm v. Coffey 80 Ky., 176.)

There is no bill of exceptions. It follows that the only question for the court to review is the sufficiency of the pleadings. The sufficiency of the petition was not questioned below, nor is it suggested on this appeal that it does not state a cause of action. The petition does state a cause of action.

It is alleged in the petition that no part of the notes have been paid. It is alleged in the answer that certain payments have been made on the notes. On one of the notes the answer pleads two payments, one for $60 and the other for $168, and claims the endorsements on the back of the note show them.

These allegations are traversed by the reply, but a payment of $68 is admitted. The court found that the proper credit was $68. It is urged that the endorsement on the note sustains appellant's contention. The evidence which the court heard is not before us. We can not tell what evidence was heard or what explanations were made as to the meaning of the endorsements on the back of the note. In the absence of such evidence we must conclude it authorized the conclusion of the court.

The judgment is affirmed.

GUTHRIE, &C. V. SMITH.

(*Filed May* 16, 1896—*Not to be reported.*)

Appellate jurisdiction—Amount in controversy—Upon appeal by a defendant the value in controversy is the amount of the judgment rendered against him and not the amount claimed by plaintiff. And as the amount of the judgment rendered against appellants in this case is less than one hundred dollars this court has not jurisdiction of the appeal.

Fenton Sims and J. C. Dabney for appellants.

R. A. Burnett for appellee.

Appeal from Trigg Circuit Court.

Opinion of the court by Judge Guffy.

J. G. Smith instituted this action in the Trigg Quarterly Court against T. G. Guthrie, &c.

It is substantially alleged in the petition that by the order and direction of the defendants, T. G. Guthrie, G. S. Austin and J. M. Taylor, that the defendant, B. F. Lenean, wrongfully seized and then held one surrey, the property of the plaintiff, of the value of $158, and that plaintiff had been damaged thereby in the sum of $100. The defendants answered but did not claim title to the surrey, nor show a right to seize and hold the same, although they denied the wrongful seizure, etc.

The judgment of the quarterly court shows that the surrey was delivered to plaintiff, and his right to same not being controverted by defendants, but plaintiff's right to damages being controverted a jury trial was awarded and the jury returned the following verdict: "We, the jury, find for the plaintiff $35.25; Esq. Guthrie, $15; George Austin, $15; Lenean, $5; Esquire Taylor, 25 cents.

"W. L. DUNN, *Foreman.*"

Thereupon the court rendered judgment against each of the parties for the sums preceding their names. Afterwards the appellants, Guthrie and Austin, appealed to the Trigg Circuit Court, executing a joint appeal bond. The circuit court, on motion of appellee, dismissed the appeal, as we suppose, upon the ground that the court had not jurisdiction of the amount in controversy, and from that judgment Guthrie and Austin have appealed to this court. It is not necessary to decide whether or not the circuit court erred in dismissing the appeal, for it is clear that at most there is not exceeding $35.25 in controversy, hence this court has no jurisdiction of this appeal.

The case of Dunning v. Lacey, 96 Ky., 611, conclusively settles the law of this case.

It results, therefore, that this appeal must be dismissed.

TRENT, &C. V. COLVIN.

(*Filed May* 15, 1896—*Not to be reported.*)

1. *Grounds for new trial*—The statement that the verdict is "contrary to law" is too general and indefinite to be considered as a ground for new trial.

2. *Forcible detainer—Description of property*—A warrant of forcible detainer need not set out the boundaries of the land alleged to be detained. A general description is sufficient.

In this case a description of the property as "one house and the lower portion of the farm on the waters of Beaver creek, in Anderson county," is sufficiently definite.

C. B. Butner and Jno. I. Felix for appellants.

W. H. Morgan and L. H. Carter for appellee.

Appeal from Anderson Circuit Court.

Opinion of the court by Judge Landes.

This is an appeal from a judgment of the Anderson Circuit Court, rendered on the trial of a traverse by the appellants of the verdict of a jury against them upon an inquest for a forcible detainer, held by a justice of the peace of Anderson county, under a warrant sued out on the 21st day of February, 1894, by the appellee, charging that the appellants did, on a certain date, "forcibly detain from the said John Colvin one house and the lower portion of the farm on the

waters of Beaver Creek, in Anderson county, * * * which the said C. S. Trent and John Trent, tenants of said John Colvin, now hold against him." By their verdict the jury in the circuit court found the appellants guilty of the forcible detainer charged in the warrant, upon which a judgment of restitution was rendered. Appellants entered their motion for a new trial in due time, alleging for grounds, first, error in the instructions to the jury; second, irregularity of the jury and of the prevailing party which prevented them from having a fair trial; third, surprise which could not have been provided against; and, fourth, that the verdict was not sustained by sufficient evidence *and was contrary to law.*

It appears from the record that, by consent of parties, the court instructed the jury orally, but the record does not show what the instructions were or that they were excepted to by the appellants. Besides, the record does not discover any irregularity or improper conduct, either on the part of the jury or of the appellee, nor is there anything in the record to show that, by reason of surprise, their substantial rights were prejudiced. So that the three last mentioned grounds for a new trial have nothing to sustain them, nor was there any attempt made by counsel in their brief to sustain them.

With regard to the statement that the verdict was "contrary to law," that, as has often been held, is too general and indefinite a statement to admit of consideration as a ground for a new trial, where there is no specification of particular errors alleged to have been committed by the court during the progress of the trial. (Jones v. Wocher, &c., 90 Ky., 230.) So that the only questions before us are: first, whether the warrant is sufficient to support the judgment; and, second, whether the evidence is sufficient to sustain the verdict.

Upon the first question, it appears that, at the beginning of the trial, and before the jury was impaneled, the appellants moved the court to quash the warrant on the ground that the description therein of the land charged to have been forcibly detained was too indefinite and that the court overruled the motion. In our opinion the desciption of the land and premises set out in the warrant was sufficient for the purpose of identifying what the appellants were charged with forcibly detaining against the appellee. It is not required in such cases that the boundaries of the land, the possession of which it is sought to recover, shall be set out in the warrant. It is only necessary that the warrant shall contain a general description of it. (Civil Code, section 454; Moore v. Massie, 3 Littell, 297.) In this case the appellants were charged to be the tenants of the appellee and with detaining from and holding against him "one house and the lower portion of the farm on the waters of Beaver creek," in Anderson county, and this certainly was sufficient to inform them what house and premises the appellee wanted them to return to him, the possession of which, if they were his tenants, they received from or held under him. We hold, therefore, that the court did not err in refusing to quash the warrant.

Upon the question as to the sufficiency of the evidence to sustain the verdict, very little need be said. We think there is no doubt, from the evidence, that the appellants agreed to hold the land as the tenants of the appellee after he purchased it from the Mansfield Machine Works, and this agreement was binding on them, notwithstanding the fact that the appellee, at the time, had only a bond for the title to the property. It is true that only one of the appellants signed the rent contract, but the other, according to his own testimony, knew of the contract and the nature and object of it, and

continued to live on the premises, after it was executed, with the one who signed it, and, so far as the record shows, he never notified the appellee that he claimed the land against him or that he would not hold it under him. We think the evidence fully justified the jury in finding as they did, and that their verdict ought not to be disturbed. The appellants, however, are not precluded by the verdict and judgment from asserting in the proper action any claim they or either of them may have to the land as against the appellee, growing out of any arrangements that may have been made between them with regard to the purchase of it by the appellee. But they can not be permitted to repudiate their contract with the appellee after he has performed what he undertook to do with reference to the land, which, according to the evidence, was undertaken and performed at the request and for the accommodation of the appellants.

There being no error, the judgment is affirmed.

CAVANAUGH V. WILLSON.

(*Filed May* 16, 1896—*Not to be reported.*)

1. *Appearance*—Where a defendant, although not summoned to answer the petition, entered her appearance, and the allegations of the petition were on her motion taken to be controverted as if she had answered, the court had jurisdiction of her person, and a judgment against her was not void.

2. *Execution sales—Writ of possession*—Where land sold under execution had previously been sold under execution in favor of another creditor, the subsequent redemption of the land by the debtor from the first sale inured to the benefit of the purchaser at the second sale, and he, having obtained a sheriff's deed, is entitled to a writ of possession. He can not be regarded as having purchased merely the equity of redemption and as having lost the benefit of his purchase by failing to redeem the land.

3. *Same*—As the debtor did not in her answer ask that the purchaser be required as a condition of being put in possession to indemnify her for the amount she paid to redeem the land, the lower court was not authorized to grant such relief.

Lane & Burnett for appellant.

A. E. Willson, W. W. Thum and Burton Vance for appellees.

Appeal from Jefferson Circuit Court, Chancery division.

Opinion of the court by Judge Lewis.

March 19, 1888, in certain consolidated actions personal judgments were rendered in favor of Kate Riley and others against Catherine Cavanaugh and others. From each of those judgments an appeal was prayed by Catherine Cavanaugh to the Superior Court and a supersedeas bond executed. But the transcript not having been filed within the time required by the Civil Code, the appeal was, on motion of appellee, dismissed with damages.

Thereafter execution on each judgment was issued and, by the proper officer, levied on a certain lot of land belonging to Catherine Cavanaugh and sold in the manner required by statute. At that sale appellee A. E. Willson, being the highest and best bidder, became the purchaser, and, subsequently, the officer, in due form, executed to him a deed.

Afterwards, February 6, 1891, Willson moved the court for a writ of possession.

April 13, 1891, the judgment now appealed from was rendered sustaining the motion for the writ.

As this record now appears to us the various judgments were valid, unsatisfied and unreversed; and, as the plaintiffs appear to have been entitled to the executions that issued, the sale was regularly made and the deed properly executed, the lower court was bound to adjudge the purchaser, Willson, entitled to the writ of possession.

The objection that the judgments were void because the court did not, at the date of the judgments, have jurisdiction of the person of Catherine Cavanaugh, can not avail, because, though not summoned to answer the pleading of each plaintiff, she did enter her appearance and the various allegations were, on her motion, taken to be controverted, as if she had answered to each.

In answer to the motion appellant stated the fact that, in June, 1888, under an execution in favor of Meyer & Pfeiffer, the same lot was sold and purchased by them, though at less than two thirds of the value thereof, and that she had until June 4, 1889, to redeem it; that in the meantime the sale was made to appellee Willson, and was, consequently, a sale of only her equity of redemption; but he never did redeem the lot and thus lost the benefit of his purchase, and that as she did, July 31, 1889, redeem the lot by paying to Meyer & Pfeiffer the purchase price, she re-acquired the absolute fee and appellee Willson lost the benefit of his purchase.

In our opinion the redemption of the lot by appellant enured to the benefit of Willson, the purchaser, and is not an obstacle to the writ of possession. She did not, in her answer, ask that appellee be required, as a condition of being put in possession, to indemnify her for the amount she so paid Meyer & Pfeiffer, and the lower court was not authorized to grant such relief.

Judgment affirmed.

LONG V. COMMONWEALTH.

(*Filed May* 15, 1896—*Not to be reported.*)

Deadly weapon—Instructions—Upon the trial of appellant under an indictment for willfully and maliciously striking and wounding with intent to kill, it appearing from the evidence that the instrument used was an iron weight, the appellant was not prejudiced by an instruction telling the jury that "by the words 'a deadly weapon,' as used in the instructions, is meant a weapon with which death could be produced when used in the manner in which defendant used it on the occasion mentioned." It was thus left to the jury to determine, from its size and weight and the manner of its use, whether the instrument used was a deadly weapon.

Boles & Duff for appellant.

W. S. Taylor for appellee.

Appeal from Barren Circuit Court.

Opinion of the court by Judge Hazelrigg.

In a justice's court in Barren county, and while one Nuckols was being recognized by the court to appear as a witness before the grand

jury against the appellant, Long, and his brother, the appellant, without notice to the witness, stepped up behind him or to his side and struck him a severe blow on the head with an iron weight.

Upon indictment and trial for thus maliciously striking and wounding Nuckols the appellant was found guilty and his punishment fixed at confinement in the penitentiary for one year.

The court properly instructed the jury under the language of the statute under which the indictment was found, as well as on the law of wounding in sudden heat and passion and of assault and battery, and no objection is urged against the instructions so given, but it is urged that No. 5 is erroneous. It reads as follows: "By the words 'a deadly weapon,' as used in instructions 1, 2, 3 and 4, is meant a weapon with which death could be produced when used in the manner in which defendant used it on the occasion mentioned in the indictment."

This instruction assumes that the defendant did use the weight, but this is admitted; nor is there any conflicting testimony as to the manner of its use. The only disputed question connected with the transaction was the size and weight of the iron instrument used. From its size and weight and the manner of its use the jury was to determine whether it was a deadly weapon—that is, one which so used could produce death.

We are not able to see in what respect the instruction was prejudicial to the rights of the defendant under the proof. It is also suggested that the punishment is excessive. If we were authorized to consider this feature of the verdict we are not prepared to agree with counsel. The attack was made under peculiar circumstances. The hand of the witness was uplifted before the court while he was being recognized to appear against the appellant was charged with a felony. The blow thus inflicted upon a wholly defenseless victim might easily have produced death. As it was, an ugly wound was inflicted and under peculiarly aggravating surroundings.

Judgment affirmed.

ROW V. DYER, &C.

(*Filed May* 14, 1896—*Not to be reported.*)

Trespass—Title to land—In this action to recover a tract of land and damages for the cutting of timber thereon, and also to restrain the defendants from further trespass, the evidence shows that the title is in plaintiff and not in defendants, and the court should have granted the relief sought, the cutting of the timber being admitted.

John L. Scott & Son, W. H. Holt and Augustus Averitt for appellant.

Howes & Patrick and B. G. Williams for appellees.

Appeal from Magoffin Circuit Court.

Opinion of the court by Judge Guffy.

This action was instituted by the appellant against Butler Dyer to recover twenty-six acres of land and damages for the cutting of timber thereon. Plaintiff by amended petition made the other appellees, except Jackson, parties, and alleged that they had cut valuable timber on said land, and sought to obtain judgment against

them, and also obtained an injunction to restrain the appellees from further trespass.

Appellee Dyer answered and claimed the land and admitted that he authorized the cutting of the timber sued for, and other appellees on a license from Dyer to cut the timber. Jackson was made a party on his own motion, and also claimed the land. Appellant and appellees, Dyer and Jackson, all claimed under title derived from the heirs of John Trusty, deceased. The evidence shows John Trusty owned a farm at the time of his death, and that a portion of it was devoted in some way to the payment of his debts, a portion set apart to the widow as dower, and the residue of the farm set apart to the children, and it appears that they sold to certain parties their interest in that farm, upon which the widow and heirs resided, and afterwards sold the land in contest to appellant, who is a son-in-law of said decedent.

The twenty-six acres in contest does not adjoin the said farm—at least seems to have been no part of it—but was a separate tract or parcel. Hence the bonds and deeds relied on by appellees did not pass the title of the Trusty heirs to the vendees, under and through whom appellees claim, and besides this the proof is clear that such vendees did not contract for nor claim to have bought the land in contest.

The court below, upon final hearing, dismissed plaintiff's petition, dissolved the injunction and adjudged the proceeds of the sale of the timber to appellees, and from that judgment this appeal is prosecuted.

Jackson's claim to the land was also adjudged to be invalid, but he has not appealed.

It seems to us that the judgment appealed from is erroneous, and the same is reversed and cause remanded, with directions to render a judgment in favor of appellant for the recovery of the land, and to perpetuate the injunction and to adjudge to plaintiff the value of the timber sued for and for proceedings consistent with this opinion.

MT. STERLING NATIONAL BANK v. GREENE.

(*Filed May* 14, 1896.)

1. *Banks—Refusal to pay check of depositor*—If a bank refuses, without sufficient justification, to pay the check of a customer, the customer has an action for damages against the bank.

2. *Set-off of bank against deposit*—Where the customer, either before the check is drawn or before the bank has notice of it, becomes indebted to the bank in an amount equal to or greater than the amount of his deposit, the bank may refuse to honor his check; and in order to give the bank this right it is not necessary that it should apply the deposit as a credit on the customer's indebtedness, the simple refusal to pay the check being all the appropriation needed for that purpose.

Tyler & Apperson for appellant.

A. T. Wood, B. F. Day, Z. T. Young and C. P. Chenault for appellee.

Appeal from Montgomery Circuit Court.

Opinion of the court by Judge Lewis.

James Greene brought this action to recover of the Mt. Sterling National Bank $5,000 damages, his cause thereof being stated substantially as follows: That October 17, 1892, he drew his check on defendant for $1,000, payable to the order of Sally A. Bratton, which was October 27, 1892, duly presented for payment; but that although when said check was drawn and delivered, as also when it was presented by Sally A. Bratton for payment, plaintiff had ample money on deposit and to his credit in the bank to pay said check, and defendant refused to pay and caused the check to be protested, and thereby injured plaintiff's credit and standing in the community as an honorable business man to his great damage, etc.

As ground of defense defendant stated in its answer substantially that December 2, 1891, plaintiff executed and delivered to it his promissory note, agreeing to pay six months thereafter $5,671.31, which became due June 2, 1892; that October 27, 1892, said note was still due and unpaid, and was for largely more than plaintiff then had on deposit and to his credit in defendant's bank; that because it had a lien upon and right of set-off against amount of plaintiff's credit on that day as depositor, defendant refused to pay said check and retained the amount of his deposit until October 31, 1892, when payment was actually made by him of the note, and then defendant released its lien and plaintiff drew checks in favor of other parties for the entire amount of his deposit, which were paid as presented.

To that answer a general demurrer was filed and sustained, demurrer to the petition having been previously overruled, and verdict and judgment being subsequently rendered in favor of plaintiff for $2,000, the defendant appealed.

It seems to be well settled that the obligation of a bank to pay checks, drafts and orders of a depositor so long as it has in its possession funds of his sufficient to do so, and which are not incumbered by the attaching of an earlier lien in favor of the bank, and the reciprocal right of the depositor to have them paid are so far substantial that if the bank refuses without sufficient justification to pay the check of a customer the customer has his action for damages against the bank. (Morse on Banks and Banking, section 458.)

As, therefore, the statements in the petition constitute *prima facie* a cause of action, the demurrer to it was properly overruled.

But in the language of the Masonic Saving Bank v. Bang's adm'r, 8 KY. LAW REP., 16, "The right of a bank to a general lien on the money and funds of the depositor in its vaults for the payment of the balance of the general account of the depositor is recognized by all the elementary books of bank and banking and sustained by an unbroken line of American decisions."

In Pursiful v. Pineville Bank, 17 KY. LAW REP., 38, it is said by this court that there is no difference of opinion as to the right of a bank under the doctrine of set-off to have applied to payment of a note held by it against a depositor unappropriated funds he may have deposited in the bank to his credit.

As aptly and correctly said in Herndon v. The Louisville Banking Co., decided by the Superior Court, 10 KY. LAW REP., 584, "the relation between the bank and the depositor is that of debtor and creditor, and as long as it exists the bank must honor the drafts and checks of the depositor in the order in which they are presented to the extent of the deposit, but when on account of any legitimate transaction between the parties the relation is shifted and the balance of the account is against the depositor, it seems to us that upon principle the bank should not be required to respond to the demand of

the holder of the check, which was drawn before this altered condition of affairs, but of which the bank had no notice until afterward."

In this case, however, the depositor, prior to and at the date of the check, was indebted to the bank by a promissory note past due an amount greater than what he had on deposit, and, therefore, occupied the relative attitude of debtor.

In sustaining the demurrer to the answer the lower court expressed an opinion that defendant had a lien on the deposit of plaintiff, and the right at the time of presentation of the check by the holder for payment to appropriate the entire amount then on deposit belonging to plaintiff to the payment of said note due from plaintiff to defendant. But the demurrer to the answer was nevertheless sustained, because in the language of the court the defendant failed on the presentation of the check to appropriate said deposit and apply the same as a credit on the said note and thereby released its lien.

It seems to us the reason for that decision is not sufficient. The question is whether at the time the check was presented the bank had the right to refuse payment. If it did, then its simple refusal to honor the check was proper exercise of that right, and all the appropriation needed for that purpose.

In our opinion the facts stated in the answer constitute sufficient justification of the bank refusing to pay the check in question, and *prima facie* sufficient ground of defense to the action. And as this record stands defendant was, on the pleadings, entitled to judgment. We need not refer to the instructions further than to say having been given upon incorrect hypothesis they are necessarily erroneous.

For the primary error in sustaining demurrer to the answer the judgment is reversed and cause remanded for new trial consistent with this opinion.

Judge Hazelrigg not sitting.

RUDY'S ADM'R, &C. v. SHELBYVILLE & LOUISVILLE TURNPIKE ROAD CO.

(*Filed May* 15, 1896—*Not to be reported.*)

1. *Turnpikes—Written contract not affected by parol agreement*—In this action against a turnpike road company to recover the amount of toll alleged to have been wrongfully collected by defendant at a tollgate on a branch road, which gate plaintiffs insist the defend had no right to erect, the agreement with the subscribers under which the defendant built the road being a written one, it was not competent for the plaintiffs to show a contemporaneous parol agreement not to erect a tollgate, such an agreement being inconsistent with the writing.

2. *Right to erect tollgates*—Although the amendment to defendant's charter authorizing it to build the branch road gave it no express authority to collect toll, yet as the act to which the amendment applied gave ample power, and the road when built became a branch of the main road and its control and management subject to the existing laws of the corporation, nothing more was necessary to authorize the collection of tolls upon the branch road.

3. *Same*—The provision of an amendment to the charter giving authority to charge and collect tolls for certain kinds of travel, and to erect special gates therefor, did not have the effect to take away the right to collect tolls for all kinds of travel which had previously been given.

D. M. Rodman for appellants.

E. J. McDermott and J. F. Bullitt for appellee.

Appeal from Jefferson Circuit Court, Law and Equity division.

Opinion of the court by Judge Hazelrigg.

Prior to 1874 a dirt road led from the village of St. Matthews near Louisville, northeastwardly toward Westport, in Oldham county. Between St. Matthews and Goose Creek on that road, a distance of some three miles, a number of persons resided, whose route to Louisville might either be over the Brownsboro turnpike, situated on the north, or over the Shelbyville pike on the south. These residents had procured a charter for a turnpike, but had despaired of building a road when, by a written contract with the Shelbyville Turnpike Co., it was agreed that the residents should give the company "as a bonus" the sums of money set opposite their names respectively, and the right of way for the purpose of making a turnpike from St. Matthews to Goose Creek, the company to build the road "sixteen feet wide, twelve feet of metal rock eleven inches deep, and four feet with broken stone, etc." Attached to the signatures of a number of these residents were certain conditions and stipulations to be observed by the company.

It is the contention of these residents, represented here by the appellants, Rudy and others, that a part of the contract under which the road was built and these sums paid was that no tollgate should be erected on this road for all time, and no toll collected for travel thereon unless at gates erected on its main road; and the company having in 1882 erected a tollgate near St. Matthews on the new road, this suit was brought in October, 1889, to recover back the amounts of toll wrongfully collected thereat.

The chancellor held that the terms of the written agreement under which the company undertook to build and did build the road could not be barred by a contemporaneous parol agreement inconsistent with the writing, and, moreover, that the proof of such agreement was "wholly insufficient and unsatisfactory," and refused to enter a judgment upon "such vague and shadowy evidence," and in these conclusions we concur.

In answer to the contention of plaintiff's counsel that the company lacked the necessary legislative authority to erect gates and collect toll on the road in question the charter and amendments thereto seem conclusive.

It is true that in the amendment authorizing it to build the Goose Creek branch no express authority to collect toll is given, but the act to which the amendment applied gave ample power, and the road when built became a branch of the main road and its control and management subject to the existing laws of the corporation. But if power were lacking here it is found in the amended and consolidated charter of February, 1882.

The appellee is given "such powers and authority as are usual and incident to turnpike corporations in Kentucky, and such as are necessary to carry out the purposes of this act," and it is given power "to hold, own, manage and operate the turnpike road now owned by said company, * * together with all the branch roads owned by said company," and might, "for five continuous miles of its road, erect and keep tollgates thereon, etc."

We agree with the learned judge below that the word "road," appearing in the sixth section of the act of 1882, "does not have the restricted meaning of referring exclusively to defendant's main road

but obviously refers to and embraces the main road and branch roads specified in section 5 of said act."

Obviously the act of 1890 attempting to construe the act of 1882 can not affect the prior rights of the parties, whatever prospective effect may be given it.

Aside from all this, however, the act of March 6, 1884 (chapter 318, acts of 1883, volume 1, page 583), gives express authority to the appellee to charge and collect toll "for wagons and other wheeled vehicles hauling produce to or from the railroad station at St. Matthews," and provided for the erection of special gates for that purpose; and while toll for no other species of travel seems to be authorized by the act last mentioned the plaintiff has not attempted to distinguish between the tolls paid in conformity with this and the light tolls which, according to apellants' contention, might have been unauthorized by it. We believe, however, that the right to collect tolls for all kinds of travel was conferred by the acts prior to the one of 1884, and that this right continued in spite of an implication to the contrary in the act last mentioned.

The judgment dismissing the petition is affirmed.

SHELBYVILLE & LOUISVILLE TURNPIKE ROAD CO. V. HITE, &C.

(*Filed May* 15, 1896—*Not to be reported.*)

E. J. McDermott and J. F. Bullitt for appellant.

D. M. Rodman for appellees.

Appeal from Jefferson Circuit Court, Chancery division.

Opinion of the court by Judge Hazelrigg.

This case is similar in all respects to that of Rudy's adm'r, &c., against Shelbyville T. P. R. Co., this day decided, *supra*, except that the chancellor gave a judgment for some $550 in favor of Simcoe and others, living on the Goose Creek road, and the company has appealed.

Upon the principles decided in the Rudy case the judgment must be reversed, with directions to dismiss the petition.

TILLETT V. CURD.

(*Filed May* 16, 1896—*Not to be reported.*)

Homestead—The homestead of the wife continues after her death for the benefit of the surviving husband; and where husband and wife executed a mortgage upon the wife's land to secure her debt, in enforcing the mortgage lien after the wife's death it was error to subject the homestead, the land being sufficient to satisfy the debt and still secure the homestead to the husband. Therefore, a homestead of the value of $1,000 should have been set apart to the husband and the residue of the tract subjected to the payment of the debt.

John H. Welch and W. R. Welch for appellant.

Bronaugh & Bronaugh for appellee.

Appeal from Jessamine Circuit Court.

Opinion of the court by Chief Justice Pryor.

The wife's land was mortgaged to secure a debt for borrowed money she owed her mother, the note executed by the husband and wife. The husband and wife lived on the land at the wife's death. She died, as is alleged, in March, 1894, and whether before or after the law giving the husband a life estate in one-third of the wife's land does not appear, nor is it material to this inquiry.

After the wife's death the appellee, who is the mortgagee, filed suit to foreclose the mortgage, and the court below sold the homestead of the husband to pay the debt. This was error.

In Ellis v. Davis, 90 Ky., 183, it was held that the husband was entitled to a homestead in the land of the wife, and, therefore, the land or enough of the tract should have been sold to pay the note and the homestead allotted to the husband in the remainder of the tract. The chancellor proceeded on the idea that it was the husband's debt, and, the mortgage to the creditor passing the homestead, it was proper to subject it. This would have been true if there had been no other security for the debt, but the land itself was bound by reason of the mortgage, and of sufficient value to pay the debt and secure the homestead to the husband.

This case is made stronger for the husband because it is alleged the money was all used by the wife, and in fact the loan made to her; still this fact does not control the case, as the husband was entitled at the death of the wife to this exemption. If the husband had died the owner the homestead would have been secured to the wife, and the latter being the owner does not change the rule.

Reversed and remanded for proceedings consistent with this opinion.

MILLER V. CAVANAUGH.

(*Filed May* 19, 1896.)

1. *Interest*—A note payable ten years after date, "with interest at the rate of 6 per cent. per annum from ——— until paid," bears interest from date and not merely from maturity. It is not reasonable to suppose the parties were contracting for interest for a time subsequent to the time fixed for payment, when the law would allow interest from that time without a contract.

2. *Motion for appointment of receiver—Appearance*—If there was any irregularity in permitting the plaintiff without notice to enter a motion for the appointment of a receiver and to file an amended petition the defendant waived his right to complain by entering his appearance to the motion and by filing an answer to the amended petition.

L. J. Moore for appellant.

Bronston & Allen for appellee.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Paynter.

This action is on a note executed by Miller to Cavanaugh for $500, payable two years after date, "with interest at the rate of 6 per cent. per annum from ——— until paid."

The judgment gave interest from the date of the note. It is insisted that it was error for the court to give interest from the date of

the note upon the principal; that when an obligation is silent as to when interest is to run the law implies that it bears interest only from the time it falls due.

We concede this to be the correct rule when a case arises for its application. This, however, is not that kind of a case. The blank date does not bring the case within the rule. The obligation is not silent as to interest, but provides that it is to draw interest at the rate of 6 per cent. per annum until paid. It was to be paid at the end of two years and "with interest."

It provides for an annual interest. It can not be said that the note only draws interest after maturity. It was to be paid at a given date, and it is unreasonable to suppose that a note for the payment of money on a particular day, with interest at a certain rate per annum until paid, could be construed to mean that the interest should commence on the day of payment and not before, for the law would give interest from that date.

The language specifying interest shows that it was the intention of the parties that the note should draw interest from date. We conclude that the parties were contracting for interest on the note for a period of time when the note would not draw interest except for such contract, and not for a time subsequent to the date when the note was to be paid. It was useless to make a contract for interest after the default of payment, when the law would allow interest on the note from such time.

We think Winn v. Young, 1 J. J. M., 52, supports our conclusion. Besides, the petition alleges that defendant agreed and promised to pay the note, with interest from its date until paid. The answer fails to controvert this allegation. The allegations of the petition, we think, are sufficient to authorize a recovery on the note.

The plaintiff held the note in suit and four others for the balance of the purchase money which the defendant had agreed to pay him for a house and lot in Lexington, Ky. The plaintiff without notice entered a motion to place the property in the hands of a receiver, and also offered and the court permitted an amended petition to be filed. Defendant filed an answer to the amended petition and resisted the motion to place the property in the hands of a receiver. On the hearing of the motion the defendant filed such affidavits as he desired.

If there was any irregularity in entering the motion and filing the amended petition the defendant waived his right to complain by entering his appearance to the motion and filing an answer to the amended petition.

Without reviewing the facts, suffice it to say that we are not inclined to disturb the judgment of the court placing the property in the hands of a receiver.

The judgment is affirmed.

SWEARINGEN V. ABBOTT, EX'OR.

(*Filed May* 19, 1896.)

Sale of infants' real estate—Where infants owned a one-fourth interest in remainder in a piece of real estate which was indivisible, it was error, upon their petition by next friend, to order a sale of the property, although the father as life tenant sought by cross petition to enforce a lien upon the property, and the owner of the other three-fourths consented to the sale.

The estate of the infants is not an estate in possession within the meaning of section 490 of the Code, and, therefore, there can not be a sale under that section. If the father has a lien he may enforce it, or if the joint tenant desires a sale she may bring the action for that purpose, but in an action brought by the infants there can not be a sale unless the case is one in which a sale is authorized by the statutes regulating the sale of infants' real estate.

Bullitt & Shield for appellant.

Gibson & Marshall and Humphrey & Davie for appellee.

Appeal from Jefferson Circuit Court, Chancery division.

Opinion of the court by Chief Justice Pryor.

While it is manifest the property in this case is indivisible, and perhaps it is to the interest of the infants that it should be sold, still the proceedings do not follow the provisions of the Code authorizing the sale of infants real estate.

It is true the owner of three-fourths of the realty consents to the sale, and the life tenant by cross petition is seeking to subject the realty to the satisfaction of a lien, yet the infants by their next friend could not bring the action because they were not in possession, and although with a vested estate the possession is with the life tenant and the other joint owner. (Malone v. Conn, 95 Ky., ——.)

This is not a sale for debt within section 489 of the Code, or a proceeding under 491, but an attempt to sell under section 490, because the estate was vested in the infants. Whether or not the title passed by reason of the cross petition of the father is a question of doubt; but the purchaser is complaining, and it is not only proper but essential that these statutes regulating the sale of infants' realty should be complied with. If the father has a lien, let him enforce it; or, if the joint tenant wants it sold, let her bring the action, and not by the next friend of the infants without an averment bringing the case within either of the sections of the Code under which the realty of infants can be sold.

Section 490 not only requires that the estate should be vested, but the possession must be with the infants. Here they have no right to enter because of the life estate in the father.

Reversed and remanded, with directions to set aside the sale and dismiss the petition.

PINCKARD, RECEIVER, &C. V. DAVIS, &C.

(*Filed May* 19, 1896.)

Authority of town marshal to execute process from circuit court—**The marshal of a town of the fifth class has no authority to execute an order of attachment from the circuit court, although the order be directed to him. The power conferred upon the marshal by the charter of towns of the fifth class "to execute and return all process issued and directed to him by any legal authority" must be restricted to process issued and directed by municipal authority.**

H. P. Willis for appellants.

Thos. H. Hines for appellees.

Appeal from Bracken Circuit Court.

Opinion of the court by Judge Hazelrigg.

In an action in the circuit court an order of attachment was issued by the clerk and directed to the marshal of the town of Augusta—a town of the fifth class. The process was duly served on the garnishee, but in a contest between the attaching creditor and a subsequent claimant of the fund sought to be attached, the trial court held the service ineffectual to create a lien, and adjudged the fund to the junior claimant.

On appeal it is contended that while the provisions of the Code (subsection 2, section 667) do not designate such an officer as one to whom such process may be directed, yet power to execute it is conferred on him by section 3629 of the Kentucky Statutes (charter of towns of the fifth class), provided the process be directed to him. That section provides that the department of the police of said city shall be under the direction and control of the city marshal, and for the suppression of any riot, public tumult, etc., he shall have the powers that are conferred upon sheriffs by the laws of the State, and shall in all respects be entitled to the same protection, and then follows this language, which is that relied on by appellant: "He shall and is hereby authorized to execute and return all process issued and directed to him by any legal authority."

Then follows further regulations with respect to the duties of the marshal in the police court and in the city. It seems to us that the power to execute process conferred by the language quoted must be restricted to process issued and directed by municipal authority. The marshal is an officer of the city government, an appointee of the council, and sustains somewhat the same relation to the city and its governmental affairs as the sheriff does to the county. We can not believe this statute intended to add his name to the list of officers authorized by the Code to execute process and orders of attachment in the circuit court.

As there was no authority on the part of the marshal to execute the process, there was none on the part of the clerk to issue and direct it to him, and its service created no lien.

Judgment affirmed.

BROWN, ASS'EE V. MARION NATIONAL BANK.

(*Filed May* 19, 1896—*Not to be reported.*)

Second appeal—Res judicata—Although the opinion upon a former appeal in this case (92 Ky., 607) is inconsistent with the opinion in the case of Sydner v. Mt. Sterling National Bank, 94 Ky., 231, yet the judgment on the former appeal is the law in this case, and as the judgment now appealed from is in accordance with the mandate of this court, it must be affirmed.

H. W. Rives for appellant.

W. J. Lisle for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Landes.

This cause is before us again on appeal from the judgment entered in the court below on the mandate from the judgment rendered here

on the former appeal, which is reported in 92 Ky., 607. The complaint is that the judgment now appealed from the court below failed to deduct from the face of the notes allowed to be proved against the estate in the hands of the appellant, as assignee for the benefit of the creditors L. and E. Baxter, usurious interest that had been embraced in the notes on renewals, and the case of Snyder v. Mt. Sterling National Bank, 94 Ky., 231, is referred to as inconsistent with the view expressed on that point in the opinion on the former appeal. The two cases are undoubtedly not in harmony on the point mentioned. Nevertheless we hold that the judgment on the former appeal is the law of this case, and since the judgment now appealed from seems to be in accordance with the mandate from this court it must stand, and is, therefore, affirmed.

MATTINGLY V. STONE'S ADM'R.

(*Filed May* 20, 1896—*Not to be reported.*)

1. *Partnership—Termination of*—A written contract between appellant and appellee, by which appellee acquired an interest in two distilleries owned and operated by appellant, in consideration of the transfer to appellant of a valuable brand owned by appellee, created a partnership between them which could not be terminated by appellant at his will and pleasure.

2. *Settlement of partnership—Compensation of partner for services*—As the parties, by the terms of the written contract, were each to perform services and and to render the assistance necessary to the proper conduct of the business, and appellee failed to render any assistance in the management of the business, leaving it entirely to appellant, who also furnished the capital, in this action for a settlement of the partnership the appellant is entitled to compensation for his services.

C. S. Walker for appellant.

Powers & Atchison and Little & Little for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Chief Justice Pryor.

By the terms of a written contract between M. P. Mattingly and W. S. Stone the latter became interested as a partner of the former in his two distilleries, one the "*Old W. S. Stone* Distillery," the other the "Daviess County Club Distillery." The consideration for the interest was the transfer by Stone to Mattingly of the exclusive use of a valuable brand belonging to Stone, and which Mattingly desired to appropriate to his own use or that of the two distilleries.

The interest of Stone was the one-eighth part of the stock ($30,000) in the Daviess County Club distillery and an interest of one-eighth in the Old W. S. Stone distillery, its property and appurtenances, the latter to share in the profits, after a certain period, in proportion to his interest. Each party was to render services, Stone running the one distillery and Mattingly the other. The general control of the business was given to Mattingly.

The partners failed to prosecute their business amicably and certain suits followed, in one of which Stone brought an action to recover for his services and failed, and Mattingly an action to rescind the contract, with like result, neither being entitled to relief.

The present action was instituted by Stone for a settlement of the partnership, to which various defenses were made.

The appellant insists there was no partnership but a mere sale, and that Stone was entitled to rents for his interest and not profits. Counsel for the appellant in the cases heretofore decided construed the contract as constituting a partnership; but whether so or not, it is plain the parties were partners by its terms, and a settlement should be had.

The question of more difficulty than any other arises from the contention of the appellant that the partnership was dissolved in March, 1885, when the former suits were instituted and the parties ceased to have any business intercourse. But assuming, as we shall do, that the partnership continued, and that Mattingly had no power to end the partnership at his will and pleasure, it then becomes proper to ascertain the balance due, if anything, by Mattingly to Stone.

Mattingly claims that he has sustained damages by reason of Stone's permitting other parties to use this brand after September, 1883, when its exclusive use was with Mattingly. There is nothing in this defense, and the fact that the Owensboro Distilling Co. was to use the brand until December, 1887, was known to Mattingly at the time of his contract, and the entire defense as to its use by others is an after-thought, with no merit in it.

The appellant claims compensation for the management and conduct of the business. That was disallowed by the chancellor, and in this we think is an error.

The parties, by the terms of the written contract, were each to perform services and to render that assistance necessary to the proper conduct of the business, and when Stone stood by and saw the entire management of the distilleries conducted by Mattingly, with his (Mattingly's) own capital, his labor and skill, it is neither just nor equitable that he should be allowed nothing and Stone awarded his share of the profits as if he had been an active partner.

The report of the commissioner to whom the case was referred is plain, concise and brief, in which he states that "Mattingly furnished all the capital to carry on the business, for repairs, paid taxes and insurance, and in fact all the capital used in carrying on the business at both houses, and the proof shows that to furnish the capital and manage the business was worth $5,000 per annum."

There was paid to Stone by Mattingly $1,992, or he obtained that much from the business.

Stone rendered no service in operating, taking care of or managing the distilleries.

With this report the chancellor charged Stone with the $1,992 he had received and credited him by his one-eighth of the profits, which was $5,482.84, leaving due Stone by Mattingly $3,490.57, for which judgment was rendered.

While we think $5,000 per annum for the six years is too much to allow Mattingly for the management of the business, furnishing capital, etc., he ought to be allowed not less than $3,000 per annum, which, for the six years would be $18,000, one-eighth of which should be charged to Stone. The one-eighth would be $2,250, and add to this the $1,992 Stone had received makes $4,242. This sum taken from Stone's part of the net profits, as reported, $5,482.84, leaves Mattingly indebted to Stone in the sum of $1,240.84, for which judgment should be rendered, after first charging the net profits with the court's cost of the litigation below.

Reversed and remanded that this may be done.

BYBEE V. BYBEE.

(*Filed May* 22, 1896—*Not to be reported.*)

1. *Devise—Advancements*—Where the testator, after making special devises to those entitled to his bounty, devised the residue of his estate to his three sons equally, the fact that he placed a valuation upon the property so devised showed merely his estimate of the value of the property and was not intended as a direction that in making the division the value of the property previously devised should be accounted for.

2. *Return of no property*—A return of *no property* by the sheriff was a sufficient averment of insolvency, and, where the appellee had a clear right to enforce his claim against the appellant and the same property was made liable as was subject to execution under judgment, the judgment granting an enforcement of the appellee's claim will not be disturbed on the ground that the property could have been subjected to sale under ordinary execution.

R. B. Dahoney, Boles & Duff and W. H. Holt for appellant.

W. L. Porter for appellee.

Appeal from Barren Circuit Court.

Opinion of the court by Chief Justice Pryor.

There is no reason for adjudging the question of advancements between the children of the testator. He devised his whole estate, and fixing the value of the land devised to the appellee at $5,000 was merely to show his estimate of the value of the property devised to him, and not to open the question as to the value of the property he had given to each one of his children.

The entire will shows a purpose to dispose of all the testator had, and, after referring to or making the special devises to each child and to his grandchildren, he concludes his will with the following clause: "All of the rest and residue of my estate that may remain undisposed of by me during life I devise and bequeath unto my sons, R. D. Bybee, George Bybee and Clinton Bybee, *to be equally divided between them.*" He had, by previous provisions of his will, given to those entitled to his bounty what he thought was proper, and then provides that what is undisposed of to be *equally* divided between his three sons, never contemplating that, in this division, the value of the property previously devised should be accounted for.

It appears that the appellee had a judgment, with a return *of no property*, against the appellant, and while it may be inferred from the petition that the property described could have been subjected to sale under an ordinary execution, as there was no objection below on that ground, and the same property is made liable that was subject to the execution, we will not reverse the judgment for that reason.

The return by the sheriff of *no property*, and such being alleged in the petition, was a sufficient averment of insolvency, and, with a clear and undoubted right on the part of the appellee to enforce his claim, we will not disturb the judgment.

Affirmed.

AMERICAN CENTRAL INSURANCE CO. v. HEAVERIN.

(Filed May 21, 1896—Not to be reported.)

1. *Fire insurance—Waiver of notice of loss*—A requirement in a policy of fire insurance that the insured should give to the company immediate notice in writing of any loss was waived by a statement of the general agent made to the insured two or three days after the loss that it was not necessary to give the written notice, the local agent, who was on the ground, having given immediate notice to the general agent.

2. *Failure to furnish proofs of loss within thirty days*—The failure to furnish proofs of loss within thirty days as required by a provision on the back of the policy, which was declared to be a part of the contract, did not deprive the insured of his right to recover, the proofs being furnished before the expiration of the time in which the insured had the right to sue, which was twelve months from the time of the fire.

3. *Same*—The clause containing the requirement as to the proofs of loss being followed by a clause requiring the assured to furnish original or duplicate invoices as often as required, and to submit to examination under oath touching all questions deemed pertinent to the loss, further providing that a refusal to comply with "the above requirements" shall work a forfeiture, the provision for a forfeiture applies only to a refusal to do the things required by the particular clause in which that provision is found, and not to the requirement as to proofs of loss found in the preceding clause. In construing such provisions all doubts are to be resolved in favor of the insured.

C. S. Walker for appellant.

Sweeney, Ellis & Sweeney for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Chief Justice Pryor.

In this case the appellant insurance company is resisting the payment of the loss sustained by reason of the failure of the insured to notify him *at once* of the destruction of his goods by fire, and his failure to send proof of loss within thirty days. These clauses in the policy are, it is insisted, made conditions precedent to the right of recovery by reason of sections 6 and 7 on the face of the policy that read, "*Proceeding in case of loss.* It being understood and agreed that all proceedings after a loss shall be in accordance with the terms and stipulations printed on the back of this policy, which are hereby declared to be a part of this contract, and are to be resorted to in order to determine the rights and obligations of the parties hereunto." (7) "No agent has power to waive any condition of this contract."

In looking to the back of the policy we find that "in case of loss the insured shall give immediate notice in writing to the company, and shall within thirty days after the happening of the loss render to the company a particular account of the loss under oath, etc." Another clause is, "The assured shall, whenever and as often as required, furnish original or certified duplicate of invoices of all property insured, and submit to examination under oath touching all questions deemed pertinent to the loss, etc., and a refusal to comply with the requirements shall work a forfeiture, etc." There was no proof of loss within thirty days furnished the company, and no immediate notice of the fire or the destruction of the goods given the company.

The local agent was on the ground and notified by telegram the company of the loss, and in a day or two the general agent came

and the insured was told by him it was not necessary to give the written notice. This was a waiver by the company of this condition, but, if not, the failure to furnish proof of loss within the time required did not forfeit the policy, as was held by this court in the case of the Kenton Insurance Co. v. Downs, 90 Ky., 236. The proofs of loss were furnished in this case before the expiration of the time in which the appellee had the right to sue, and this was twelve months from the time of the fire. The appellant insists that clause 6 of the policy makes these endorsements on the back of the instrument a part of the contract, and the measure or extent of the liability of the company is to be determined by each and all of them, and in this way attempts to distinguish the present case from that of Downs, in 90 Ky., 236.

The question at last arises, was the failure to give the notice and make the proof within the time a forfeiture of the right to recover? We think clearly not; nor did the insertion of the forfeiture on the back of the policy, resulting from a failure to answer questions, exhibiting invoices, etc., affect the questions of notice and proof of loss, but the forfeiture must be construed as applying alone to the failure or refusal to do these things mentioned in the second clause. It must be apparent to any one examining the various conditions on the face of such policies and the endorsements on the back of such instruments that they are inserted more for the purpose of entrapping the unsuspecting than to evidence a *bona fide* contract, and in the construction of such provisions the doubt should be given to those who in good faith have observed the essential provisions of the policy, made necessary to guard and protect the rights of the insurance company, as well as that of the insured, and in this case there is no reason for exempting the company from liability upon a construction that at best arises from implication, and must defeat the ends of justice.

Judgment affirmed.

ANDERSON V. HALL, &C.

(*Filed May* 21, 1896—*Not to be reported.*)

1. *Dower*—Where, in a proceeding in bankruptcy, a tract of land containing 232 acres was sold to satisfy a lien which existed upon only 85 acres of the tract, in allotting dower to the widow of the bankrupt the 85 acres should be valued as of the date of the sale to the purchaser, and the widow allowed as her dower in that part of the land one-third of the remainder after deducting the amount of the lien; and the entire dower can then be laid off as one parcel out of the entire 232 acres.

2. *Same*—That part of the land upon which improvements have been made by the purchaser should be allotted to him and dower allowed to the widow out of the unimproved part of the land, the whole being valued in its condition when sold, and without reference to its enhanced value by reason of the improvements made by the purchaser.

J. J. Cornelison for appellant.

Tyler & Apperson for appellees.

Appeal from Montgomery Circuit Court.

Opinion of the court by Chief Justice Pryor.

The husband of the appellant, Mrs. Anderson, owned and was in possession of during his lifetime a tract of 232 acres of land that was composed of several tracts he had purchased at different times. He was adjudged a bankrupt, and this tract of land sold as part of his assets. On the tract of 85 acres that constituted a part of the 232-acre tract there was a lien for purchase money, and when this lien was enforced the entire 232 acres was sold to satisfy it, and not merely the 85 acres.

The lien was $3,572, and when the sale was made the 85-acre tract, as we must infer, was worth more than the amount of the lien, as this was created in the purchase of a life estate in the 85 acres, and, therefore, this tract should be valued as at the date of the sale to the purchaser, and the amount exceeding the lien will show the extent of the dower interest, the widow being entitled to the one-third of the remainder, and the entire dower can then, if practicable, and of this there can be no doubt, be laid off as one parcel out of the entire 232 acres.

The entire 232 acres should be valued on its condition when sold, and without reference to its enhanced value by reason of the improvements made by the purchaser. The mode of ascertaining the dower or of allotting it is erroneous. The land was valued at $60 per acre, or $13,869 for the entire tract. The lien was then deducted from it, $3,572, and the value of the improvements, $4,623, leaving a balance of $5,674, and of this the appellant was held entitled to one-third for life, $1,891, and 27 acres allotted as dower in the entire land.

This, at a glance, must be seen to be error. It can not be difficult out of such a large tract to find as much as one-third in quality and value as of the date of sale upon which there has been no improvements, except such as is necessary to keep the farm up or in ordinary repair, and instead of valuing the whole tract and ascertaining its enhanced value by reason of the improvements, allot to the purchaser that part of the land on which the improvements have been made by him since his purchase, and in this manner the dower can be easily laid off. This is on the idea that the appellees own the entire tract jointly. If not, dower will be assigned out of each tract if owned by different purchasers.

On the theory adopted, if the land had been enhanced $40 an acre by reason of the improvements, the chancellor would have dismissed the petition.

Reversed and remanded for proceedings consistent with this opinion.

The Kentucky Law Reporter.

EDITOR:
WALTER G. CHAPMAN, ... Frankfort, Ky.

VOL. 18. OCTOBER 1, 1896. No. 7

KENTUCKY COURT OF APPEALS.

BEDFORD, &c. v. BEDFORD'S ADM'R, &c.

(*Filed May* 19, 1896.)

1. *Construction of wills*—The ordinary rules of testamentary construction should always be subordinated to the cardinal rule, which is of universal application, that the intention of the testator as gathered from his entire will must prevail, if not opposed to some positive provisions of the law, or to some general principle of public policy.

Where a father devised land to his daughter, "to go to her child or children at her death, or, if she and her son Robert die without children, the estate to revert to her four brothers now living, their heirs or assigns forever," the testator must be held to have intended that the portion thus devised to his daughter and her son should revert to his other children only in the event both of them died without children previous to his death. And the testator having died, leaving both of them surviving, the daughter took a life estate, remainder to her son in fee, he being her only child, and upon his death it passed to his devisees.

2. *Same—Residuary clause*—The testator, after making certain specific devises, having provided, by a separate clause, that the residue of his estate should go to his five living children, "and should any of them die without issue before they have disposed of their interest in any realty thus devised, their portion shall pass to the others living or having issue, their heirs or assigns forever," the restriction, if there be any, upon the right of the children to dispose of the property devised to them, does not operate upon the property embraced in the specific devises to them, but only upon that embraced in the residuary clause.

3. *Same*—The court is inclined to the opinion that the effect of the language quoted from the residuary clause is to vest the children of the testator with the fee simple title to the property received under that clause, but it is not necessary to decide that point.

4. *Effect of codicil*—Under a codicil providing that upon the death of the testator's wife the property thereby devised to her for life should be divided into five equal parts, four parts to go to his sons "and their heirs forever," and the other fifth to his daughter, the use of the words "and their heirs forever" after the gift to the sons, and the omission of the same words after the gift to the daughter, does not evince an intention to give the daughter

any less estate than the sons, and, therefore, she takes a fee simple estate as well as the sons.

5. *Same*—As the property thus devised by the codicil to the wife for life, remainder to the children, was the testator's land "that had not been specifically devised to his children," a provision in the codicil that "should my children or grandchildren to whom I have willed anything die without issue, then the property thus willed shall revert back to my surviving children and their heirs in equal proportion," does not operate upon the specific devises made to the children of the testator in the body of his will, but only to the interest which they take under the codicil.

6 *Dying without issue*—It would not be an unreasonable construction of the clause just quoted to refer the words "die without issue" to the death of any of the testator's children or grandchildren before the death of the testator; but it is not necessary to decide that question.

7. *Effect of codicil*—Where the terms of a will clearly give an estate, the words of a codicil must manifest an equally clear intent to revoke or change it before they will be allowed to have such an effect.

The testator having, by the first item of a second codicil to his will, "instead of the various devises contained in the preceding will," left to his wife "one equal third part of all my property, both real, personal and mixed, during her natural life," and provided that "after my death my will and desire is that the same be equally divided between my five children, their heirs and assigns forever," and by subsequent items of this codicil referred to some of the specific devises that he made in the body of his will, it must be concluded that he did not intend that any of his specific devises should be changed by the first item of the codicil quoted.

8. *Double contingency*—When an estate depends upon a double contingency, both must concur.

A provision of the second codicil that if the daughter should die "before her son shall have arrived at the years of maturity, and should her son die without issue," then the property bequeathed to her should "revert and be merged in the estate," created a double contingency, the first contingency being the daughter's death during the minority of her son, and the second the son's death without issue during his minority; but even if the second contingency be construed to be his death without issue at any time, still when the son reached his majority, his mother surviving, it became impossible for the first contingency to happen, and, therefore, the mother at once became the absolute owner of the property.

9. *Charitable trust—Indefiniteness as to beneficiaries*—Indefiniteness as to the beneficiaries does not invalidate a charitable trust, as that is the one thing that distinguishes such a trust from a mere private trust.

A devise of property to the State of Kentucky in trust "for the use and benefit of the children of the State," the profits therefrom "to be appropriated annually forever toward the education of the children of the State of Kentucky, particularly the poor and most unintelligent," and "to constitute a permanent school fund," is not void for uncertainty.

Geo. T. Halbert, Sam J. Pugh, Wm. Goebel and W. H. Holt for appellants.

E. L. Worthington and Garrett S. Wall for appellees.

Appeal from Lewis Circuit Court.

Opinion of the court by Judge Landes.

Mrs. Elizabeth M. Bedford died in Lewis county in the month of February, 1860, leaving a son, Robert Bedford, who was then thirty-two years old. She made a will a short time before she died, which was duly probated, and which contains the following devises:

"1st. I give and bequeath to my son, Robert Bedford, all of my

lands in Lewis county, to have and to hold during his natural life. * * If said Robert Bedford should die leaving a child or children of his own body, then those lands are to go to those children and their heirs forever.

"2d. I give and bequeath to my son, Robert Bedford, all the lands and other property I own in the county of Nicholas, to have and to hold during his natural life. * *

"4th. In case my son dies leaving children of his own natural body, I give and bequeath all my lands to them and their heirs forever. But if my son dies without a child or children, then I desire that all my lands in Lewis and Nicholas be sold, and the money arising from said sales I give and bequeath to the State of Kentucky in trust, that the said State will forever hold the same for the use and benefit of the children of the State; that the said State will invest said money in some profitable bank stock, and the profits therefrom I desire to be appropriated annually forever towards the education of the children of the State of Kentucky, particularly the poor and most unintelligent. I desire that this money constitute a permanent school fund, and the interest from this fund be appropriated annually towards the education of the children of this State."

The testatrix owned at the time of her death a tract of 343 acres of land in Lewis county, which she purchased in the year 1836. She owned or claimed to own also a tract of 200 acres, and one of 300 acres, both in Nicholas county, and an undivided interest of one fifth in a tract of about 469 acres, situated in Nicholas and Robertson counties, under the will of her father, George M. Bedinger, deceased, who died domiciled in Nicholas county, and whose will was probated and recorded in that county. The question whether she owned and had the right to dispose of the lands claimed under her father's will must be determined by the meaning of several clauses of his will, which will be referred to.

Robert Bedford survived his mother twenty-seven years, and died in 1887, in Mason county, leaving a widow, appellant Susan M. Bedford, having made a will by which he devised to his widow all of his property. He died without ever having had issue.

The death of George M. Bedinger occurred in the year 1843. He left a widow, Henrietta; four sons, Henry C., Daniel P., Benjamin F. and Joseph Bedinger; and one daughter, the said Elizabeth M. Bedford. By his will, after making numerous specific devises, including a liberal provision for the comfort of his widow, he left the residue of his property to his said sons and daughter. The body of his will was written in 1838, to which were added two codicils, the first bearing date 11th day of July, 1842, and the second the 28th day of May, 1843.

In the body of his will he devised to his daughter a tract of 200 acres of land, using the following language: "To my daughter, Elizabeth M. Bedford, I give and bequeath 200 acres of land lying on the east side of the Maysville turnpike road. * * The property bequeathed to my daughter, Elizabeth M. Bedford, to go to her child or children at her death, or, *if she and her son Robert die without children*, the estate to revert to her four brothers now living, their heirs or assigns forever."

The residuary clause of his will is as follows: "The residue of my estate, of every description, with all reversions, I will and bequeath to my five living children equally, and should any of them *die without issue before they have disposed of their interest in any realty thus devised*, their portion to the others living or having issue, their heirs or assigns forever."

In the first codicil of his will he made the following provision: "My further will and desire is that my beloved wife, Henrietta, should have the use and benefit of all my land not specifically willed to my children, and I hereby will and bequeath the same to her during her natural life, in addition to the bequests heretofore devised to her, and at her death my will and desire is that that part given to my wife during her life should be divided into five equal parts, four parts to go to my sons, Henry C. Daniel P., Benjamin F. and Joseph Bedinger, and their heirs forever, and the other fifth bequeath to my daughter, Elizabeth Bedford, and should my children or grandchildren, to whom I have willed anything, die without issue, that then the property thus willed should revert back to my surviving children and their heirs in equal proportion."

Finally, in the second codicil to his will, which was written a short time before he died, he used the following language: "First, * * instead of the various devises contained in the preceding will, I will to my wife one equal third part of all my property, both real, personal and mixed, during her natural life, and *after my death* my will and desire is that the same be equally divided between my five children now living, to wit, Henry C., Daniel P., Benjamin F. and Joseph Bedinger and Elizabeth M. Bedford, their heirs and assigns forever; * * sixth, it is my will and desire that in case of the death of my daughter, Elizabeth, *before her son shall have arrived at the years of maturity, and, should her son die without issue*, that the property bequeathed shall revert and be merged in the estate."

This suit was brought by Thos. S. Clark, administrator *de bonis non*, with the will annexed, of Elizadeth M. Bedford, deceased, to sell said lands and have the proceeds paid to the State of Kentucky in accordance with the terms of her will. There is no controversy about Mrs. Bedford's ownership and her right to dispose of the tract of land in Lewis county, which was purchased by her in 1836. But the appellant, Susan M. Bedford, claims all of the lands mentioned, both in Lewis and Nicholas counties, under the will of her husband, the said Robert Bedford, alleging that the disposition of these lands in the will of his mother, Elizabeth M. Bedford, was so vague, indefinite and uncertain, especially in regard to the beneficiaries of the trust attempted to be created, as to render it absolutely void. Her contention is that by virtue of the provisions of the second codicil of the will of George M. Bedford, deceased, Elizabeth M. Bedford having died after her son Robert reached his majority, the title to the lands in Nicholas county devised to her became absolute, and that, being thus seized in fee of all the lands claimed by her, at her death they descended to Robert, and passed to her under his will, the devise to the State of Kentucky in trust being absolutely void, as above stated.

On the other hand it is claimed for the other appellants, the heirs of the four brothers of Mrs. Elizabeth M. Bedford, all of whom are dead, that under the will of George M. Bedinger, deceased, Mrs. Bedford had only a life interest in the Nicholas county lands devised to her, and that the said Robert Bedford having died without issue the said lands reverted at his death and vested in the four sons of the said George M. Bedinger, who are named in his will, or their heirs, while the appellee, Garrett S. Wall, who had, prior to the commencement of the action, been appointed by the superintendent of public instruction, in pursuance of the provisions of the General Statutes (section 4397 of the Kentucky Statutes), agent for the State to collect and take charge of the money, claims that under the will of Elizabeth M. Bedford the State is entitled to receive as trustee

the proceeds of the sale of all of the lands intended to be disposed of by her, on the ground, as alleged, that she owned the same absolutely at the time of her death and had the right to dispose of them, and that the said Robert Bedford, to whom she devised a life estate in them, died "without a child or children."

On the final hearing of the cause, the court below in substance adjudged that Mrs. Bedford owned all of the lands above mentioned in fee simple, and that they passed under and in pursuance of her last will, except the 200-acre tract in Nicholas county, in which it was adjudged she had only a life estate, and which, therefore, did not pass under her will.

The court accordingly adjudged that the 200-acre tract belonged in proper proportions to the heirs of the four brothers of Mrs. Bedford. Joseph Bedinger, one of the four brothers, being a defendant, but having died after the judgment was rendered, his heirs were by proper proceedings made parties to the appeal in this case, and the judgment which we have recited is before us for review.

Although proper exceptions were taken in behalf of the State or its agent, with regard to so much of the said judgment as established the claim of Joseph Bedinger and others to the 200-acre tract of land, the State or its agent is no longer concerned in that question as the case now stands, because no appeal was prayed or is now prosecuted from the judgment in behalf of the State. But the question as to the correctness of that part of the judgment is before us on the appeal of Susan M. Bedford, and its solution depends upon the meaning that is to be given to the clause of the will of George M. Bedinger, by which this tract of land was devised to Elizabeth M. Bedford, which we have quoted. This question we will notice first.

In a preceding part of his will the testator had devised certain portions of his lands to each of his four sons. To three of them he had devised their respective portions, "to them and their heirs and assigns forever." The portion of his other son, Joseph, he devised to trustees, for the use and benefit of himself and his children, but upon such a scheme as was intended that he or his children should eventually have the actual control and final disposition of the land or its proceeds. But to his daughter, Mrs. Bedford, he devised the 200 acres, limiting her interest in the land to a life estate, by providing that it should go "to her child or children *at her death*," and this limitation to her was followed by the further provision that "if she *and* her son, Robert, *die without children*," the estate to revert to her four brothers now living, "their heirs or assigns forever."

It is contended that since both Mrs. Bedford and her son Robert died without child or children surviving them, the title to the land vested at the death of the said Robert in the said Joseph Bedinger and the heirs of Mrs. Bedford's other three brothers, all of whom were then dead. But this contention can not be sustained. In construing testamentary provisions of this kind it is sometimes quite difficult to determine to what period the words "dying without children," or words of similar import, refer. And often precedents are of little avail to aid in reaching a correct interpretation of such provisions on account of the great variety of forms of expression in wills, and of the different meanings that are attached to technical words and sentences by different testators.

On this subject Mr. Justice Miller, in Clarke v. Boorman, 18 Wall., 493, said: "No two wills, probably, were ever written in precisely the same language throughout, nor do any two testators die under the same circumstances in relation to their estate, family and

friends. And it would be very unsafe as well as unjust to expound the will of one man by the construction which a court of justice had given to that of another merely because similar words were used in particular parts of it."

These conditions illustrate the necessity of limiting the ordinary rules of testamentary construction in their application and of subordinating them to the cardinal rule, which is of universal application, that the intention of the testator, as gathered from his entire will, must prevail if not opposed to some positive provision of the law or to some general principle of public policy. (Schouler on Wills, sections 462, 464, 466, 468.)

Applying this cardinal rule of construction, and gathering from the other provisions of the will of George M. Bedinger with regard to these specific devises of land to his children that it was his intention that the living beneficiaries should be eventually the absolute owners of the portions devised to them, it is our opinion that he intended that the portion devised to his daughter and her son should revert to his other children only in the event *both of them* died without children previous to his death.

Upon this construction, which we think is a rational one, and in exact accord with the intention of the testator thus ascertained, both Mrs. Bedford and her son Robert having survived the testator, the former was left with a life estate in the land, with remainder in fee to the latter, which was subject only to the possibility of being divided upon the death of Mrs. Bedford, leaving other children surviving her. It follows that at the death of Mrs. Bedford the said Robert, being her only child, became vested with the absolute title to the 200 acres of land in controversy under the will of George M. Bedinger, deceased, and that it passed at his death and under his will to the appellant, Susan M. Bedford, unless the character of his interest in the land was changed by subsequent provisions of the will and codicils, and that question we will now consider.

In the body of his will George M. Bedinger left to his wife, Henrietta, a farm of 300 acres, called his "mill farm," for life, besides a small farm of about 80 acres, also for life, it being the farm on which he lived, some negro slaves and all of his household and kitchen furniture and provisions.

It will be observed, by reference to the residuary clause of his will, which we have quoted, that taking out what he had left to his wife and the specific devises and bequests he had made to his five children, and some of his grandchildren named in the will, he left all the residue of his estate of every description to his "five living children." This clause contains the provision that should any of his five children "die without issue *before they have disposed of their interest* in any realty thus devised their portion (shall pass) to the others living or having issue."

It is ably contended by counsel for the appellees, and there is strong authority to support the contention that the language quoted vested his children with the unlimited right to dispose of the property left them respectively, and that, therefore, each of them was thereby vested with a fee simple title to the property received under this clause. We are inclined to the opinion that this is the legal effect of the language used when taken in connection with the words, "their heirs or assigns forever," which occur at the end of the clause quoted from. But it is not necessary for our purpose now to decide that point. We have quoted this language to show that the restriction, if there be any in the residuary clause of the will, does not operate upon the property embraced in the specific devises to the

children of the testator, but only upon the property that passed to them under the residuary clause. The language is with reference to the disposal by his children of the "realty *thus devised*"—that is, devised to them by the residuary clause. The language quoted is susceptible of no other reasonable interpretation.

Coming now to the first codicil, which was executed on the 11th day of July, 1842, by that addition to his will he provided that his wife should have for life all of his land *that had not been specifically devised to his children*, in addition to what had been left to her in the body of his will, and provided further that at her death all of the property left to his wife during her life should be divided into five equal parts—"four parts to go to my sons, Henry C., Daniel P., Benjamin F. and Joseph Bedinger, *and their heirs forever*, and the other fifth bequeath to my daughter, Elizabeth Bedford."

It is contended by counsel for appellants that the provision last quoted did not vest Mrs. Bedford with a fee in the property to which she was entitled under the first codicil, but we are of the opinion that it was intended by the testator that all of his children named in the codicil should have the absolute title to the property they were respectively entitled to thereunder, and that the use of the words "and their heirs forever," after the gift to his sons, and the failure to use the same words after the gift to his daughter, did not evince an intention on his part that the daughter should be vested with a less interest in her share than his sons would have in their respective shares; but much stress is laid upon the latter part of this clause of the codicil, which provides that "should my children or grandchildren, to whom I have willed anything, die without issue, that then the property thus willed should revert back to my surviving children and their heirs in equal proportion," and it is contended that the legal effect of this part of the clause was to change the fee of the property devised to each of his children and to his grandchildren into a defeasible fee.

But while it is unnecessary to decide that question here, owing to the peculiar wording of the whole clause, it would not, in our opinion, be an unreasonable construction of the part of it last quoted to refer the words "die without issue" to the death of any of the testator's children or grandchildren before the death of the testator, as we have done in construing the clause by which the tract of 200 acres of land was devised to Mrs. Bedford; but whether this would be a fair construction or not it is quite evident that the first codicil was not intended to operate upon the specific devises made to the children of the testator in the body of his will because the land devised to them was expressly excepted from the devise therein made to his wife of all his land "not specifically willed to my children."

If, however, the clause now under consideration ought to receive the construction contended for by counsel for the appellants, so far as thus construed, it would affect the title to the property devised to Mrs. Bedford, its operation is defeated by the second codicil, which will be next considered.

The second codicil bears date the 28th day of May, 1843, not long before the death of George M. Bedinger. He was led to add this codicil to his will by the fact that he had leased for a term of years his residence and adjoining property, a part of which had been devised to his wife, which made it necessary, in his opinion, "to change and explain many items contained in the will and codicil, to which this is attached." Consequently, in the first item, "instead of the various devises contained in the preceding will," he left to his wife "one equal third part *of all my property*, both real, personal and

mixed, during her natural life," and provided that "*after my death* my will and desire is that the same *be equally divided between my five children*," naming them, "*their heirs and assigns forever.*"

In other items of this codicil he referred to some of the specific devises that he had made, from which we conclude that he did not intend that any of them should be changed in any way by the first item of this codicil above quoted; and it is a familiar principle that where the terms of a will clearly give an estate, the words of a codicil must manifest an equally clear intent to revoke or change it before they will be allowed to have such an effect. (Sturgis v. Work, 122 Ind., 134, 17 Am. St. Rep., 349.)

Finally, in the sixth item of this codicil, he provided that in case of the death of Mrs. Bedford, "*before her son shall have arrived at the years of maturity, and should her son die without issue*," then the property "bequeathed" to her should "revert and be merged in the estate." This is clearly *a double contingency*, upon the happening of which the reversion of the property devised to Mrs. Bedford under this codicil was made to depend, and the general rule is that when an estate depends upon a double contingency both must concur. (Phelps v. Bates, 54 Conn., 11; 1 Am. St. Rep., 92.)

We have seen that in this codicil the property was devised to Mrs. Bedford and her four brothers in fee simple, but the portion devised to Mrs. Bedford was made subject to reversion upon two conditions or contingencies: First, her death *during the minority* of her son; and, second, his death without issue *during his minority*.

We think the second contingency, as we have stated it, is the proper construction, but we do not regard it as material because the effect of the failure of either event upon which the reversion depended to happen was to prevent the reversion—that is, the death of Mrs. Bedford during the minority of her son, *and his* death without issue either during his minority or after he attained his majority—so that when the son reached his majority, his mother surviving, every condition or contingency was removed from her title to the property, and she at once became the absolute owner of it, with full power to dispose of it in any way she might choose to do.

It follows that Mrs. Elizabeth M. Bedford had the right to dispose of all her land by will except the tract of 200 acres, in which, as we have seen, she had only a life estate, and that the devise of it, after the death of her son, to the State of Kentucky in trust is valid unless it is so indefinite and uncertain as to the object and the beneficiaries of the trust as to render it impossible to execute the trust. And this we are now to determine.

The clause of Mrs. Bedford's will by which the lands that she owned in Lewis and Nicholas counties, and which she had the right to dispose of, were devised to the State of Kentucky in trust, has been quoted. After the termination of her son, Robert Bedford's, life estate in these lands which was devised to him, and upon his death, without child or children, she required the lands to be sold, and bequeathed the proceeds of the sales to the State of Kentucky "forever in trust," and to be held by the State forever "for the use and benefit of the children of the State," the money to be "invested in some profitable bank stock, and the profits therefrom * * * * to be appropriated annually forever toward the education of the children of the State of Kentucky, particularly the poor and most unintelligent." She desired that the money should constitute "a permanent school fund, and the interest from this fund be appropriated annually towards the education of the children of this State."

It is contended that this disposition of her property was invalid because of indefiniteness, and that the property descended to her son, Robert Bedford, and passed to his wife, appellant Susan M. Bedford, under his will. The allegation is that the foregoing devise "is so uncertain, indefinite and ambiguous as to its purpose and beneficiary objects as to render it insusceptible of execution or enforcement, and is, therefore, ineffective and inoperative, and should be held for naught."

Counsel for appellants have wholly failed to sustain their contention as to the indefiniteness and the consequent invalidity of this bequest of the proceeds of the sales of the lands of Mrs. Bedford. It is definite, as has been fully sustained in the arguments of counsel for the agent of the State, first, as to the *trustee;* second, as to the *beneficiaries;* and, third, as to the *object* and *purpose* of the trust.

It is not contended that the State may not be a trustee of a charity, nor that *education* is not a proper purpose for which charitable uses may be created; but it is contended that the beneficiaries are so indefinitely described that they can not be identified. Indefiniteness in the latter particular characterizes all charitable trusts to a greater or less degree, and it is said to be the one thing that distinguishes such a trust from a mere private trust. (2 Pomeroy's Equity, section 1025; Russell v. Allen, 107 U. S. Rep., 182.)

In the latter case the court said that charitable trusts "may, and indeed must be, for the benefit of an indefinite number of persons, for if all the beneficiaries are personally designated the trust lacks the essential element of indefiniteness which is one characteristic of a legal charity."

In numerous cases trusts of this kind have been sustained by this court which it is not necessary to review. (Moore's heirs v. Moore's devisees, &c., 4 Dana, 354; Curling v. Curling, 8 Dana, 38; Attorney General v. Wallace, 7 B. Mon., 611, Cromie's heirs v. Louisville Orphans' Home Society, 3 Bush, 365; Peynado v. Peynado, 82 Ky., 5; Leeds v. Shaw's adm'r, *Ib.*, 79.)

In the Peynado case the beneficiaries of the trust were to be "as many little orphan children (males) from respectable families as can possibly be taken" into an orphan asylum and school that was provided for, and the trust was held to be valid.

In the case of Leeds v. Shaw a bequest was made of the income of certain stocks, which was directed "to be paid over every year to the trustees of the Lagrange School District, and by them expended in the education of poor children, or towards the maintenance of a good common school in said district, etc.," and this was held not to be void for uncertainty. And so we hold that the bequest in this case is sufficiently definite in every particular, and that it is valid.

For the reasons given so much of the judgment of the court below as adjudged that the tract of two hundred acres of land in Nicholas county that was devised to Elizabeth M. Bedford specifically by the will of George M. Bedinger, deceased, belonged to Joseph M. Bedinger and others is reversed and the cause remanded, with directions to enter a judgment in favor of the appellant, Susan M. Bedford, for the said tract of land, and so much of the said judgment as adjudged that the testatrix, Elizabeth M. Bedford, had a fee simple interest in the tract of 300 acres, and the one-fifth of the tract known as the Blue Lick property, containing about 460 acres, in Nicholas county, and in the tract of 343 acres in Lewis county, and that the same passed under her will, and that the said lands be sold and the pro-

ceeds thereof paid to Garrett S. Wall, the agent of the State of Kentucky, be affirmed, and such further proceedings may be had in the cause in the court below as may be necessary to execute the said judgment of sale and to secure the rights of the parties in interest.

TURNER V. JOHNSON.

(*Filed May* 20, 1896—*Not to be reported.*)

1. *Appeals*—The collection by appellant of the judgment rendered in his favor in the court below, which was for only a part of his demand, does not preclude him from prosecuting this appeal.

2. *Bill of exceptions—Final orders*—The order overruling appellant's motion for a new trial having given him until a day in a subsequent term to file bill of exceptions, a bill of exceptions filed after the day thus fixed can not be considered, although at the same term at which the motion for a new trial was overruled the court entertained a motion by appellant to reconsider the order overruling the motion for a new trial, and reserved the decision of the motion to reconsider until a succeeding term, and did not in fact dispose of it until after the time fixed for filing bill of exceptions. The order overruling the motion for a new trial was a final order, and the court had no power over it after the expiration of the term at which it was rendered, although it attempted to reserve that power.

3. *Transfer to ordinary docket*—This action to recover the rental value of land during the time it was occupied by defendant pending an appeal by him from a judgment in favor of plaintiff for the recovery of land, and also to recover damages on account of waste, etc., was properly brought in equity, and the court erred in transferring it to the ordinary docket, the multitude of questions and issues involved rendering a jury trial impracticable. The question of damage to the farm by neglect to properly cultivate and care for the same may, if either party so desire, be submitted to a jury as an issue out of chancery, but all other questions must be tried in equity.

Wm. H. Holt, J. H. Hazelrigg, Wood & Day, R. A. Mitchell, C. C. Turner and G. C. Lockhart for appellant.

Stone & Sudduth, White & Brooks and Thos. H. Hines for appellee.

Appeal from Montgomery Circuit Court.

Opinion of the court by Judge Guffy.

[This appeal is prosecuted from a judgment rendered in the Montgomery Circuit Court in the suit of Thomas Turner, etc. v. Thomas Johnson; the appeal being prosecuted by Thomas Turner and Squire Turner, Ben. R. Turner and J. R. Cassidy, assignees of Thomas Turner, claiming that the judgment rendered was much less than they were entitled to recover, the amount recovered being $4,403.59, appellants having sued for $36,000.

It appears that, some time prior to 1884, appellee had acquired the legal title to a large body of land in Missouri, formerly owned by the appellant, Thomas Turner. Appellant claimed the right to redeem said land and have the title restored to him, which claim was denied by appellee. A suit in the court of Missouri was instituted by appellant Turner and judgment rendered in his favor, from which judgment Johnson appealed, and, on the 15th of April, 1885, executed a supersedeas bond, which suspended the judgment, and thus enabled Johnson to continue in the use and control of said land

until the supreme court of Missouri decided the appeal, which court affirmed the judgment of the lower court.

It seems that Johnson, by reason of the appeal and supersedeas, held the possession of the land for four years or more, and, as matter of law, became indebted to Turner on that account. The bond stipulated, in effect, that he should pay the damages that Turner sustained by reason of the appeal, in the event the judgment should be affirmed.

In 1888 the administratrix of Berry Robertson instituted suit in the Montgomery Court of Common Pleas against Turner and Johnson, seeking to subject the indebtedness due from Johnson to Turner to the payment of a judgment held by her against Turner. Prior to this Turner had transferred to Perry nearly $3,000 of his claims on Johnson. Soon after the institution of said suit of Robinson's administratrix Johnson filed his answer, admitting an indebtedness of nearly $6,000, setting up divers offsetts and assailing the priority of Perry's claim, making his answer a cross petition against Turner and others, asking a settlement and accounting of the matters between him and Turner growing out of the occupancy of said land. Turner answered, and set up defense to plaintiff's cause of action, etc. On the 28th of December, 1888, Turner made an assignment of all that appellee owed him to the other three last-named appellants, in trust for all his creditors, subject to the prior assignment to Perry. It seems that Robertson's administratrix had also a suit pending for the settlement of his estate, Turner being a party thereto. On the 8th of March, 1889, these appellants and Perry filed this suit to settle the trust, collect the sum due from appellee and distribute the same; and, on appellants' motion, the three suits were consolidated. Afterwards, on motion of appellee, appellants were required to elect which cause of action they would prosecute—to settle the trust or to collect the sum due from appellee; and appellants elected to prosecute the suit for a settlement and collection of the claim against appellee. At the September term, 1889, on motion of appellee, an issue out of chancery was ordered as to the value of rents, damage, etc., to the land; and at the March term, 1890, a jury trial was had and verdict rendered, which was set aside on appellants' motion. Afterwards, on motion of appellee, the cause was transferred to the ordinary docket. At the November term, 1891, a trial by jury was had, resulting in the verdict and judgment hereinbefore stated. Appellants' motion for a new trial was overruled, and appellants' have appealed.]

This appeal was decided by this court June 19, 1895.

Appellee fi ed a petition for rehearing and a re-argument was ordered, and after hearing the same the court now withdraws the former opinion. Appellee's motion to dismiss the appeal, made on the grounds that appellant had collected the judgment recovered in the court below, is overruled.

Section 757 of the Civil Code of Practice authorizes this appeal, but if it did not authorize the appeal the agreed order on page 206 of the record would preclude appellee from pleading the collection of the judgment in bar of this appeal.

It appears that the judgment appealed from was rendered at the November term, 1891, of the Montgomery Circuit Court, and appellant's motion for a new trial made and overruled, and time given until a day in the November term, 1892, to file bill of exceptions; afterwards, at the same term at which the motion for a new trial was overruled, the court entertained a motion by appellant to reconsider

the order overruling the motion for a new trial and reserved the consideration and decision of said motion to reconsider until a succeeding special term of the court. It seems that no determination or decision of that question was made until the November term, 1892, and until after the day fixed for filing the bill of exceptions, at which time the court refused to set aside the said order and extended the time for filing the bill of exceptions to a certain day, at which time the bill was filed and approved. Appellee insists on his motion to strike the bill of exceptions from the record. The contention of appellee is that the court had no power to set aside the order overruling the motion for a new trial after the term at which the order was made, and that the order of court reserving the right to do so is a nullity, as is also the order of the November term, 1892, giving time to prepare and tender the bill of exceptions.

The contention of appellant is that the action and order of the court at the May term, 1892, suspended the order overruling the motion for a new trial, and that the same so remained until the court acted on the motion to reconsider, hence that the bill of exceptions was properly and legally filed and approved. It is manifest that the learned judge of the court below was of the opinion that his action had the effect contended for by appellant, and that he believed he had the power to do so, and it is earnestly urged by appellant that we should so treat the order in question. It, however, seems clear to us that the order overruling the motion for a new trial was a final order, and that the court had no power over it after the expiration of the term at which it was rendered, and that the attempt to reserve that power was unauthorized, and, therefore, a nullity. It results, therefore, that appellee's motion to strike the bill of exceptions from the record must be sustained, and the bill is stricken from the record. The material and important question in the case is as to whether the court below erred in transferring this suit from the equity to the ordinary docket.

It seems to us that the cause of action, the object of the suit, together with the multitude of questions and issues involved, make this a case of equitable cognizance and rendered a jury trial impracticable, and that the court erred in transferring the case to the ordinary docket. The question of damage to the farm by neglect to properly cultivate and care for the same, may, if either party so desire, be submitted to a jury as an issue out of chancery, but all other questions must be tried in equity.

A number of questions have been presented and argued which we deem it unnecessary to notice, and it is to be understood that this opinion does not affect or decide any question in the case not specifically mentioned in the opinion.

For the reason indicated the order of the court below requiring appellant to elect which cause of action he would prosecute, as well as the order transferring the case to the ordinary docket and overruling appellant's motion for a new trial, were erroneous, and the judgment is reversed and cause remanded, with directions to transfer the case to the equity docket and award appellant a new trial, and for proceedings consistent with this opinion.

McLAUGHLIN V. COMMONWEALTH.

(*Filed May* 21, 1896—*Not to be reported.*)

1. *Indictment for rape*—An indictment for rape is not defective in failing to allege that the female upon whom the rape was committed was over twelve years of age, as that is to be understood where there is no allegation as to her age, the punishment being less severe where she is over twelve years of age than where she is under that age.

2. *Rape*—Neither fornication nor adultery is a degree of the offense of rape, and the failure, upon the trial of appellant for rape, to instruct the jury as to those offenses was not error.

3. *Appeals*—This court can not reverse in a criminal case for an error occurring at the hearing of the motion for a new trial.

J. M. Simmons for appellant.

W. S. Taylor and Thos. W. Thomas for appellee.

Appeal from Warren Circuit Court.

Opinion of the court by Judge Paynter.

The accused was indicted for rape, tried, convicted and sentenced to the penitentiary for ten years. The indictment is not defective because it failed to state that Clyde McFerran, upon whom the rape is alleged to have been committed, was over twelve years of age. A rape may be committed on a female of any age, but when she is under twelve years of age the punishment is greater than when she is over that age.

When the indictment fails to allege that the female upon whom the rape is committed is under twelve years of age, then it must be understood as meaning she is above that age. Neither fornication nor adultery are degrees of the offense of rape, therefore, it can not be said the court failed to give the whole law of the case because it failed to instruct the jury upon such questions.

This court has no revisory power to act upon the alleged error occurring at the hearing of the motion for a new trial. (Redmon v. Commonwealth, 82 Ky., 333.)

The court entertains not the slightest doubt of the defendant's guilt.

The judgment is affirmed.

GRAYSON V. COMMONWEALTH.

(*Filed May* 22, 1896—*Not to be reported.*)

Criminal law—Evidence of threats—The evidence of a defendant on trial for his life is inevitably viewed with suspicion, and if he can corroborate it on a material point he should be permitted to do so.

Upon the trial of appellant for murder he should not have been required to rely upon his own evidence alone as to threats made by deceased against his life, but should be permitted to prove by others that the deceased had made such threats; and while threats made a year previously might possibly be considered as too remote, those made one month before were competent.

John L. Scott & Son and B. G. Williams for appellant.

W. S. Taylor for appellee.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge DuRelle.

There is but one question for decision in this case. The instructions seem to us to correctly state the law of the case as applicable to the facts proven.

On the trial of appellant for murder it was shown that he came to his home and found deceased sitting in a buggy in front of the house; that a difficulty took place between them; that deceased alighted from his buggy and a fight took place, in which the deceased was shot and killed.

Appellant was allowed to state the circumstances of the two previous difficulties with deceased, which took place a year and a month respectively before the killing, and to state threats made by deceased against his life on both occasions. But the court refused to allow him to prove by others that deceased had on those occasions assaulted him and threatened his life. The threats made a year previously might possibly be considered as too remote, but those made one month before the killing were competent as corroborating his statement of his reasons for believing his life to be in danger. It was error to compel him to rely on his own unsupported evidence in that behalf. The evidence of a defendant on trial for his life is inevitably viewed with suspicion, and if he can corroborate it upon a material point he should be permitted to do so.

For this reason the judgment below is reversed and the cause remanded, with directions to award appellant a new trial.

SUMMERS V. SPRIGG.

(*Filed May* 22, 1896—*Not to be reported.*)

1. *Homestead*—The husband is not entitled to a homestead exemption in the lands of his wife until after her death, her lands not being subject to his debts.

2. *Same—Abandonment*—Where a debtor moved from a tract of land owned and occupied by him as a homestead to a tract of land owned by his wife, which was separated from his land only by a public road, and used both tracts as if they were contiguous, it can not be said that he has abandoned his homestead, and, his land being worth less than $1,000, he is entitled to have it set aside to him as a homestead.

J. P. Hobson for appellant.

Sprigg & Chelf for appellee.

Appeal from Hardin Circuit Court.

Opinion of the court by Judge Landes.

The appellee caused an execution in his favor against the appellant to be levied on the appellant's interest in a parcel of about 12 acres of land in Hardin county, which the appellant claimed as his homestead; and in this action the appellant sought to have the levy quashed and to have the land levied on adjudged to be his homestead. The court below adjudged that the appellant was not entitled to a homestead in the land and dismissed his petition, and from that judgment he has appealed.

It appears that the land levied on was purchased by the appellant, who was a housekeeper, and occupied by him with his family, consisting of his wife and one child, as a homestead, some time before the debt he owes appellee was created. It also appears that he moved from this land to a farm belonging to his wife, situated about four hundred and forty yards from his land, but connected with his land by a public road. This occurred about ten years ago, and he has been living with his family on his wife's land ever since he moved there, being all the time a *bona fide* housekeeper, but has continually used both tracts as if they were contiguous, using the house on his land as farmers ordinarily use such houses in connection with his farming operations, and that the land levied on is all the land he owns, and that he has, during all this time, claimed it as his homestead and that it is of less value than $1,000. His wife's farm contained, originally, 137 acres, but in 1890 they conveyed to a brother of appellant an undivided half of it for $2,600 and mortgaged the other undivided half to him for $2,500 and the whole tract is worth $4,500.

It is claimed by counsel for the appellee that this land of appellant is subject to execution for his debt against the appellant on the ground that he has a homestead in his wife's land, and the further ground that the appellant had abandoned it when he left it and moved on his wife's land. But this claim cannot be sustained. It is true that under the statute the surviving husband is entitled to a homestead right in the homestead of his wife in like manner and under the same restrictions as are provided for the widow respecting the homestead of her deceased husband. (Gen. Stat., chap. 38, art. 13, secs. 14 and 15; Ky. Stat., secs. 1707 and 1708.) But the husband is not entitled to the exemption for *his* debts of homestead in the lands of his wife until after her death, because, first, he is entitled under the statute to no such homestead right during her life; and, second, the wife's lands are not subject to the debts of her husband. The exemption allowed by the statute is *to the debtor*, of the homestead *owned by him*, and from or respecting *his debts*. (Ky. Stat., sec. 1702; Johnson v. Kessler, 87 Ky., 458.) And while it is true that it has generally been held that the debtor, in order to entitle him to this exemption, must actually reside on the land claimed as a homestead, the statute does not, in express terms or by any fair implication, make an actual and continuous residence upon or occupancy of the land claimed as a homestead an essential condition in every case of the right of exemption. There may be, in accord with the true spirit and intent and in contemplation of the statute, such an occupancy of the premises in which a homestead is claimed as, although not actual, would be effectual in securing the right of exemption allowed by the statute. And it has been well settled that, where there are several contiguous tracts or parcels of land or several tracts or parcels not contiguous but conveniently situated so that they may be and are actually used as one farm or place of residence, the actual residence being on one of the tracts or parcels, they must be regarded as the homestead of the debtor claiming the exemption, and that the exemption extends to all of them to the extent of $1,000 in value. (Nichols v. Bennett, &c., 5 KY. LAW REP., 199; Bennett v. Baird, 81 Ky., 554; Rose v. Sweeney, 12 KY. LAW REP., 861; Slaughter v. Karn, 15 *Ib.*, 429; Mason v. Columbia Finance & Trust Co., 18 KY. LAW REP., 40.) But in all such cases the *bona fide* use of the land by the debtor for the benefit of himself and family must be shown and must be considered as well as the question of actual residence.

Upon the material facts of this case as stated, which show that the appellant has never ceased to claim the land levied on under the execution in favor of the appellee as his homestead since he removed to his wife's land, and during the whole time has used it in good faith in connection with the use of his wife's land, upon which he actually resided, just as if the two tracts were contiguous, it can not be said that he has abandoned his homestead. And the interest in the land that has been levied on being owned by him, and being all the land he owned, and, according to the agreed facts, it being worth less than $1,000, the appellant was entitled to have it exempted and set aside to him as his homestead, and the court below erred in refusing so to adjudge.

Wherefore, the judgment is reversed and the cause remanded, with directions that a judgment be entered in favor of the appellant consistent with this opinion.

CITY OF HAWESVILLE V. BOARD OF EDUCATION OF HAWESVILLE.

(*Filed May* 22, 1896.)

Repeal of local acts—Disposition of license fees for privilege of selling liquor—Section 3646 of the Kentucky Statutes, a part of the charter for towns of the fifth class, which provides that all moneys received from licenses shall be paid into the "general fund," operated to repeal certain local acts requiring all or a part of the license fees for the privilege of selling liquor in the city of Hawesville, a town of the fifth class, to be paid to the board of education of the city; therefore, all license fees imposed and collected under the authority of the city council belong to the general fund of the city, while the licenses collected and required to be paid to the State authorities should be paid to the officer authorized to receive the same.

R. Y. Bush and T. M. White for appellant.

D. L. Adair for appellee.

Appeal from Hancock Circuit Court.

Opinion of the court by Judge Guffy.

This appeal is prosecuted by the city of Hawesville from a judgment rendered in the action of the board of education of Hawesville against the appellant.

It appears that in 187- and 1882 and 1888 sundry acts of the Legislature were passed regarding the city of Hawesville, as well as organizing or incorporating the board of education, and at one time it seems that the law set apart all license fees paid by vendors of ardent spirits in Hawesville for the benefit of the board of education. In 1882 an act was passed extending the limits of the said town, etc., and in 1888 an act was passed giving the trustees power to license coffee houses, etc., for the sale of ardent spirits, etc., and provided that eighty per cent. of such license should be paid to and be for the benefit of the board of education, and the residue be applied to the payment of marshals' salary and police expenses. All parties proceeded to act under and according to the provisions of the act of 1888, until some months after July 3, 1893, at which time appellant refused to pay to appellee any part of the license fees received after the act of 1893. Therefore, appellee instituted suit to recover the same.

The case was submitted upon an agreed statement of facts, and the court rendered judgment in favor of appellee for $638, and from that judgment this appeal is prosecuted, that sum being eighty per cent. of the license fees collected. Appellee obtained a cross appeal, and insists that the entire license fees should be paid to it, assuming and contending that the act of 1888 setting apart the twenty per cent. for city purposes, being a change of the former law, was and is void.

The contention of appellee is that by the charter of appellee and acts of the Legislature it acquired a vested right to all such license fees, and relies on the Dartmouth College and many other decisions to support its contention. It also contends that the act of 1893 for the government of towns of the fifth class, to which class appellant belongs, is not inconsistent with the local laws quoted and relied on by it.

It seems clear to us that the act of July 3, 1893, repealed all laws inconsistent with it, and the several local acts relied on by appellees, being inconsistent with the general law of 1893, were repealed thereby. Subsection 4 of section 3637, Kentucky Statutes, authorizes the city council to license vendors of spirituous liquor, and requires not less than $250 nor more than $1,000 license fee to be paid.

Section 3646 *supra* provides that all moneys received from licenses shall be paid into the general fund.

It seems clear to us that, under the law in force from and after July 3, 1893, all license fees imposed and collected under the authority of the city council properly belong to the general fund of the city of Hawesville, and the license collected and required to be paid to the State authorities should be paid to the proper officer authorized to receive the same.

For the reasons indicated the judgment on the cross appeal is affirmed, and the judgment on the original appeal is reversed and cause remanded, with directions to render judgment in favor of appellant on its counterclaim and for proceedings consistent with this opinion.

THOMAS, &C. v. TURNER, &C.

(*Filed May* 22, 1896—*Not to be reported.*)

Partition—In partitioning land between joint owners, what one or more of them may have previously taken or derived therefrom and appropriated, whether consisting of rents and profits or timber or minerals, is a proper and germane subject of the litigation; therefore, in this action for partition of land, it appearing that one of the joint owners had cut and carried away a large quantity of timber from the land jointly owned, the value of their share of which the other joint owners sought to recover, it was error to require them to elect whether they would proceed for partition of the land or for recovery of value of timber taken. And while they elected to proceed for partition, yet as the court afterward referred the matter to a commissioner, and each party took proof in regard to quantity and value of timber taken and report thereof was duly made, the order requiring an election should be treated as having been set aside with acquiesence of all parties; therefore, in decreeing partition it was not improper to deduct from the interest of the joint owner who had taken the timber so much land as was required to compensate the other joint owners for their share of the value of the timber taken.

Beckner & Jouett for appellants.

Wood & Day and Thos. Turner for appellees.

Appeal from Powell Circuit Court.

Opinion of the court by Judge Lewis.

The principal questions involved on this appeal were directly or incidentally determined in two cases consolidated and decided by this court June 21, 1890, the style being Howe, &c. v. Anderson, &c.

It appears, as recited in the opinion then delivered, that in 1853 Kincaid, claiming and being in possession, sold and conveyed to Moses Spencer a large body of land, lying in the present counties of Powell and Wolf, and described by land marks; but in 1860 he brought suit in the Wolf Circuit Court to enforce his lien for purchase money, and the land having been sold was purchased by P. C. Bedford and Thomas Turner at only $450. However, at the next term of the court, an agreement was made between them and Kincaid's representative and heirs, he being dead, and Moses Spencer, W. T. Spencer and Congleton, by which the sale was without exception confirmed, Bedford and Turner agreeing to pay $800 for an undivided half of the land, two-thirds of the other half to be property of W. T. Spencer and the remaining third property of Congleton.

In 1867 Bedford and Turner purchased the interest of W. T. Spencer, thus becoming owner of forty forty-eighths, and A. C. Turner became owner of Congleton's interest. In 1868 Bedford conveyed his interest to J. H. Trimble, who, however, gave his obligation to reconvey ten forty-eighths to Bedford upon payment of certain money.

In 1870 Trimble sold five forty-eighths of the land to James Turley, who, in 1875, transferred title bond therefor to Parmela Fisher. The remaining five forty-eighths was mortgaged by Trimble to his sureties in a revenue bond, the benefit of which mortgage lien, as decided by this court, enured to Howe and Marks. Subsequently Trimble, by direction of Bedford, reconveyed ten forty-eighths to T. C. Anderson, who conveyed or attempted to convey the entire twenty forty-eighths to English.

In May, 1875, on motion of Anderson and Bedford, the action of Kincaid v. Spencer was reinstated on the docket of the Wolfe Circuit Court, and Cox, a commissioner, under order of court, conveyed the entire tract of land as follows: To Turner, twenty forty-eighths; Wm. Mitchell and B. F. Chenault, twenty forty-eighths, and to Turley, eight forty-eighths thereof; and in 1884 Chenault and M. L. Anderson, who had acquired the interest of Mitchell, sold and conveyed the twenty forty-eighths formerly owned by Trimble to the present appellant, J. M. Thomas.

In one of the two consolidated actions heretofore before this court Parmela Fisher set up claim to the five forty-eighths sold by Trimble to Turley, her vendor, and in the other Howe and Marks claimed a mortgage lien upon the other five forty-eighths. To each of the actions J. M. Thomas was made a party defendant, and the decision by this court in favor of the parties plaintiff therein involved loss to him of ten forty-eighths of the twenty forty-eighths of the tract of land which he claimed under Trimble.

The judgment now appealed from was rendered in the same two actions, consolidated with the action of Thomas Turner against J. M. Thomas, &c., and J. M. Thomas, &c., against O. S. Tenney, &c., and according to its terms Turner is owner of twenty forty-eighths; Potter, vendee of Tenney, eight forty-eighths, subject to a lien of J. M.

Thomas; J. H. Trimble, five forty eighths, subject to the lien of Howe and Marks; Parmela Fisher, five forty-eighths, and J. M. Thomas and his vendee, the Kentucky Union Land Co., ten forty-eighths.

Each of the other parties alleged Thomas and his vendee, the Kentucky Union Land Co., had cut and converted to their exclusive use and carried away a large quantity of timber from the land jointly owned, and the value thereof was upon proof ascertained and reported to court by a commissioner appointed for that purpose.

Partition of the land between the joint owners was directed to be made by commissioners according to the interest of each, as before mentioned, except they are required in making the allotment to deduct from the interest of ten forty-eighths, belonging to Thomas and said company, and leave with residue of said tract so much of said ten forty-eighths as will reasonably compensate the other joint owners in the sum of $3,518.15.

There seems to be no objection made by appellants to the particular mode adopted by the lower court for making compensation to the appellees for the timber appropriated, nor do we think they can reasonably complain of the sum ascertained and fixed by the judgment.

One ground for reversal is the court having at one term sustained a motion requiring the other joint owners to elect whether they would prosecute the action for the partition of the land or for the recovery of the value of timber taken and used by Thomas and the land company, and had no jurisdiction to render any judgment as to the latter cause of action.

It is true the court sustained the motion and plaintiffs elected to proceed for partition. But that action was improper, because in partitioning land between the joint owners what one or more of them may have previously taken or derived therefrom and appropriated, whether consisting of rents and profits or timber or minerals, is a proper and germain subject of the litigation. Besides, as the court afterwards referred the matter to a commissioner, and proof was taken by and in behalf of each party in regard to quantity and value of the timber, and report was duly made, the order should be treated as having been set aside with acquiescence of all parties.

Another ground is refusal of the court to direct the issue as to the boundary and ownership of the land submitted to the jury. An entirely sufficient answer to that objection is that there was really no issue left for the jury to try. It had been already distinctly decided by this court in the two cases of Howe, &c., against Anderson that J. M. Thomas, a party to both, was entitled to only ten forty-eighths of the land; and, although neither Turner nor Potter, present appellees, was a party to those actions, there is not the slightest reason for doubting the former was owner of twenty forty-eighths and the latter eight forth-eighths. Indeed the vendors of Thomas are estopped to deny they are joint owners. The land had to be identified according to the description contained in Kincaid's title bond, which was recognized and adopted by the vendors of Thomas in the deed of Cox, commissioner, mentioned. It is true we held that deed to be void as to Howe and Marks and as to Mrs. Fisher. Nevertheless it was a recognition by the vendors of Thomas as the true description of the land. Whether the land as now claimed and owned is within the boundary of a particular patent is not now material, because Kincaid never acquired title under anyone, nor had any other than a possessory title. The boundary of land now jointly owned by the parties to this litigation must, there-

fore, be ascertained without reference to the lines or location of any other survey.

In our opinion the land sold by Kincaid has been held and claimed by him and his vendees in the manner and for a length of time required to make a perfect title; and as it is sufficiently identified and the quantity of interest of each joint owner plainly shown, the lower court properly adjudged a partition and accounting of timber taken and appropriated by appellants.

Judgment affirmed.

DELANEY V. COMMONWEALTH.

(*Filed May* 22, 1896—*Not to be reported.*)

1. *Homicide—Instructions to jury*—As appellant was found guilty only of manslaughter, the court will not inquire whether there was any error in the instructions as to murder; nor will there be any inquiry as to whether there was error in the admission of evidence bearing upon the question of the degree of homicide, as appellant could not have been prejudiced thereby.

2. *Criminal law—Rescue of one abducted*—The appellant's brother having been forced in the nighttime under threats against his life to leave his place of business, enter a carriage and go to the county seat, several miles distant, to marry the daughter of the persons who thus abducted him, the appellant and others had the right to arm themselves and pursue the carriage in order to rescue the prisoner, and to use such force as was reasonably necessary for that purpose, but they did not have the right to commence firing into the carriage or to make a hostile demonstration before demanding the release of the prisoner, and especially so when instead of overtaking the carriage they met it returning.

3. *Practice in criminal cases*—It was too late after all but one of the arguments to the jury had been made to lay foundation for contradiction of a witness who had testified.

4. *Prejudicial errors*—As the Commonwealth's attorney merely followed the example of counsel for appellant in referring to facts not proved, and was interrupted and the matter brought to the attention of the jury, they were not misled or appellant prejudiced by what the Commonwealth's attorney said.

5. *Same*—While the trial judge said rather more than was absolutely necessary to the jury on the subject of agreeing to a verdict, yet as he at the same time, with equal emphasis, admonished them not to agree to bring in a verdict they did not conscientiously approve, and they were not kept together an unreasonable length of time, the appellant was not prejudiced.

I. A. Spalding and H. X. Morton for appellant.

W. S. Taylor for appellee.

Appeal from Union Circuit Court.

Opinion of the court by Judge Lewis.

This is the second appeal by George Delaney from a judgment rendered in pursuance of a verdict of guilty under an indictment against him and eight others for the murder of Abbie Oliver.

On the former trial which, like the present, was a separate one, he was convicted of the crime of murder and his punishment fixed at confinement in the penitentiary for life. But that judgment was reversed and the case remanded for a new trial, at which he was found guilty of manslaughter and his punishment fixed at confinement in the penitentiary for six years.

The facts are not materially different from those developed on the former trial and recited in the former opinion. So we need not repeat them in any greater detail than necessary for an intelligent decision as to the errors of law complained of.

As appears from the evidence Henry Delaney, a brother of appellant, was by Taylor Oliver and his wife forced in the night time, under threats against his life, to leave his place of business in the town of Sturgis, Union county, enter a carriage and go with them to Morganfield, the county seat, twelve miles distant, to marry their daughter, Abbie Oliver, who accompanied them. The excuse for thus coercing him, which they did by presenting, she a pistol and he a gun, was that he had seduced their daughter, which he, however, denied.

Some time after they left, probably as soon as they could be notified and gotten together, the parties indicted, including appellant, started on horseback, armed with shotguns and pistols, in pursuit for the purpose of rescuing Henry Delaney. They did not, however, overtake the carriage, for Oliver and his party had reached Morganfield, Henry Delaney and Abbie had been married, though against his will, and the four persons had reached what is called Tur's Hill, about two miles from Morganfield, on their return to Sturgis, when met, still in night time, by appellant and his companions.

Very soon after the two parties met guns and pistols were fired, resulting in wounding Taylor Oliver in the arm and face, and mortally wounding Abbie, who died about fifteen minutes after the carriage, driven very rapidly by Mrs. Oliver, reached the residence of a person on the road about one and one-half miles from the place of the rencounter in the direction of Sturgis.

Whether Taylor Oliver, when called on by one of the persons indicted to halt, fired the first shot or at all, or whether appellant fired at those in the carriage, or the wounds were inflicted by others of his companions, are questions of fact, about which the testimony is conflicting, and that it was the province of the jury to decide. The main inquiry for this court is whether the lower court properly instructed the jury. But as appellant was found guilty of only manslaughter we will restrict our inquiry to the instructions relating to that degree of the homicide with which he is charged.

The instruction defining manslaughter is as follows: "If the jury believe from the evidence beyond a reasonable doubt that defendant, George Delaney, shot and killed Abbie Oliver, but shall also believe he did so in a sudden affray without previous malice by recklessly and unlawfully shooting into a surrey in which Abbie Oliver and others were at the time traveling, the jury should find him guilty of manslaughter only and fix his punishment at confinement in the penitentiary for a period of not less than two nor more than twenty-one years."

The court defined the law of self-defense as applicable to this case: "The court further instructs the jury that if prior to or on the night of the killing of Abbie Oliver the defendant had information that Mr. and Mrs. Oliver contemplated the capture of Henry Delaney and to compell him by force and against his will to marry Abbie Oliver, then the defendant not only had the right to discuss the matter with Henry Delaney and others but he had the right to bear arms openly and to peaceably employ such means as he deemed proper and necessary to prevent it; and when they had taken said Henry Delaney as aforesaid, if they did it, that was unlawful, and the defendant, either alone or jointly with others, had the legal right to

peaceably pursue and to effect the release of said Henry Delaney and to use such force as reasonably appeared to him to be necessary for that purpose, and if while he was peaceably seeking the release of said Henry Delaney the said Taylor Oliver and wife, or either of them, first fired on him, or those in company with him, the defendant had the right, if it appeared to him to be necessary to save his life or prevent the infliction of great bodily harm upon him or those in company with him to return the fire, and if in doing so Abbie Oliver was accidentally or unintentionally shot and killed, the jury ought to acquit the defendant."

The jury found the homicide was not committed with malice aforethought, or in pursuance of a conspiracy to take the life of Oliver or his wife, and that he was consequently not guilty of murder as defined in previous instructions, but that it was done under circumstances making the offense manslaughter. There is, however, plainly stated in the instruction relating to excusable homicide two distinct conditions the jury was required to believe before finding the defendant guilty of any offense at all—one that the defendant or other person in his company fired into or at inmates of the surrey before either Oliver or his wife fired; another that the defendant himself fired.

In our opinion the instruction was quite as favorable to appellant, if not more so, than the law authorized. While he, accompanied by others, had the right to pursue the carriage armed in order to rescue Henry Delaney, and to use such force as was reasonably necessary for that purpose, they did not have the right to commence firing into the carriage or to make a hostile demonstration before making of Oliver and wife a demand to release him, and especially would such act or demonstration have been unlawful, inasmuch as instead of overtaking the carriage they met the Olivers and Henry Delaney returning from Morganfield to Sturgis.

Objection is made to the ruling of the court on the admission of certain evidence, but as it bore upon the question of the degree of homicide, of which defendant was guilty, he was not prejudiced by the ruling, whether right or wrong, as he was found guilty of only manslaughter.

It was too late, after all but one of the arguments to the jury had been made, to lay a foundation for the contradiction of a witness who had testified. Besides, the matter about which it was announced he could be contradicted was not material.

Counsel for a defendant has no more right than the Commonwealth's attorney to go outside the record in search of facts not proved; and if we understand the complaint made in this case if was simply that he followed the example of appellant's counsel and referred to facts not proved. But as he was interrupted, and the matter brought to the attention of the jury, they were not misled or appellant prejudiced by what the Commonwealth's attorney said. The lower court said rather more than was absolutely necessary to the jury on the subject of agreeing to a verdict, but he at the same time with equal emphasis admonished them not to agree to or bring in a verdict they did not conscientiously approve. Besides, they were not kept together an unreasonable length of time before finding their verdict.

In our opinion no error of law was committed on the trial to the prejudice of appellant, and as the issues of facts were plainly presented to and decided by the jury the judgment is affirmed.

HAWES V. KIRK, &C.

(*Filed May* 22, 1896—*Not to be reported.*)

1. *Thirty years' statute*—The thirty years' statute of limitation is a complete bar to actions for the recovery of real estate, regardless of disabilities.

2. *Sale of land by husband and wife by title bond*—Where husband and wife sold by title bond the wife's land in which the husband had a life estate, although the sale was void as to the wife, the purchaser's adverse possession of thirty years bars a recovery by the wife's heirs, as the thirty years' statute began to run at once, and not merely upon the termination of the husband's life estate.

Cochran & Son for appellant.

W. H. Wadsworth for appellees.

Appeal from Mason Circuit Court.

Opinion of the court by Judge Guffy.

The appellant, Hawes, brought suit against the appellees, alleging in substance that Wm. Moran died the owner of certain lands, including the tract in contest, leaving certain named children, among them, these: Elizabeth, who intermarried with Ashton Turner in 1842, and to them was born an only child, who married one Hawes, and died leaving the appellant her only child; that Mrs. Turner died in 187–, and Ashton Turner died in 1887.

The appellant claims to own one-third of the 50-acre tract of land, described in the petition, as heir at law of Sarah Turner, and seeks to have the tract divided and his one-third assigned to him. The appellees pleaded adverse possession of more than thirty years before the institution of this suit, which was denied by appellant. Judgment was rendered in favor of defendants. We think the possession was established by the proof. It seems that Thos. Moran purchased or claimed to purchase from the other heirs of Wm. Moran the land in contest as early as 1846, and that he and those claiming under and through him seem to have held and occupied the same adversely ever since. But the appellant contends that, the sale by Turner and wife being by title bond the same is void as to Mrs. Turner, and that, Mr. Turner having a life estate, the sale was valid as to him, and that he lived until 1887, until which time appellant had no cause of action, hence the statute of limitation can not bar appellant's right to recover; and that former decisions of this court holding the statute to be a bar in such cases should be overruled.

This court has often held the thirty years statute to be a complete bar to actions for the recovery of real estate, regardless of disabilities, and we are not inclined to depart from the rule so well established. (Midlock v. Suter, 80 Ky., 106; Butler v. McMillen, 82 Ky., 420; Bradley v. Virgess, 87 Ky., 650, and many other decisions of this court conclusively settle the law of this case.

Judgment affirmed.

WORTHINGTON V. WORTHINGTON'S DEVISEES.

(*Filed May* 23, 1896—*Not to be reported.*)

Settlement of will contest—Power of guardian to bind infants—Where the will of a testator was being contested by some of his devisees, a curator had been appointed and an endless litigation confronted those who were inter-

ested, an agreement among the executors, heirs and devisees for a settlement of the controversy and a distribution of the estate was, at their request, properly entered by the chancellor as the judgment of the court, the guardian of the infants having full power to bind them by the settlement, it being to their interest.

J. W. Bryan for appellant.

Edmund K. Stallo for appellees.

Appeal from Kenton Circuit Court.

Opinion of the court by Chief Justice Pryor.

This petition was filed in the court below asking the chancellor to confirm the act of the executors, heirs and devisees of H. Worthington, deceased, evidenced by an agreement under which the rights of the parties in interest have been determined and a prolonged litigation avoided.

The chancellor, in an opinion reciting the facts and adopting the agreement as the judgment of the court, demonstrates the necessity for a speedy settlement of the matters between the parties as well as the wisdom and justice of such an agreement.

The devisor, Worthington, owned a large estate, encumbered by an indebtedness of nearly $300,000. His will was being contested by some of his devisees. A curator had been appointed to take charge of the estate, and administration granted in the State of Ohio, the decedent owning property in that State. An endless litigation confronted the executors, and those entitled to testator's bounty, and no better mode could well have been adopted to secure the estate to those entitled and save the expense of a tedious litigation than the agreement of the parties made part of this record. The guardian of the infants had full power to adjust these matters by settlement, and particularly when for the interest of all those laboring under disabilities.

Judgment affirmed.

ALLEN-BRADLEY CO. V. ANDERSON & NELSON DISTILLERIES CO.

(*Filed May* 23, 1896.)

1. *Arbitration and award*—Arbitrators have no power to select an umpire unless they are authorized to do so by the terms of the submission, and where an umpire is selected by them without such authority an award made by him is a nullity.

2. *Same—Award void*—Where arbitrators make an award as to matters submitted to them, and the award also determines matters not submitted, the award as to the questions submitted will be enforced, but will be treated as void as to the matters not submitted. But that rule has no application in this case, because the entire award is void, for the reason that it was made by an umpire who had no power to act.

3. *Distilleries—Liability for expense of operating pump house*—Where the owner of four distilleries, in connection with which there was a well and pumping station, sold and conveyed to appellant one of the distilleries and sold and conveyed to appellee the other three, also conveying the pumping station, and providing in the deeds that when the property "should be operated for use the cost of operation and the ordinary expenses of repairing incident thereto should be paid by the distilleries using the water from said pump

house in proportion to the quantity of water used, determined by the number of bushels of grain crushed," the appellant is not liable for any part of the expense of operating the pump house during the time it did not obtain water from that source, although its distillery was in operation, as it had the right to obtain water elsewhere if it chose to do so.

Grubbs & Morancy for appellant.

Humphrey & Davie for appellee.

Appeal from Jefferson Circuit Court, Chancery division.

Opinion of the court by Judge Paynter.

The Newcomb-Buchanan Co. formerly owned four distilleries in the city of Louisville. This company failed and the property went into the hands of its assignee.

By proper conveyances the appellant, Allen-Bradley Co., became the owner of one of the distilleries, and the appellee, Anderson-Nelson Co., became the owner of three of them.

To supply their distilleries with water for the purpose of manufacturing whisky the Newcomb-Buchanan Co. procured some ground some distance from the distilleries, on which it had dug a large well, about which the necessary machinery was placed to force the water into the pipes leading to the distilleries.

By the deed which the assignee of Newcomb-Buchanan Co. made to the purchasers of the distilleries he conveyed the pumping station, the deed defining the rights of the parties thereto, and the proportion of expenses each should pay for operating the station, for the ordinary expenses of repairing incident thereto and for reconstruction, etc.

There appears in the deed language as follows, to wit:

"*First*, that when the property should be operated for use the cost of operation and the ordinary expenses of repairing incident thereto should be paid by the distilleries using the water from said pumphouse in proportion to the quantity of water used, determined by the number of bushels of grain crushed as reported to the office of the collector of internal revenue of the United States."

For the distilling seasons of 1885-6, and 1886-7. the Anderson-Nelson Co. paid the expenses of operating the pumphouse. A contoversy arose between the parties over the expense account, particularly over the expense on account of operating the pumphouse for the season of 1885-6.

The pumphouse seems to have been operated ninety-five days during the season of 1885-6. The operation of the pumphouse appears to have ceased about June 1, 1886. Instead of using the water for ninety-five days the Allen-Bradley Co. claimed it had only used water for forty odd days, and that it should not pay any part of the expenses in operating the pumphouse except when it was receiving water from the well. After much correspondence between the companies the matters in controversy were submitted to the arbitrament of Gen. D. W. Lindsey, who was attorney for the Allen-Bradley Co., and Col. John Mason Brown, who was attorney for the Anderson-Nelson Co.

There was no formal submission, but the letters which passed between the companies seem to have formed the basis of the submission. Anderson-Nelson Co. contends that nothing was submitted except the "outstanding accounts" between the parties. The Allen-Bradley Co. contends that it was not only the "outstanding ac-

counts" but the question as to the interpretation of the provisions of the deed under which the pumphouse was acquired. It is insisted for it that Allen-Bradley Co. disputed the account because of the charges for part of the expense of operating the pumphouse when it did not receive the water, claiming that under the contract it could only be so charged with such expenses when it was receiving the water; that this dispute necessarily involved an interpretation of the contract, and that the interpretation given it on the award is binding on the parties in the settlement of all future accounts for operating the pumphouse.

There was no agreement that the arbitrators should choose an umpire. Before they began the investigation the arbitrators selected Judge Alvin Duvall as umpire. The arbitrators could not agree upon an award, and, therefore, the *umpire made it.* It was not an award by those to whom the parties had submitted the questions in dispute.

Arbitrators derive their powers from the submission. An umpire must derive his in the same way. Arbitrators have not the inherent power to select an umpire unless they are authorized to do so by the terms of the submission. When an umpire is thus selected and makes the award it is a nullity. It is the action of a person who has no authority to determine the matters in dispute. (Daniel v. Daniel, 6 Dana, 98; Morse on Arbitration and Award, 245.)

The court below, in so far as the award of the umpire attempted to determine the accounts for the season of 1885-6, upheld the award. When arbitrators make an award as to matters submitted to them it will be enforced; and if the award determines matters not submitted to them, the award as to questions submitted will be enforced, and the award as to the matters about which no question was submitted will be treated as void. (Adams v. Ringo, 79 Ky., 211; Eddy's ex'or v. Northup, 15 KY. LAW REP., 434.)

The award stated the principle which should control in the settlement of the accounts for the distilling season of 1885-6 under the deeds, and also as to how they should be settled for future distilling seasons. The award is that "The expenses of operating the pumphouse during any distilling season are to be paid by the parties in the proportion of the number of bushels of grain mashed by each during that distilling season, whether using the water or not, inasmuch as each party has the privilege and right to use the water."

The effect of the award is that should one of the distilleries run during a distilling season, or a part of one, and procure the water it needs for the purpose from any place other than the well, still it would be bound to pay the expense of operating the pumphouse in the proportion of the number of bushels of grain mashed by each distillery during the distilling season.

The distilleries did not run during the season of 1887-8. They did during the seasons of 1888-9 and 1889-90, and Allen-Bradley Co. paid the expenses of operating the pumphouse during these seasons. The distillery seasons began in the falls of 1888 and 1889, and closed respectively in ———, 1889, and in June, 1890. Anderson-Nelson Co. did not begin to take water from the well in the distillery season of 1888-9 until April 1, 1889, and the distillery season of 1889-90 until April 18, 1890, and continued from the dates named to take water from the well until the close of each season. Allen-Bradley Co. used the water during the entire seasons.

This action is to recover of Anderson-Nelson Co. its proportionate part of the expense for operating the pumphouse during the distillery seasons of 1888-9, and 1889-90. The Allen-Bradley Co. kept their

account upon which it sues on the basis of the award, and seeks to compel Anderson-Nelson Co. to pay part of the expenses for operating the pumphouse for several months in the distillery seasons of 1888–9 and 1889–90 when it was procuring at great expense its water elsewhere. If the award was void then neither is entitled to have it enforced.

The Allen-Bradley Co. wants to enforce the entire award, while Anderson-Nelson Co. wants it enforced in so far as it determined the accounts for the distilling seasons of 1885–6, but disregarded wherein it claims that the umpire went beyond and determined matters which were not submitted to Brown and Lindsey for arbitration. One part of the award was just as void as another part of it. The entire award being void, the rule that an award is enforcible so far as it determines the questions submitted and disregarded wherein it determines matters not in the terms of the submission, is not applicable. That rule is applicable when there has been a valid submission and the chosen arbitrators have made an award.

In this case the arbitrators did not make an award, and acts of the umpire were void, the question in dispute between the parties remained undetermined. Under the award made by the umpire Allen-Bradley Co. would be compelled to pay part of the expenses of operating the pumphouse in the seasons of 1885–6 when they were not getting water from the well. It appears it did not get any water from it in the months of April and May, 1886. The judgment of the court below sustains the award, wherein it has the effect that we have just stated.

The court below also held that Anderson Nelson Co. was not liable for the expenses of operating the pumphouse when it was not receiving water therefrom.

The contention of the Anderson-Nelson Co. that the award in the particular mentioned should be enforced is inconsistent with its claim that the award is void, and obviously unreasonable and unjust.

The court below held that in making up the accounts between the two companies for the seasons of 1888–89, and 1889–90, and in defining the proportion of expense of operating to be paid by each company, the amount of water used by each company should be arrived at by ascertaining the number of bushels of grain mashed as reported to the office of the collector of internal revenue of the United States from the time that the companies respectively commenced using the water until they ceased using it for the season. In this the judgment is correct.

The same rule must be applied in making up the accounts and determining the water used by each company for the distilling seasons of 1885–6 and 1886–7. For this purpose the case must be referred to the commissioner of the court.

The interpretation given the deed by the umpire in regard to the expense of operating the pump house (and we are not to be understood as expressing an opinion as to the balance of it) is certainly not the proper one. It certainly was not intended that the company not using the water from the well should pay any of the expenses of operation while the other company was alone using the water. With the separate pump as now arranged it seems that no complication can arise in the future.

All questions not specifically passed upon by this opinion are undetermined by this court.

The judgment is reversed, with directions that further proceedings conform to this opinion.

WEBB V. COMMONWEALTH.

(Filed May 23, 1896—Not to be reported.)

1. *Breaking warehouse with intent to steal*—A livery stable, where bridles, buggies and farming implements are kept, is a storehouse or warehouse in the meaning of section 1164 of the Kentucky Statutes, providing for the punishment of any person who shall feloniously break such a house with intent to steal.

2. *Same*—Although the upper part of the stable door was open, yet, as the lower part was fastened by a pin and the defendant removed the pin and shoved the doors open, this constituted a breaking.

3. *Evidence—Prejudicial error*—While it was error to allow witnesses to testify that articles stolen prior to the breaking were found in the possession of defendant, he was not prejudiced thereby, as he admitted the breaking and the stealing of other articles at that time.

4. *Evidence of breaking*—Evidence that the articles taken at the time of the breaking were found in the possession of defendant was competent to show that he had stolen them, the stealing being evidence that the breaking was with intent to steal.

C. C. Grassham for appellant.

W. S. Taylor for appellee.

Appeal from Livingston Circuit Court.

Opinion of the court by Judge Paynter.

The charge is that the defendant feloniously broke a livery stable where bridles, buggies and farming implements were kept, with the intent to steal property of value therefrom, and did steal property therefrom, to wit: collars, bridles, comb and brush.

A stable thus kept is a storehouse or warehouse in the meaning of the statute. (Ray v. Commonwealth, 12 Bush, 397; White v. Commonwealth, 87 Ky., 454.)

The door of the livery stable consists of lattice and solid parts. The lattice part was the upper part and is about 7 feet high and 9 feet wide. Below it the solid part of the door hung and fills a space of about 3 feet and 6 inches by 9 feet. The lattice part was standing open and the other part was fastened by a hasp and a pin. The defendant unfastened it by removing the pin and shoving the doors open. This was a breaking.

It was error to allow the witnesses to testify as to the loss of the collars and bridles or as to finding them in the possession of the defendant, as they were not stolen at the time of the breaking.

They had been stolen from the stable, as the evidence showed, some weeks before the breaking of the stable occurred. The comb and brush were stolen by the defendant on the occasion of the alleged breaking, and the evidence that they were found in the possession of the defendant on the day they were stolen was admissible as evidence to show that the defendant had stolen them and that the breaking was felonious.

This court has held that the stealing is evidence of the intent in breaking.

The defendant was introduced as a witness for himself and admitted that he stole the comb and brush at the time charged in the indictment and that he entered the stable in the manner hereinbefore stated.

He admits the breaking and the stealing. The act of stealing

after the breaking is evidence of the defendant's intent to steal when he entered.

With such admissions of the accused we are unable to see how his substantial rights have been prejudiced by the above evidence referred to, especially in view of the fact that the jury fixed the lowest penalty allowed by law.

Judgment affirmed.

SHEWMAKER, &C. V. MACKVILLE, WILLISBURG & LOUISVILLE T. P. CO.

(*Filed May* 26, 1896—*Not to be reported.*)

Turnpikes—Right to enjoin collection of tolls—Individuals can not enjoin a turnpike road corporation from collecting tolls upon the ground that the corporation does not keep the road in repair. Proceedings for relief must be in the name of the State.

W. E & S. A. Russell for appellants.

Jno. W. Lewis for appellee.

Appeal from Washington Circuit Court.

Opinion of the court by Judge Guffy.

This appeal is prosecuted from a judgment of the Washington Circuit Court rendered in favor of the appellee in an action instituted by C. Shewmaker and others against the appellee.

The plaintiffs below, appellants here, sought to enjoin and restrain the defendant, a turnpike company, from charging and collecting toll from the plaintiffs when traveling on said turnpike road upon the ground that the company failed to keep the road in reasonable repair; also questioned its right to collect at all and knowingly permitted the road to be and remain in an unsafe and dangerous condition.

Appellee's demurrer seems to have been overruled. The defendant answered denying the material averments of the petition. The proof in the cause is considerable, but need not be recited for the reason that the plaintiffs can not maintain an action to enjoin the collection of tolls upon the ground and only for the reason that defendant does not keep the road in repair.

The case of Kennedy v. Green, 16 KY. LAW REP., 258, determines the questions litigated in this suit.

It seems that the defendant is a chartered company, and, that being true, proceedings for relief must be in the name of the State.

The defendant might also be indicted for failing to keep the road in proper condition for travel.

This appeal was taken prior to the rendition of the opinion in the case *supra*.

Judgment affirmed.

RHODES v. WILSON, &c.

(Filed May 26, 1896—Not to be reported.)

1. *New trial—Bill of exceptions*—Upon this appeal from a judgment rendered upon a verdict in favor of plaintiffs, it appearing that there was a former verdict for defendant, and that the court granted plaintiffs a new trial, there can be no reversal on account of the action of the court granting a new trial in the absence of a bill of exceptions containing the testimony heard and the instructions of the court given on the former trial.

2. *Same—Additional grounds*—The court was authorized to grant a new trial upon additional grounds filed within three days after verdict.

Clay & Clay for appellant.

Montgomery Merritt for appellees.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge Guffy.

This appeal is prosecuted to reverse a judgment of the Henderson Circuit Court rendered against the appellant in favor of the appellees.

The plaintiffs below, appellees here, sued appellant to recover for waste committed on a tract of land described in the petition, the appellant being the owner of a life estate in the land and appellees owning the remainder. The principal charge in the petition was that appellant had cut, sold and removed a large amount of valuable timber from the land or permitted it to be done, to the great damage of the remaindermen. The petition, as finally amended, claimed judgment for the sum of $1,500.

The answer denied all waste and damage as well as appellant's liability for any damages.

The final trial resulted in a verdict and judgment in appellees' favor for the sum of $241.

The grounds relied on for a new trial are, in substance, that the judgment is excessive, appearing to have been given under the influence of passion or prejudice; that it is not sustained by sufficient evidence; error in the assessment of the damages; error of the court in giving instructions numbers 1, 2 and 3, and in rejecting number 4, asked by appellant.

Appellant in his brief also urges a reversal because the court, at a former term, granted appellees a new trial upon the filing of additional grounds. It, however, seems that the additional grounds were filed within the three days required by law, and no bill of exceptions containing the testimony and instructions of the court, given on the trial referred to, are copied into this record, hence we can not reverse the judgment awarding the new trial.

The trial court must of necessity be allowed a large discretion as to permitting or refusing amendments, and we are not inclined to hold that the court erred in allowing the amendment complained of to be filed.

We think that the instructions given were as favorable to appellant, if not more so, than he was entitled to, and the court properly refused the instruction asked by appellant.

It may be conceded that the testimony was conflicting, but it was sufficient to authorize and sustain the verdict of the jury.

Judgment affirmed.

MERRITT, &C. v. DROVERS & MECHANICS BANK, &C.

(Filed April 21, 1896—Not to be reported.)

1. *Vendor and vendee—Purchase-money lien*—When the purchasers of land transferred to the vendors in payment therefor certain notes which they held upon third persons, and the vendors by the deed which they executed retained a lien upon the land to secure the payment of the purchase price, in this action by the appellees, to whom the vendors assigned the notes thus transferred to them, the makers of the notes having pleaded that the notes were procured by fraud, it was error to render personal judgment against them until that issue was determined; but as the plaintiffs also sought an enforcement of the purchase-money lien it was not improper to grant that relief, as the lien exists even though the notes transferred in payment for the land are void.

2. *Bills and notes*—As it does not appear from the petition that the plaintiffs are bankers or are banks authorized to discount paper, as provided by section 483 of the Kentucky Statutes, so as to place the notes on the footing of bills of exchange, the assignment of the notes did not cut off the defense that they were procured by fraud.

W. J. Hendrick and W. S. Harkins for appellants.

C. M. Parsons for appellees.

Appeal from Pike Circuit Court.

Opinion of the court by Judge Hazelrigg.

Stratton and an associate owned about nine-tenths of the stock of the Monarch Coal & Coke Co., a corporation owning large bodies of mineral lands in Pike county, valued at $600,000, and which sum made up the amount of the capital stock of the company. On May 16, 1892, upon representations alleged, as we shall presently see, to have been false, these owners sold three-fourths of this entire stock, or $450,000 worth, to A. R. & E. T. Merritt, who paid therefor $30,000 in cash, and executed their notes to the company for $420,000, payable at different dates in the future.

On July 5, 1892, Stratton bought from Trigg and associates 25,211 acres of land in Pike county, or the mineral rights therein, and in payment therefor delivered to his vendors three notes of the Merritts to the extent of $63,027.50. About this time the Merritts, Stratton and others formed a new corporation—the Empire Coal Co.—as a successor to the old one, and to it the property rights of the old were fully transferred.

On November 9, 1892, Stratton conveyed to this new company the lands and rights therein bought by him of Trigg and associates, and recited in his conveyance that his vendors, Trigg and associates, held the unpaid notes of the Merritts as the purchase price of the land to the extent of $63,027.50, less some $15,000 which had been paid, and that there was a lien on the land to that extent. On the following day the Merritts executed their notes to the Empire Coal Co. for various amounts, with the intention, it seems, of substituting them for those formerly executed to the Monarch Coal & Coke Co. At any rate, in July, 1893, Stratton exchanged three of these new notes, amounting to $28,000, properly endorsed by the Empire Coal Co., for three of the old ones held by Trigg and associates. Another of the old notes for $10,000 had been assigned to the Lynchburg Bank, and was not exchanged. These new notes were substantially copies of the old ones, save as to the payee, and under the contract of exchange were to be held in all respects as were the old ones for which they were substituted.

Thereafter and before the maturity of any of these notes Trigg and associates assigned them to the appellees, who were the plaintiffs below, and who brought this action in equity for judgment against the Empire Coal Co. and the Merritts, and for a sale of the land upon which a lien had been retained in the Trigg deed to Stratton, and in Stratton's deed to the Empire Coal Co., the aggregate amount of the notes sued on being the sum of $38,000.

Notwithstanding an answer of the Merritts setting up the notes executed by them were procured by the fraud of Stratton and his associate, the trial court permitted a submission of the case on the plaintiff's motion, and rendered a personal judgment against the Merritts, and also against the company, presumably upon the theory that by the assignment of the paper it had been placed on the footing of a foreign bill of exchange, and at a succeeding term rendered judgment for a sale of the land in satisfaction of the purchase money lien.

The first judgment was clearly erroneous. It does not appear from the petition or any amendment thereto that the plaintiffs are bankers or are banks authorized to discount paper as provided by section 483 of the Kentucky Statutes, so as to place the notes on such a footing, and manifestly the pleader did not have in mind the intention of bringing a suit on the notes as on bills of exchange, but mainly sought to enforce as the liens of various holders. The averments of the answer, if true, show a clear case of fraud in the procurement of the notes. The representations made by Stratton & Lingiser as to the condition of the Monarch Coal & Coke Co. probably induced the Merritts to buy the stock, and if, as alleged, these representations were false and were made to deceive, the consideration of the notes will be seriously affected.

There ought, therefore, to have been no personal judgment against the Merritts or the endorsor, the Empire Coal Co., until the issues thus tendered should be tried out. With respect to the judgment of sale, however, a different state of case is presented. Treating the Merritt notes as void for the reasons set up in the answer, still the sum they represented stood for the amount of the purchase money of the Trigg land, and a lien was retained on the land for that sum, without regard to whether the makers owed the notes or not. Trigg and associates sold and conveyed their lands and retained a lien for some $67,027 represented, we may suppose, by worthless notes. Their vendee sold and conveyed the same land to the Empire Coal Co., expressly retaining for the benefit of his vendors a lien for the same amount, and whatever issues may be raised between the makers of the notes and the parties who procured them the lien of Trigg and associates and their assignees remains unaffected.

The judgment of sale is affirmed, but the personal judgment against the Merritts and the Empire Coal Co. is reversed for proceedings consistent with this opinion.

LOUISVILLE & NASHVILLE R. R. CO. v. MAYFIELD.

(*Filed May* 19, 1896—*Not to be reported.*)

1. *Failure to reply to plea of contributory neglect*—The plea of contributory negligence is affirmative matter which must be controverted, and the failure of the plaintiff to controvert it entitles defendant to a judgment, notwithstanding the verdict.

2. *Record*—This court can not treat as a part of the record a paper purporting to be a reply, there being no order of court filing it or any bill of exceptions showing that it was treated as a part of the record on the trial of the case. The omission can not be supplied by affidavits showing how the paper appeared in the record.

H. W. Bruce and J. A. Mitchell for appellant.

E. W. Hines and B. F. Proctor for appellee.

Appeal from Warren Circuit Court.

Opinion of the court by Judge Paynter.

The trial resulted in a verdict for appellee. Appellant moved for a judgment for it, notwithstanding the verdict. The court overruled the motion.

The action was for damages, claimed to have resulted from the negligence of appellant's servants in charge of a train. The answer pleaded contributory negligence. There was no reply to the answer. The plea of contributory negligence is affirmative matter, which must be controverted. (Louisville & Nashville R. R. Co. v. Copas, 95 Ky., 460.)

There are a number of other cases to the same effect. The failure to controvert it entitled the appellant to a judgment, notwithstanding the verdict. (Evans v. Stone, 80 Ky., 78.)

The court in the Copas case held that a failure to reply to the affirmative matter contained in the plea of contributory negligence entitled the defendant to a judgment, notwithstanding the verdict, yet the court held because the record failed to "show a motion for a judgment on the pleadings, or that the court's attention was called, the failure to reply to the answer as one of the grounds for the motion, the court must necessarily assume that the notice for a *nonsuit applied alone to the evidence.*"

In other words the defendant had waived his right to have the judgment, because he did not make a motion for it. The court also held that the motion for a nonsuit being a demurrer to the evidence did not have the effect of calling the court's attention to the failure to reply. However, there is no question in this case that appellant had waived its right to a judgment, as on a return of the verdict the motion was entered.

After a careful examination of the Copas case, Chesapeake & Ohio Ry. Co. v. Thieman, 96 Ky., 507, and Evans v. Stone, *supra*, we are unable to see the slightest conflict between them. We can not treat the paper, which purports to be a reply, as part of the record. There was no order showing it had been filed, nor is there a bill of exceptions showing that it was treated as part of the record on the trial of the case.

This omission can not be supplied by affidavits showing how the paper appeared among those constituting the record, nor is it competent on this appeal to determine what were the instructions of the court to the jury by an affidavit filed before this court stating what they were.

The judgment is reversed, with directions to the court to sustain appellant's motion to have the judgment entered, notwithstanding the verdict.

WRIGHT, &C. v. GEO. W. MCALPIN CO.

(Filed May 26, 1896—Not to be reported.)

1. *Fraud—Recovery by vendor of goods sold*—In this action to recover the purchase price of goods sold by plaintiff to defendants, the court did not err in allowing plaintiff to file an amended petition praying for the recovery of the goods upon the ground that they were obtained by false and fraudulent representations made by defendants as to their solvency, it being alleged that plaintiffs did not know of the false representations until after the filing of the original petition.

2. *Same—Assignment for creditors*—The fact that an assignment for the benefit of creditors had been made by the purchasers of the goods did not preprevent a recovery, as the assignee occupies no better position than the assignors.

3. *Summons*—While it may be that summons should have been issued against defendants on the amended petition before a specific attachment was issued, yet, as all parties seem to have been finally brought into court and defense was made, defendants were not prejudiced by the failure to issue summons.

J. R. Hays and Eli H. Brown for appellants.

R. H. & E. P. Taylor and C. S. Walker for appellees.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Guffy.

This appeal is prosecuted by the appellants, Wright & Unsel, and their assignee, from a judgment of the Daviess Circuit Court rendered in favor of appellee.

It appears from the record in this case that Wright & Unsel, who were merchants in Daviess county, on the 1st of November, 1892, bought a bill of goods from appellee, a merchant of Cincinnati, Ohio, the bill of goods amounting to $692.27, part of which was on thirty and part on sixty days time, and defendants having failed to pay any part of the sum due, appellee on the 5th of January, 1893, brought suit for the sum due, and caused a summons to issue thereon which was executed on the defendants on the 5th and 7th of January, 1893. It further appears that on the 20th of January appellee filed an amended petition and obtained a specific attachment for the goods so sold, the grounds stated in the petition being in substance that the defendants had obtained the goods by false and fraudulent representations as to the amount of property owned by them and as to the amount owing by said firm.

A trial resulted in a verdict and judgment in appellee's favor for the goods sued for if to be had; if not, then the sum of $493.20, with interest from the 4th of November, 1892, and the further sum of $197 07, with interest from the 4th of January, 1893.

The verdict of the jury is in the following language: "We, the jury, find for the plaintiff. LEE MOSBY, *Foreman.*"

Appellants relied on seven grounds for a new trial. It may be true that some courts have held that the plaintiff's right to sue for the goods sold is barred by the institution of a suit for the price, but the petition in this case shows that plaintiff did not know of the false representations until after the filing of the first petition, and under the facts of this case it seems to us that the court did not err in allowing the amended petition to be filed. The fact that an assignment had been made by the firm to R. Unsel could not prevent a recovery, for the assignee for the benefit of creditors occupies no better posi-

tion than the assignors, as has been often decided by this court. It may be that summons should have been issued against appellants on the amended petition before the attachment was issued, but all parties seem to have been finally brought into court and defense made, hence the error complained of was not prejudicial to appellant's substantial rights.

Instruction No. 2 should not have been given, but Nos. 1 and 3 correctly stated the law of the case, and we are of opinion that No. 2 did not prejudice appellant's substantial rights in the cause. The other instructions were properly overruled. We can not say that the verdict and judgment are contrary to law or not supported by the evidence. The evidence was conflicting and sufficient to sustain a verdict for either party. The jury seems to have relied on or accepted the evidence of plaintiff as true and found accordingly, and we do not feel authorized to disturb the finding.

Judgment affirmed.

HERNSHEIM BROS. & CO. v. NEWPORT NEWS & MISSISSIPPI VALLEY CO.

(*Filed May* 28, 1896—*Not to be reported.*)

Carriers—Loss of goods by fire—Goods delivered to a railroad company for transportation having been destroyed by fire by reason of the company's negligent failure to ship them promptly, as it agreed to do, the company is liable to the shipper for the loss.

Robertson & Lee for appellants.

T. H. Darby for appellee.

Appeal from Graves Circuit Court.

Opinion of the court by Judge Guffy.

The court below sustained the demurrer of the appellee to the petition of the plaintiff below and dismissed the petition. The only question presented for our determination is whether or not the petition stated a cause of action.

The court gave no reason for its decision, and no brief of appellee being on file we are left without any argument or reasoning on behalf of appellee to support the judgment of the court below. Appellants say in their brief that the court below was governed by the decision of this court in Patch v. City of Covington, 17 B. M., 727, but we fail to see that the principles announced in that case apply to the case at bar.

The petition is in the following language: "The plaintiffs state that the defendant, the Newport News & Mississippi Valley Co., is a corporation incorporated under the laws of the State of Connecticut, with power to sue and be sued, to make contracts and be contracted with, and to own and operate a railroad and cars, which it does own, run and operate through this, Graves county, and through other counties in this State.

"Plaintiffs say that in the month of September, 1891, they delivered to the defendant, through its agent and employes at Mayfield, Kentucky, thirty-five (35) hogsheads of tobacco, Nos. 2051, 2143, 2151, 2166, 2167, 2172, 2174, 2178, 2192, 2217, 2158, 2458, 2468, 2478, 2559, 2615, 2640, 2836, 2862, 2934, 2947, 2965, 2966, 2983, 3040, 3122, 3123, 3522,

3526, 3712, 3718, 3724, 3760, 3761 and 3776, to be shipped to them at New Orleans, Louisiana, all of which tobacco defendant received into its custody and possession at Mayfield, Kentucky, and promised and agreed to immediately ship all of said tobacco to plaintiffs at New Orleans, Louisiana.

"Plaintiffs state that defendant did not ship any of said tobacco away from Mayfield, Kentucky, and all of said tobacco was lost to plaintiffs by a fire which occurred at Mayfield, Kentucky, on the morning of October 8, 1891, through the carelessness and negligence of defendant in failing to ship said tobacco as it promised and agreed to do.

"Plaintiffs say that the defendant carelessly and negligently failed to ship said thirty-five hogsheads of tobacco within a reasonable time; that by the use of ordinary diligence defendant could have shipped all of said tobacco before its destruction by said fire on October 8, 1891; that by and through such carelessness and negligence of defendant all of said tobacco was lost to plaintiffs, and defendant has failed and refused to account to or pay plaintiffs for any of said tobacco, and plaintiffs have sustained damage in the loss of all of said tobacco, in the sum of its full value, amounting to the sum of three thousand, five and thirty-eight one-hundredths dollars ($3,005.38.) The said thirty-five hogsheads of tobacco were reasonably worth said sum of three thousand, five and thirty-eight one-hundredths dollars, and plaintiffs were the owners of all of same.

"Wherefore, plaintiffs pray judgment against defendant for three thousand, five and thirty-eight one-hundredths dollars, for costs and for all proper relief.

"S. HERNSHEIM BROS. & CO."

"By W. P. Lee and W. W. Robertson, attorneys."

It seems to us that the allegations of the petition clearly show that the loss was the direct result of the negligence and carelessness of appellee. If appellee had shipped the tobacco immediately as it agreed to do the loss by the fire could not have occurred, and as they had taken it into custody and agreed to immediately ship the same and could have done so it seems to us that appellee is liable for the damage sustained by the appellants.

The case of the L. & N. R. R. Co. v. Brownlee, 14 Bush, 599, seems to be an authority in point and to determine the liability of appellee if the facts are as alleged in the petition.

For the reasons indicated the judgment of the court below is reversed and cause remanded, with directions to overrule the demurrer and for proceedings consistent with this opinion.

LOUISVILLE & NASHVILLE R. R. CO. v. PLUMMER & CO.

(*Filed May* 28, 1896—*Not to be reported.*)

1. *Carriers of goods—Injuries by fire*—In this action against a railroad company to recover damages on account of its failure to deliver to plaintiff in good condition certain goods which it had undertaken to carry, the goods having been injured by fire, water and smoke while in a car on the side track after they reached the place of destination, but before they were delivered to plaintiffs, the evidence was sufficient to authorize the jury to find that the fire was caused by defendant's negligence.

2. *Opinions of witnesses* —The defendant was not prejudiced by the action of the court in allowing witnesses to give their opinions as to the origin of the fire, the witnesses having first stated all that they knew about the fire.

3. *A common carrier can not by contract escape liability for damage or loss due to its negligence.*

Blanton & Berry for appellant.

Swinford & Evans for appellees.

Appeal from Harrison Circuit Court.

Opinion of the court by Judge Guffy.

The plaintiffs below, appellees here, instituted this action in the Harrison Quarterly Court to recover of appellants $137 alleged damage sustained by them on account of appellant's failure to deliver to them in good condition certain goods, wares and merchandise in Cynthiana, Ky. Judgment was rendered in the quarterly court in favor of plaintiff and an appeal taken to the Harrison Circuit Court, where on final trial a verdict and judgment was rendered in favor of appellees, and appellant's motion for a new trial having been overruled it prosecutes this appeal.

The petition substantially shows that appellant undertook to transport certain goods and merchandise from Cincinnati, Ohio, to appellees at Cynthiana, Ky. It is also alleged in the petition that appellant, by its gross negligence and carelessness, failed to deliver the goods in a good condition; that the same was, by reason of the said negligence and carelessness of appellant, greatly damaged by fire to the damage of $137.

The substance of the defense is that the goods were transported to Cynthiana in good condition, and that while the car was on the sidetract at the depot the goods were damaged by fire, water and smoke, without any fault or failure of appellant. Appellant also alleged that the goods were shipped by plaintiff and delivered to defendants upon the express agreement and contract that defendant was not to be liable for any loss or damage caused by heat, water, dirt or fire, and that all of the alleged damage was caused by fire, water and smoke after the goods had reached Cynthiana.

The reply traverses the allegations of the answer and especially denies the agreement set up as well as also charging that there was fire in the car before it reached Cynthiana.

The appellant relied on numerous grounds for a new trial, some of which need not be noticed. It is, however, insisted by appellant that the court erred in permitting witnesses to give their opinion as to the origin of the fire. The witnesses first stated all that they knew about the fire and what they had seen, and we do not see how an expression of opinion could prejudice the substantial rights of the appellant. We do not think that appellant was entitled to the conclusion of the argument. It is not necessary to discuss the acceptance of the alleged contract as to exemption from damage caused by fire, nor to discuss the validity of the same, because the case was tried out upon the issue of negligence and carelessness, and it will not be seriously contended that a common carrier can by contract escape liability for damage or loss due to its negligence.

We think the jury were authorized by the facts stated to believe that the fire was caused or occurred by the negligence of defendant, and that, too, independent of the opinions given by the witnesses. The instructions given by the court were quite as favorable to ap-

pellant as it was entitled to, and the court did not err in refusing the instructions asked by appellant.

The liability of appellant was, by the instruction given, made to depend alone upon the fact of its negligence or carelessness, and the verdict being supported by sufficient evidence we do not feel authorized to disturb the finding.

Judgment affirmed with damages.

BULLITT, &C. v. EASTERN KENTUCKY LAND CO.

(*Filed May* 29, 1896.)

1. *Vendor and vendee—Rescission of contract—Liens—Transitory and local actions*—In an action by the vendee seeking a rescission of a contract for the sale of land upon the ground that the vendor can not make a good title to a part of the land, the vendee, in the event of a rescission, is entitled for the purpose of securing what he has paid, to a lien upon any part of the boundary to which the vendor has title, although the vendor may not have him put in possession of the land, and where he seeks the enforcement of such a lien the action should be brought in the county in which the land is situated.

2. *Same*—An action purely for the rescission of a contract for the sale of land or its specific execution is not *in rem* but *in personam*, and is, therefore, transitory; but where it is sought also to enforce a lien on the land the action becomes local.

3. *Depositions*—A deposition taken by one of several defendants can not be used against his co-defendants.

4. *Judgment*—As one of the vendors warranted generally as to 40 per cent. of the land and the other as to 60 per cent. of it, it was error to render judgment against them jointly for what the vendee had paid. If the contract is rescinded the court should adjudge that one of the vendors is to pay 40 per cent. of the amount and the other 60 per cent.

5. *Special judge*—When from any cause the regular judge can not act and a special judge is selected by agreement of the parties or elected to preside in the case, then such orders as are made in the case are presumed to have been made by such judge unless the contrary appears in the record.

6. *Same*—If the special judge fails to attend and try the case an election can be held to select another special judge for the purpose.

W. B. Dixon and T. W. Bullitt for appellants.

A. T. Wood for appellee.

Appeal from Menifee Circuit Court.

Opinion of the court by Judge Paynter.

By executing contracts the Bullitts conveyed to the Eastern Kentucky Land Co. a boundary of land situate in Menifee county, supposed to contain 3,000 acres, for the sum of $5,000—$2,500 was cash and the balance to be paid under certain conditions of the contract. If there were less than 3,000 acres in the boundary then the price was to be at a given sum per acre, and in no event was the price for the whole boundary to be more than $5,000. This action was instituted by the appellee in the Menifee Circuit Court to rescind the contract to recover the sum paid thereon and to enforce a lien therefor on whatever part of the boundary of land which belonged to the Bullitts.

The contract required the vendors to free the land of squatters and place the vendee in possession of it. It was alleged that the vendors

had failed to do either; that parts of the land were in possession of squatters; that the vendees could not comply with the terms of the contract by making a deed with covenants of general warranty, etc. The alleged squatters were made defendants to the action and served with process in Menifee county. The Bullitts, who resided in Jefferson county, were served with process in that county. If the contract was rescinded and any part of the land embraced in the contract belonged to the vendors we are of the opinion the vendee had a lien thereon to reimburse it for any sum which it had paid the vendors on the purchase money, notwithstanding the vendor failed to place it in possession of the land. In many cases in this court where the vendee had taken possession of land under a purchase, and afterwards the court rescinded the contract, the vendee was adjudged a lien for such purchase money as he had paid the vendor. In these cases the court recited the fact in its opinion that the vendee was in possession under his purchase.

While the court recited the fact of the vendee's possession it did not hold in terms that the vendee would not have been entitled to the lien except for such possession.

One who enters upon land under a parol contract can not maintain an action to enforce it, but he has a lien upon it for whatever he may have paid for or improvements made on it. (Speers v. Sewell, 4 Bush, 239; Usher's ex'or v Floyd, 83 Ky., 563.)

It is a resisting equity, and the court will not deprive the vendee of his possession until he is reimbursed. In such states of case courts of equity endeavor to place the parties in *statu quo* as it does in cases of rescission of contracts of sales of land. We can see no reason for the rule which would deny a vendee a lien upon the land for the money he had paid the vendor simply because the vendor had broken his contract in failing to place the vendee in possession of the land. The equitable title to whatever land the vendors actually owned within the boundary sold was conveyed to the vendee. If there is a rescission of the contract the vendee should not be compelled to surrender this equitable title to the land until it has been reimbursed and the sum paid the vendor.

In Bibb v. Prather, 1 Bibb, 316, it does not appear whether or not the vendee had been placed in possession of the land. The contract was rescinded and the court adjudged that the lien existed.

In Miller v. Hall, 1 Bush, 237, the inference is that the bidder at a judicial sale did not get possession of the land, but the court held that for the money he paid before the judgment under which the sale was made was superceded or appealed from he was entitled to a lien on the land.

In Vaughn v. Myers, 2 Dana, 113, the conveyance was set aside which was made under a sale by the sheriff under an execution against Myers, and the court held as Myers was insolvent it was proper to allow Vaughn (the purchaser) a lien on the land conveyed to him to recover the payment of the sum paid by him to the sheriff. The vendee does not appear to have been in possession of the land, but as Myers was insolvent the court adjudged the lien. The question of possession did not enter into the consideration of the case. The court, in adjudging a rescission and allowing a lien to the vendee for reimbursement in Barbour v. Morris' adm'r, 6 B. M., 120, did not state whether or not the vendee was in possession, and, of course, did not adjudge the lien because the vendee was in possession of the land. An action purely for a rescission of a contract of sale of land or its specific execution is transitory—not *in rem* but

in personam. (Kendrick v. Wheatley, 3 Dana, 34; Parish v. Oldham 3 J. J. M., 544.)

When in the action it is sought to enforce a lien on land which results from the rescission then the action becomes local.

In Kendrick v. Wheatley, *supra*, the court held that the action could not be maintained in the county where the land was situated as the defendants neither resided in that county, nor were they served with process therein, and that the allegations of the bill were not sufficient to authorize a decree for the sale of the land. It was alleged that the vendor of the land had *no title* to it. Certainly if the vendor had no title to the land there could not be a lien adjudged upon it, hence the court would not be authorized to decree a sale of land belonging to one other than the vendor. In this case it was not alleged in the petition that the vendors had *no title* to the land, but that squatters were in possession of and claiming a part of it. It follows that some part of it is conceded to have been the property of the vendors, and upon which a lien could be adjudged and enforced. The petition was not as definite as it should have been, but the court, upon motion, would have compelled the plaintiff to have made it more so.

"Actions must be brought in the county in which the subject of the action or some part thereof is situated. * * 3. For the sale of real property * * under a mortgage lien or other encumbrance or charge except for debts of a decedent." (Section 62, Civil Code.)

Having reached the conclusion that there is a lien upon part of the boundary sold if a rescission was adjudged, therefore, the Menifee Circuit Court had jurisdiction. We can not believe that the vendee should be required to bring its action in Jefferson county or some county in which the vendors could be served with process, and if it succeeded in having the contract rescinded then to bring another action in Menifee county to enforce its lien.

The plaintiff failed to take any testimony to sustain the allegations of its petition as amended. The report of the surveyor simply showed the boundaries of the tracts of land sold by the Bullitts to the plaintiff and the boundaries claimed by the defendants (other than the Bullitts) within that boundary. It was not evidence of the character of the claims of the several defendants to their respective boundaries. It did not furnish evidence that their claims were valid or adverse to the Bullitts' title. The depositions taken by the defendants could not be used against their co-defendants, the Bullitts. It follows from these conclusions that the evidence did not authorize the judgment.

In the contract of sale T. W. Bullitt warranted generally as to 40 per cent. of the land, and Joshua F. Bullitt as to 60 per cent. of it. The judgment for $2,500 and interest was against them jointly and did not specify what part each should pay. This was an error. If upon a return of the case the court should rescind the contract then the court should adjudge that T. W. Bullitt should pay 40 per cent. of the amount and Joshua F. Bullitt 60 per cent. of it. When from any cause the regular judge can not act and a special judge is selected by agreement of the parties, or elected to preside in the case, then such orders as are made in the case are presumed to have been made by such judge unless the contrary appears in the record. If such special judge fails to attend and try the case an election can be held to select another special judge for the purpose. Upon a return of this case either may amend their pleadings or file such additional ones as the court may deem necessary to complete the issues.

The case is reversed, with directions that further proceedings conform to this opinion.

The Kentucky Law Reporter.

EDITOR:
WALTER G. CHAPMAN, ... Frankfort, Ky.

VOL. 18. OCTOBER 15, 1896. No. 8

KENTUCKY COURT OF APPEALS.

WILSON v. HINES, &c.

(Filed May 5, 1896.)

1. *Local option—Powers of contesting board*—An election held under the local option law of August 6, 1892, having resulted against the sale of liquor according to the certificate of the canvassing board, and the contesting board having decided that the act under which the election was held was void, and conferred upon the board no authority whatever, and thereupon adjudged that the board had no authority to compare the vote, this was in effect a judgment in favor of the contestants that the result of the election was not to prohibit the sale of liquor, and from that judgment the contestees had the right to appeal.

2. *Notice of contest—Amendment*—A contestant is not allowed to set up by way of amendment an entirely new ground of contest in addition to those stated in his notice, but he is not precluded from amending and making more specific and definite any ground that is embraced in the notice. In fact this may be required to be done under section 134 of the Civil Code, which applies to proceedings of this kind as well as to regular actions.

3. *Powers of contesting board*—Contesting boards are clothed with power and authority to consider and decide upon any matter or thing that is a lawful ground of contest unless restricted by the statute which prescribes their authority and jurisdiction. But in every case they are to be governed by the rules of evidence as well as by the law regulating their proceedings, and their action is subject to review and correction on appeal.

In this case it was competent for the board to determine the validity of the law under which the election was held.

4. *Enrolled bill*—The local option act of August 6, 1892, being properly enrolled and signed, must be taken to have been passed in conformity to all the requirements of the Constitution with reference to the enactment of laws.

5. *Filing petition for election*—The petition to the county judge for an election under the local option law must be received in court and there made a matter of record by the proper order entered on the order book showing that it has been received and filed, and the purpose of it, and the order for the election should be made at the next regular term of the court thereafter. The word "lodge," when used with reference to such matters, does not mean simply to leave with or in the possession of the officer, but imports

that the instrument or writing "lodged" is to be made a matter of record in some way.

As the order for the election in this case was entered at a term of the court beginning the next day after the petition for the election was handed to the judge out of court, the election was not lawfully held.

E. W. Hines and J. A. Mitchell for appellant.

Sims & Covington and Wright & McElroy for appellees.

Appeal from Warren Circuit Court.

Opinion of the court by Judge Landes.

This case is before us on appeal from the judgment of the Warren Circuit Court in a case involving the validity of an election held in the city of Bowling Green on the 1st day of July, 1893, under the "local option act" of August 6, 1892 (chapter 89 of Session Acts of 1891-2-3). The election was on the proposition whether spirituous, vinous or malt liquors should be "sold, bartered or loaned" in the said city, which was submitted by the county judge upon petition of the requisite number of voters in the different voting precincts of the city, by an order made in the county court on Monday, the 24th day of April, 1893, it being the first day of the April term of the court in that year, the petition having been received by the judge on the day before. The election resulted in a majority of twenty eight against the traffic, which was ascertained and certified as required by the statute by the canvassing board of elections of Warren county.

Within the prescribed time after the final action of the board the appellees gave notice of contest, as provided in the act, and to this proceeding the appellants entered themselves as contestees. The case was prepared and brought duly before the board created by statute for determining the contested elections of county officers, jurisdiction being conferred on the board in such cases by the act.

There were several grounds of contest set out in the notice, all of which were controverted by the contestees, either by denial or by demurrer, but it will be necessary for us to notice only two of them. These are, first, that the law under which the election was held was not valid, but was unconstitutional and void; and, second, that the order for the election was made by the county judge, not at the next regular term of the county court after he received the petition, but on the day the petition was received by him.

After the notice was given and after the names of the contestees had been entered, and more than ten days after the final action of the contesting board, the contestants attempted to amend the first ground of contest, above named (it being the eighth ground stated in the notice), by setting forth in detail the reasons for the alleged invalidity of the act under which the election was held, the object being to show that the act of August 6, 1892, was not passed in the manner prescribed in the Constitution so as to become a valid and binding law, which proposed amendment was filed in the clerk's office.

This was objected to by the contestees before the contesting board, which, against the objection of the contestees, permitted the amendment to be filed, on the motion of the contestants, for the purpose, as was claimed, of making that ground more definite.

Upon the trial the contesting board refused, in its final action, to pass on any of the grounds of contest alleged except the eighth, as amended, and upon that decided that the act of August 6, 1892, was "unconstitutional and void," and that it conferred upon the board

"no authority for any purposes whatever," and thereupon adjudged that the board had "no authority to compare the vote or to certify a majority of the vote either way." The contestees prosecuted an appeal from this action of the board to the circuit court.

When the case came up for trial on the appeal, the appellees moved the court to dismiss the appeal on the ground that the action of the contesting board was no judgment that could be appealed from. The court overruled the motion to dismiss, and this is complained of as error by counsel for the appellees, whose contention is that the remedy of the appellants was not by appeal but by mandamus to compel the contesting board to proceed to try the case and to decide the contest one way or the other. It is manifest that the ruling of the court in this regard was right. The action of the contesting board was in effect a judgment in favor of the contestants, that the result of the election was not to prohibit the traffic in liquors in the city of Bowling Green, and of that judgment the contestees had the right to complain and to have corrected and reversed by appeal if erroneous.

With reference to that judgment, however, counsel for appellants insist that the contesting board had no jurisdiction in this contest of the question as to the invalidity of the act of August 6, 1892, on the grounds alleged in the amendment which the contesting board permitted to be filed, or in the eighth ground of contest as amended; first, because the board had no lawful authority to permit the grounds of contest stated in the notice to be amended; and, second, because the board had no right to decide upon the question of the invalidity of the act, even if it was proper to permit the grounds of contest to be amended.

The first objection cannot be sustained. The law regulating such contests (Kentucky Statutes, section 1535), requires that the notice shall state the grounds of the contest and provides that "none other shall afterward be heard as coming from such party." Under this statute a contestant is not allowed to set up, by way of amendment, an entirely new ground of contest, in addition to those stated in his notice, but he is not thereby precluded from amending and making more specific and definite any ground that is embraced in the notice. This may be allowed, and in fact may be required to be done under the Civil Code (section 134), which applies to proceedings of this kind as well as to regular actions, and under which it was proper for the board and the lower court to permit the contestants to amend, as was done, in such a manner as to make definite the charge that the act under which the election was held was not in force and the reasons for it. That did not in this case make a new or additional ground of contest, but simply made more definite and certain one of the grounds of contest stated in the notice.

The second objection is equally untenable. In support of it counsel refer to the cases of Leeman v. Hinton, 1 Duvall, 40, and Commonwealth v. Jones, 10 Bush, 789, as showing that the contesting board was restricted in the performance of its functions under the statute. But on examining these cases it will be found that it is held that the boards are restricted as to the methods by which, or the evidence upon which, they may decide questions before them rather than as to the questions which they are allowed to decide. And we hold that under the law they are clothed with power and authority to consider and decide upon any matter or thing that is a lawful ground of contest, unless restricted by the statute which prescribes their authority and jurisdiction. But in every case they are to be governed by the rules of evidence as well as by the law reg-

ulating their proceedings, and their action is subject to review and correction on appeal, which the statute allows.

But the lower court, in an elaborate opinion and by its judgment, held that the act of August 6, 1892, was not passed in pursuance of the method of enactment prescribed by the Constitution, and that it was on that account invalid, and was, in fact, not a law. The same question has been before this court in several cases, recently decided, in which it was held that the act in question must be taken to have been passed in conformity to all the requirements of the Constitution with reference to the enactment of laws. (Lafferty v. Huffman, 18 KY. LAW REP., 17; Commonwealth v. Shelton, 18 *Ib.*, 30; Commonwealth v. Hardin County Court, 18 *Ib.*, 113.)

We adhere to the opinion in each of these cases, and now hold that so much of the judgment of the lower court in this case as holds that the said act was passed in pursuance of the constitutional requirements, and was, therefore, invalid, is erroneous. But the lower court adjudged that the action of the county judge in ordering the election at the time the order was made was unauthorized, and that the said order was void. In this we concur. The first section of the act made it the duty of the county judge, at the next regular term of the county court "*after receiving* the petition" of the requisite number of voters of each precinct of the territory to be affected, "to make an order on his order book directing an election to be held in the said county, city, town, district or precinct, as the case may be," on some day "not earlier than sixty days *after said application is lodged with the judge of said court.*"

We have seen that the petition was handed to the county judge on Sunday, the day before the first day of the April term of the county court in 1893, and that the order directing the election to be held was made on the first day of that term of the court. These requirements are similar to those contained in section 4464 of Kentucky Statutes with reference to holding elections for graded schools under the common-school laws of the Commonwealth. That section requires an election to be ordered by the county judge at the "next regular term of his court after he receives said petition" of a certain number of legal voters who are taxpayers, the election not to be "earlier than forty days from the date of the order."

That section has been construed to require the county judge to make the "receiving" of the petition a matter of record in his court at one term, and to order the election at the "next regular term" thereafter. We think the same construction should be given to the first section of the act of August 6, 1892.

Counsel contend that the use of the word "lodged" in the latter act requires a different construction of it from that given to section 4464 of Kentucky Statutes in Doores v. Varnon, 94 Ky., 507, and in Webb v. Smith, 17 KY. LAW REP., 1308, but in this view we do not concur. We do not understand the word "lodge" when used with reference to such matters to mean simply to leave with or in the possession of the officers. In our opinion it imports that the instrument or writing "lodged" is to be made a matter of record in some way, and in this case is not to be construed differently from the word "received" as used in this act and in the section of the Kentucky Statutes referred to; and in our opinion it was intended that the petition should be "received" in court and there made a matter of record by the proper order entered on the order book showing that it has been received and filed, and the purpose of it, and that the order for the election should be made at the next regular term

of the court thereafter. It follows that in this case the order for the election was not made at the proper time, and the election was not lawfully held.

For the reasons given the judgment of the lower court is affirmed.

The court delivered the following response to a petition for rehearing Oct. 1st, 1896:

Counsel for the appellants, in their petition for a rehearing, ably argue that the court erred in the construction put upon the first section of the act of August 6, 1892, on which the judgment of the court below was affirmed, and endeavor to distinguish this case from Doores v. Varnon and Webb v. Smith.

In the conclusion of their petition they say that the rule laid down "for the first time in this case" is "a rule in direct conflict, not only with the plain language of the statute, but in conflict with the ruling of the court just one month before in the case of Commonwealth v. Shelton, *ante*, 30," but after carefully reviewing the opinion in the light of the argument of the petition of the learned counsel and the authorities quoted by them, we see no reason why the rule laid down in the opinion, and which is so vigorously attacked by counsel, should be changed.

Section 4464 of the Kentucky Statutes, providing for holding elections in the graded common school districts under the common school laws, and section 1 of the act of August 6, 1892, providing for holding local elections with reference to the traffic in ardent spirits, both require the county judge to make an order for the election "at the next regular term" of his court after the petition is received by him, asking that the election be held. Both sections provide that the application for the election shall be made to the county judge, who is required to deal with it and act upon it, as the judge of the county court, which, in the opinion of this court, means dealing with and acting upon it in open court, and not elsewhere. This is the rule laid down in Doores v. Varnon and in Webb v. Smith, and which was followed in the opinion in this case.

The former section, prescribing the duty of the judge to make the order "at the next regular term" of his court, uses the words "after he receives said petition," and the latter section uses the words "after receiving said petition." Both expressions have the same meaning, and, as construed by this court, the "receiving" of the petition must be an act of record in the court. The former section authorizes *the court*—that is, "the said judge *in said order*"—to fix the day for the election not earlier than forty days "from the date of said order." The latter section requires the day for the election to be named in the petition, "not earlier than sixty days after said petition *is lodged* with the judge of said court."

The court adheres to the meaning of the word "lodged" that is given in the opinion. It was manifestly intended by the Legislature to refer to the act of "receiving" the petition, or of making the application by petition for the holding of the election as the starting point from which to compute the time within which the election might be held.

Counsel are mistaken in supposing that the case of the Commonwealth v. Shelton, *ante*, 30, was overlooked by the court in deciding this case. It was not only not overlooked but was referred to in examining the question, but it was not referred to in the opinion because the question there decided was entirely different from the question in this case. The question there decided was as to the proper mode

of computing the time within which to hold the election or the act from which the computation was to be made. So far as it appears from the opinion in that case the question as to whether the election was ordered at the proper time was not raised in that case; and so the rule followed here is not in conflict with the ruling there, as counsel seem to think.

Not doubting that we have correctly construed the section of the statute under which the election was ordered and held in this case, the petition is overruled.

FEHLER V. GOSNELL.

DICKSON V. GLEASON.

(*Filed May* 26, 1896.)

1. *Appellate jurisdiction*—An appeal lies from a judgment *in rem* to enforce a street assessment lien without regard to the amount for which the lien is adjudged.

2. *Publication and passage of ordinance—Assessments for street improvements*—Under the charter for cities of the first class, which provides that no ordinance for the original improvement of a street shall pass both boards of the general council at the same meeting, and that at least two weeks shall elapse between the passage of any such ordinance from one board to the other, it is not necessary that there should be fourteen full days between the days of the passage of the ordinance by the respective boards, but the day on which the ordinance was first passed may be counted as one of the days, as the time required is between the passage by one board and the passage by the other, and not between the two days of passage; therefore, where an ordinance is passed by one board on Thursday and by the other on Thursday two weeks thereafter it is valid.

3. *Pleading and practice*—Even if the petition was defective in failing to allege that the notice required to be published by the board of public works informed the public of the facts required by the statute, the defendant was not prejudiced by the action of the court in overruling a demurrer to the petition, as he pleaded over and filed with his answer a copy of the notice actually given and averred failure in the notice to comply with the provisions of the statutes.

4. *Street improvements*—After the contract has been let and the work performed it is too late to object that the notice given by the board of public works did not inform the public of the general nature of the work, and did not state the nature and extent of the bond or security required.

5. *Same*—The apportionment warrants are not the basis of such an action, and mistakes therein will not prevent a recovery by plaintiff.

6. *Same—Void ordinance*—A provision in an ordinance for the original construction of a street requiring the contractor to keep the street in good repair for the period of five years has the effect to require the lot owners to pay the cost of repairs for that period in addition to the cost of construction, and, is, therefore, in violation of the requirement of the statute that the cost of reconstruction or repair is to be provided out of the taxes upon the city at large; but such a provision does not render the whole ordinance void, the contractor being still entitled to recover of the lot owner except to the extent the assessment has been increased on that account, and he can recover of the city such portion of the contract price as was for repairs to the street.

7. *Validity of contract—Signature by the mayor*—As the seal of the city was affixed to the contract, and the mayor of the city, who was the proper person to sign the name of the city of Louisville, signed his own name as mayor, this was a sufficient execution of the contract by the city, although the contract recites that the name of the city of Louisville "is hereto subscribed."

John Roberts and John Barrett for appellants.

Lane & Burnett for appellees.

Appeal from Jefferson Circuit Court, Common Pleas division.

Opinion of the court by Judge DuRelle..

These cases have been heard together, and are appeals from judgments enforcing liens for the improvement of a part of Oak street, in Louisville, by original construction of the carriage-way.

The case of Dickson v. Gleason presents a question of jurisdiction not presented in the other case, which may be first disposed of. It was a suit upon apportionment warrants for street improvements, and the amount adjudged in the court below, as a lien upon the property of any one of the defendants, was less than $100, though the aggregate amount of the judgments is more than that sum.

It has been settled in this State that separate judgments can not be added together, in order to give jurisdiction by the amount involved. "The legal questions involved may be identical, but the judgments are entirely distinct." (Zabel v. Harris, 82 Ky., 475; Oswald v. Morris, 92 Ky., 52). But the question remains whether this court has jurisdiction of the appeal in this case, irrespective of the amount of the judgment.

Section 950, Kentucky Statutes, provides: "No appeal shall be taken to the Court of Appeals from a judgment for the recovery of money or personal property, if the value in controversy be less than one hundred dollars, exclusive of interest and costs, nor to reverse a judgment granting a divorce. * * * In all other civil cases the Court of Appeals shall have appellate jurisdiction over the final orders and judgments of all courts."

In common acceptation the words "judgment for the recovery of money or personal property" imply a personal judgment. In this procedure no personal judgment was sought or obtained. The proceeding was *in rem* against the property, and provides for a sale of the land. There seems little difference between the judgment in this case for the sale of land under a proceeding *in rem* to satisfy the lien upon it, and a judgment for the recovery of land, which it is conceded may be brought to this court by appeal, irrespective of the value of the land. (Smith v. Moberly, 15 B. M., 72.)

In our opinion a judgment *in rem* to enforce a street assessment lien may be appealed without regard to the amount of money for which the lien is adjudged. The next question for decision is whether the ordinances providing for the improvements were so passed as to be valid.

By section 2834, Kentucky Statutes (a section of the act for the government of cities of the first class), it is provided that * * * "no ordinance for any original improvement mentioned in this act shall pass both boards of the general council at the same meeting, and at least two weeks shall elapse between the passage of any such ordinance from one board to the other."

In the case of Fehler v. Gosnell, the ordinance providing for the improvement passed the lower board on April 5th, and the upper board on April 19, 1894; and the appellants contend that two weeks did not "elapse" between the votes of the two boards, within the meaning of the statute. It is earnestly contended by counsel for appellants—and much authority from other States is cited in support of their position—that the intent of the statute was to provide for fourteen full days between the days of the passage of the ordinance

by the respective boards; but this contention does not seem to us to be supported either by the ordinarily accepted use of the language or by the statutory rule of construction of this State. In ordinary language a provision that two weeks must elapse between two acts would be considered as fulfilled by the first act occurring Thursday, and the second act occurring Thursday two weeks thereafter.

Moreover, section 453, Kentucky Statutes, provides that "if a statute requires a notice to be given, or any other act to be done a certain time before any motion or proceeding, there must be that time, exclusive of the day for such motion or proceeding; but the day on which such notice is given or such act is done may be counted as one day and part of the time."

It is to be observed that the time required by section 2834 of the statutes is between the *passage* by one board and the *passage* by the other, and is not between the *day* on which it is passed by one board and the *day* on which it is passed by the other.

Without undertaking to answer in detail the ingenious argument of counsel for appellant, it is sufficient to say that, in our opinion, the statute requires only that the passage by the first board shall be fourteen days before the passage by the other board; and that, in this case, that provision has been complied with. (Woods v. Patrick, Hardin, 457; Pollard v. Yoder, 2 A. K. Marshall, 264; Ogden v. Redman, 8 A. K. Marshall, 234; Sanders v. Norton, 4 Monroe, 464; Wood v. Commonwealth, 11 Bush, 220; and Moore v. Bank of Covington, 80 Ky., 305.) Nor can we concede much force to the contention that section 453 of the statutes, being a general law of construction, must yield to the peculiar language employed in the act for the government of cities of the first class. The latter act is also a general law, and must be so under the Constitution.

The next objection to the judgments in these cases is based upon section 67 of the act for the government of cities of the first class) Kentucky Statutes, section 2829), which provides that whenever the board of public works shall order any work to be done, to be performed by independent contract, there shall be prepared and placed on file in said office complete drawings and specifications of said work. "Thereupon said board shall cause a notice to be published in one daily or weekly newspaper, of general circulation, published in said city, once in each week for two weeks, informing the public of the general nature of the work, of the fact that the drawings and specifications are on file in said office and of the nature and extent of the bond or security required, and calling for sealed proposals for said work by a day not earlier than ten days after the first of said publications."

Appellants claim that the demurrer to the petition should have been sustained, because it did not allege that the notice informed the public of the general nature of the work or of the fact that the drawings, etc., were on file in the office of the board or gave information of the nature or extent of the bond or security required.

The averment of the petition is as follows:

"And the plaintiffs say that the said board of public works caused to be printed and published, on the 5th and 18th days of April, 1894, in and by the said Evening Post and Louisville Anzeiger, advertisements; that, up to 12 m. on the 18th day of April, 1894, bids, offers and proposals would be received by said board of public works from persons offering, proposing and bidding to furnish all necessary labor and material therefor and to construct and complete the improvement of the carriage-way of Oak street, 30 feet in width, from the west line of 15th street to the center line of 16th street with the ma-

terial and in the manner as prescribed by it and as provided for in the ordinance hereinbefore referred to as approved March 1, 1894."

After the demurrer was overruled, the defendants in each case pleaded over and filed with their answers copies of the notice which was actually given, and averred failure in said notices to comply with the provisions of the statute. The questions desired to be raised by the demurrer, therefore, were raised upon the actual facts of the notices, and we can not see that the action of the court in overruling the demurrers was error to the prejudice of the substantial rights of the appellants.

As each defendant filed an answer to the petition "it must be regarded as a waiver or virtual withdrawal of the demurrer, and leaves him in the same condition he would have been had the demurrer never been filed." (Patrick v. Conrad, 3 Marshall, 613; Curran v. Osborn, 10 B. Mon., 156.)

The objections to the sufficiency of the notices given by the board of public works are:

First. That the notice does not inform the public of the general nature of the work, but refers to the general ordinance regulating the improvement of streets.

Second. That it does not state the nature and extent of the bond or security required, but merely states that bond with approved security will be required.

These objections would have more force in a proceeding by way of injunction to prevent action under this ordinance. After the contract has been let and the work performed, we think it too late to rely upon these objections. (Section 2834, Kentucky Statutes.)

It is further objected that the apportionment warrants purport to have been ordered by the general council and are signed "J. Henry Hoertz, Clerk B. of P. W." This objection appears to us to be founded upon an erroneous theory that the apportionment warrants are the necessary basis for the action. If the warrants had been for other and erroneous amounts, the facts set out in the petition would justify a recovery by the plaintiff, provided the ordinance was in other respects valid.

We do not further consider these objections at this time because the remaining contention of appellants is, in our judgment, decisive of the case.

The ordinances for the improvement of the carriage-way of Oak street, one approved March 1, 1894, and the other May 15, 1894, provide that the carriage-way of Oak street between the points stated shall be improved "as designated in the ordinance concerning the improvement of streets with vitrified brick or block pavement," approved on the 5th day of February, 1894. By the 14th section of that ordinance it was provided:

"The contractor shall guarantee the faithful performance of his contract according to this ordinance, and the pavement therein specified and the materials composing the same shall be kept in good repair for the period of five years from the completion of the work and its acceptance by the board of public works; and, to protect the city as to the character of said work and material and such repairs as may be needed, the board of public works to be the judge, the contractor shall deposit bonds of the city of Louisville or of the United States, amounting to ten per cent. of the original contract price of the entire work, with the city treasurer, who shall hold the same, principal and interest, to be applied, so far as need be, in the necessary repairs of said work; and, at the end of said five years, the unexpended balance, if any, to be subject to the order of said

contractor. Should the board of public works be of opinion that any repairs are needed on the work during the contract period, they may give the contractor notice in writing of such necessity, and he shall commence making the same within three days after such notice and prosecute the same with all due diligence to completion. Should he fail to begin said work within three days, this board may have said repairs made and charge same to said contractor; and to pay this expense of such repairs may sell for cash as many of the bonds herein mentioned as may be necessary to pay for same. Said sale to be made at public auction at such time and place as the board may order, notice of said sale being given by one insertion in the papers doing the city printing and advertising."

Under sections 2833–4, Kentucky Statutes, it is only when the improvement of a public way is by original construction that the improvement is to be made at the exclusive cost of the owners of lots in each fourth of a square abutting upon said improvement. When the improvement is by reconstruction or repair, the cost of it is to be provided out of the taxes upon the city at large, special levies being provided for these purposes; and the contention of appellants is, that the ordinance above quoted, and the contract made in compliance therewith, provide for keeping the improvement in repair for the space of five years, and thereby charge the property-holder with the cost of repairs to the street for that period, in addition to the cost of the original construction.

The cases in this State are:

First. The City of Louisville v. Henderson, 5 Bush, 520, in which case the stipulation was that the contractor was required to keep his work in repair for six months after its reception by the general council; and the case was decided upon the theory that the thing stipulated was that "the work—his work—on the street he will keep in repair—not all injuries to the street which may result from other causes than defects in his work."

Second. The City of Covington v. Dressman, 6 Bush, 214. In that case the covenant was to keep the work in repair. Referring to the Henderson case the court said:

"This court held that a similar contract to keep in repair for six months, according to the evidence in that case, meant simply a guaranty that the work was well done, as if so it would need no repair in that time. It is certainly not a felicitous way of expressing the guaranty for sound, good work, yet that may be what it means; at least it would be so presumptively held on demurrer, when, if such is not the case, this may be put in issue and elucidated by the evidence; and, on the contrary, if it should appear that this imposes an additional burden on the property holders, and is not a mere guaranty by the contractor that he will perform his work, *they should, to that extent, be released;* for it is the duty of the city to keep such streets in repair and not impose this on the property holde s."

In the second case referred to it may well be considered that a provision in the contract that the contractor should keep his *work* in repair for a limited period of time of six months or a year was merely an unfortunate mode of expressing the guaranty that the work was well and properly done at the time it was received by the city; as if well done it would need no repairs during the time specified; and the provision being specifically limited to the contractor's *work*, it may well be considered as not applying or intended to apply to any repairs which might be necessary from other causes than defects in the contractor's work.

But in the case of Gosnell, &c. v. City of Louisville, 14 KY. LAW REP., 719, the Superior Court held that "the requirement in an ordinance, contracting for the improvement of a street, that 'the pavement and material composing the same shall be kept in good repair for the period of five years from the completion of the work and its acceptance by the general council,' does not bind the contractor to do more than remedy the defects in his work as they may appear or develop, and in no way compels him to keep the street in repair; and, as he cannot be presumed to add that expense to the estimate, the abutting property owner, in paying his assessment for street building, pays nothing, either directly or indirectly, for repairs.

"Even if the provision quoted binds the abutting property owner to contribute to keep up the repairs on the street for five years, yet, as it is not so interwoven with the other provisions of the ordinance as to vitiate the whole, the contractor is still entitled to recover except to the extent the defendant's assessment has been increased on that account. And as there is nothing in the petition to show that there has been any increase in defendant's assessment on that account, the demurrer to the petition was properly overruled."

In these conclusions of the Superior Court we are unable to concur except the conclusion that the contract to keep up the repairs is not so interwoven with the other provisions of the ordinance as to vitiate the whole.

In this case the contractor is required not only to guarantee the faithful performance of his contract according to the ordinance, but that "the pavement therein specified and the materials composing the same shall be kept in good repair for the period of five years;" and, further, that "to protect the city as to the character of said work and material, *and such repairs as may be needed*, the board of public works to be the judge, the contractor shall deposit bonds of the city of Louisville or of the United States amounting to ten per cent. of the original contract price of the entire work with the city treasurer, who shall hold the same, principal and interest, to be applied as far as need be in the necessary repairs of said work."

This provision, in our judgment, not only embraces a guaranty of faithful work, but also a provision for repairs rendered necessary by other causes than defects in the contractor's work. We are equally sure that these provisions requiring the withdrawal of capital from the contractor's business, and its investment in bonds as a security for the making of repairs, of whose nature and extent he could not be certain, caused the bids for the work to be higher than they would have been without such provisions.

In the somewhat similar case of Brown v. Jenks, in the Supreme Court of California, 98 Cal., 10, the court said of a five years' stipulation to repair: "The bond is not only unauthorized by the words of that statute, but the requirement changes and may increase the burdens of the property owner. It is manifest that an obligation to keep the street in repair for five years is a burden which one would not undertake for nothing. Therefore, the contractor would charge a higher price for the work when he was forced to contract also for repairs. The expense is indefinite and the property owner must pay for the repairs in advance, whereas the statute provides for them after the necessity for them appears, when, it being contingent, he will be paying for the repairs which may never be required. And then they are assessed upon a different basis from that required by the statute. * * * Officers are provided and vested with the power and charged with the duty of seeing that such work is prop-

erly done. The bond can not be substituted for the performance of this duty. Besides, it is for all repairs, and not such as may result from the defects in the work. It covers repairs for defects from unforeseen causes or wanton abuse of the street by individuals."

In the case of the People v. Maher, 63 New York, 88, the contractor was bound to keep the street in repair for seven years from the completion of the work. The court in that case said: "Other bidders may have thought it necessary to make their bids higher, for the reason that they would be required to keep the work in repair for seven years, and if no such requirement had been inserted such other bidders might have made a proposal lower than this contractor; then the property owners would have had less to pay, and for the ensuing years the city would have done the repairs. * * * A further argument is made, viz, that since 1893 every contract of paving has required the contractor to keep the pavement in repair for a year; but this may reasonably be considered a time within which to test the pavement. Defects in construction may not appear immediately, and this time of one year may be proper in order that such defects may become apparent. By the present contract five per cent. of the price is to be retained for not more than one year as a guaranty that the work will be kept in good order. * * * The city, therefore, compels the property owner to pay the contract price not only for laying the pavement but for seven years' repairs. This it has no right to do." (McAllister v. City of Tacoma, 37 Pacific Rep., 147.)

We do not, however, concur with the ruling of the New York court in People v. Maher, *supra*, that the ordinance was entirely void, but concur with the opinion of the Superior Court in Gosnell v. City of Louisville, that "the contractor is still entitled to recover, except to the extent the defendant's assessment has been increased on that account."

The act for the government of cities of the first class contains the provision that "no error in the proceedings of the general council shall exempt from payment, after the work has been done as required by either the ordinance or contract; but the general council, or the courts in which suits may be pending, shall make all corrections, rules and orders to do justice to all parties concerned." (Kentucky Statutes, section 2834.)

The city had authority to contract for the repairs of streets, provided such contract were not made in violation of other requirements of the statute; and the contractor can recover of the city such portion of the contract price as was for repairs to the street.

The contention of appellants, that the contract is invalid because, while reciting that the name of the city of Louisville "is hereto subscribed," it does not show the name of the city of Louisville signed by any official, need not be specially noticed. The seal of the city was affixed, and the mayor of the city, who was the proper person to sign the name of the city of Louisville, signed his own name as mayor. In our opinion this was a sufficient execution of the contract by the city. (Kentucky Statutes, section 2817.)

For the reasons stated the cases are reversed and remanded, with directions for further proceedings consistent with the principles of this opinion.

KEATING V. CITY OF COVINGTON, &C.

(Filed May 27, 1896—Not to be reported.)

1. *Incompatible offices*—The plaintiff having been elected in November, 1894, to fill a vacancy in the office of city collector of the city of Covington, caused by the resignation of the incumbent of that office, who was elected in November, 1893, for a full term of four years under the old charter of the city, he was entitled to the office unless he had forfeited his right by accepting an incompatible office.

2. *Same*—The office of deputy sheriff is incompatible with the office of city collector, and plaintiff, by accepting the former office, forfeited the latter. Even if a deputy sheriff is not "a State officer or deputy officer" within the meaning of section 165 of the Constitution, a question not determined, the office of deputy sheriff is a "county office" within the meaning of section 3746 of the Kentucky Statutes, and is, therefore, incompatible with the office of city collector.

W. A. Byrne for appellant.

Wm. Goebel for appellees.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Landes.

This case originated in the Kenton Circuit Court, where the appellant sued the appellees to recover the office of city collector of the city of Covington, to which office he claimed to have been elected at the election held in said city in November, 1894, to fill a vacancy in said office, occasioned by the resignation of Daniel Kingsly, who was elected for a full term of four years in November, 1893, under the old charter of the city.

It is alleged and not denied that the common council of the city, upon the resignation of Kingsly some time after his election, appointed the appellee, Frank Darenkamp, to fill the vacancy thus created until the next election, and that at the November election in 1894 the appellant was chosen to fill the vacancy for the unexpired portion of the term; that in due time after the election he qualified by taking the oaths required, and by executing bond with security for the faithful performance of the duties of the office, but when he demanded the office from the appellee, Darenkamp, he refused to surrender, and this action was brought under section 483 of the Civil Code, which provides that "if a person usurp an office or franchise the person entitled thereto or the Commonwealth may prevent the usurpation by an ordinary action."

In order to succeed in such action plaintiff must establish his right to the office. (Tillman v. Otter, 93 Ky., 600.)

A demurrer was sustained to the petition because it was not sufficiently definite in its allegations, and the defects having been cured by an amendment the appellee, Darenkamp, filed his answer, setting up the fact that after the commencement of the action the appellant had been appointed a deputy sheriff of Kenton county; that he had accepted the office and qualified, and was acting as such and performing the duties of the office. To this answer a demurrer was filed, and also a reply which admitted the facts stated in the answer to be true.

The court overruled the demurrer and dismissed the petition, thus denying the relief sought, and from that judment this appeal is prosecuted.

In a written opinion the court below held that under section 165 of the Constitution the office of deputy sheriff was incompatible with the office of collector of the city of Covington, and that by accepting the former he virtually abandoned his claim to the latter. The court was careful not to decide whether the appellant was lawfully elected or not, or whether or not he had lawfully qualified as such. But upon the record before us, the facts as to his election not having been controverted, we think the appellant made out a good claim to the office in controversy, and that he was entitled to it, and that the court ought to have so adjudged, at least so far as his right was not affected by the provisions of the charter of cities of the second class, unless he forfeited or abandoned or vacated his right by accepting an incompatible office after his election and qualification as collector.

Section 165 of the Constitution, upon a construction of which the learned judge based his judgment, provides that "no person shall at the same time be a State officer or deputy officer or member of the General Assembly and an officer of any county, city, town or other municipality or an employe thereof."

We are not prepared to hold, as we presume the learned judge regarded it, that a deputy sheriff is a deputy of a "State officer," and for the purposes of this case it is not necessary to pass on that question, but we do hold that the office of deputy sheriff held by the appellant was incompatible with the office of tax collector of the city of Covington, and that by accepting the former he no longer had the right to claim or hold the latter. (Kentucky Statutes, section 3744; Goodloe v. Fox, 96 Ky., 607.)

The office of deputy sheriff is recognized by the Constitution (section 99) as well as by the statute (Kentucky Statutes, section 4560), and if not embraced in the category of "State officer or deputy officer," as given in the clause quoted, it is a public county office, and the incompatibility which is found to have existed between that office and the office of tax collector of the city of Covington, if not declared by the provision quoted from the Constitution, is declared by section 3746 of the Kentucky Statutes, the last clause of which provides that, "nor shall any person at the same time fill a municipal office and a county office."

That is decisive of this case, and, finding no error in the judgment, it is affirmed.

KNOTTSVILLE ROLLER MILL CO. V. MATTINGLY.

(*Filed May* 28, 1896—*Not to be reported.*)

1. *Subscription*—Where one entered into a written agreement with others and made a subscription "to form a joint stock company or a partnership, whichever may be hereafter determined upon," the subscription can not be enforced by a corporation organized for the accomplishment of the purposes set out in the agreement, as a corporation is essentially different from a joint stock company or a partnership.

2. *Same—Consideration*—Even if the defendant promised after the subscription was made to sign the articles of incorporation, the promise was, so far as the petition shows, without consideration.

3. *Same—Sufficiency of petition*—As the contract provided that unless the required sum be subscribed by a certain time the subscription should be null and void, the petition seeking to recover the subscription is defective in failing to allege that the required sum was so subscribed.

Birkhead & Clements for appellant.

Wilfred Carrico for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Guffy.

Knottsville Roller Mill Co. and W. S. Hazel and J. B. Aud instituted this action against the appellee, Henry D. Mattingly, to recover judgment for $100 alleged to be due and owing to the plaintiffs, by reason of a subscription made by appellee. Several defenses were interposed by the appellee, and, after the issues were made up and plaintiff's proof introduced, the court, on motion of appellee, gave a peremptory instruction to the jury to find for the defendant, which was done, and judgment rendered in appellee's favor.

It appears that a part of the subscribers to the paper in question became a corporation, at least claimed to be such, and sue as a corporation, and one of the questions for decision is, can defendant be made to pay the $100 to a corporation.

The paper signed by him and others reads as follows: "We, the undersigned, agree to form a joint stock company or a partnership, whichever may hereafter be determined upon, for the purchase of the mill and ground in Knottsville, Daviess county, Ky., known as the Crouse mill, and now owned by W. S. Hazel, and the said Hazel agrees with the undersigned to put said mill and ground into said stock company or partnership at the sum of one thousand dollars, taking stock to that amount or taking an interest in said company to said amount, and, in addition thereto, agrees and does hereby subscribe five hundred dollars to said partnership or joint stock company. In consideration therefor we, the undersigned, agree to pay to W. S. Hazel and J. B. Aud for the benefit of said joint stock company or partnership, who will contract for mill, the sums set opposite our names, and whenever called upon so to do by the said W. S. Hazel and J. B. Aud, and we are to be interested in said property in the amount so subscribed. This to be binding only on condition that as much as $1,500 stock, in addition to Hazel's stock, is subscribed. All stock must be subscribed by 1st of November, 1892, or this contract is null and void.

"W. S. Hazel old mill	$1,000 00
W. S. Hazel, cash	500 00
J. B. Aud & Bro.	400 00
M. H. Wilhite	100 00
I. A. Aull	100 00
W. M. O'Bryan	100 00
I. G. Drury	100 00
Henry H. Mattingly	100 00
Geo. W. Aull	100 00
Jesse D. Martin (one-half in brick)	50 00
W. C. Clayton	50 00
C. N. Higdon	100 00
John L. Johnson	100 00
William Crouse	200 00"

It will be seen that no mention is made of a corporation in the article of subscription. No promise is made to pay a corporation or to organize one, hence it seems to us that defendant can not be required to pay his subscription for a purpose entirely different from that named in the writing. A party might be willing to pay $100 to a partnership or joint stock company, and become a member

thereof, and yet be averse to paying anything to a corporation; also be quite unwilling to become a stockholder in the same. A joint stock company is essentially different from a corporation organized under the provisions of chapter 56 of the General Statutes.

Appellants insist that the allegation of the petition amounts to an averment that appellee agreed to the incorporation, and that the allegation is not denied. We do not think so. It is certain that he did not sign the articles of incorporation, and if he had, after the subscriptions were made, so promised or agreed, the promise would have been, so far as the petition shows, without any cons
The article of subscription provides that unless the required sum be subscribed by 1st of November, 1892, the subscription should be null and void, and it is nowhere alleged in the petition that the required sum had been so subscribed, hence the demurrer of defendant ought to have been sustained.

The evidence introduced by plaintiff wholly failed to show a right to recover, and the peremptory instruction was, therefore, properly given, and the motion for a new trial was properly overruled.

Judgment affirmed.

STEPHENS, &C. v. FELTON, &C.

(*Filed May* 28, 1896.)

Classification of towns—Creation of towns—Section 2740 of the Kentucky Statutes, classifying cities and towns, was not intended to create towns not before existing as such, and, therefore, although a territory which had been incorporated merely as a civil district was designated by that statute as a town of the fifth class, it was not thereby created a town.

Cleary & Cleary and D. A. Glenn for appellants.

Tisdale & Gray for appellees.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Lewis.

Thomas B. Stephens and others, appellants, brought an action to enjoin Matthew Felton and others from further proceeding to have established and incorporated as a town, by the name of "Latonia," certain territory described in the petition of appellees filed for that purpose, and then pending in the Kenton Circuit Court, and which territory appellants allege is within the boundary of what was originally designated by a statute as "South Covington District," but, as they aver, now an incorporated town known by the name of "Milldale."

Peter Keller and others brought an action, alleging they are the duly elected trustees of "South Covington District," and ask an injunction restraining Charles G. Mason and others from assuming the offices of mayor, police judge and councilmen of the town of Milldale, thereby superceding plaintiffs as such trustees.

The two actions being consolidated, judgment was rendered perpetually enjoining Mason and others from asserting claim to or exercising powers of the respective offices of mayor, police judge and councilmen, and dismissing the action of Stephens and others against Felton and others.

It appears that in 1884 certain territory within the county of Ken-

ton was incorporated, and called "South Covington District," and, although provision was made in the statute for the election of trustees, having the same powers of trustees of a regularly organized town, still the territory, which included many farms, was recognized and intended as a civil district and voting precinct, within which were to be two justices of the peace and a constable, possessing and exercising fully within and for that territory the functions of those offices. The territory was not marked out and set apart as a town, but simply as a civil district, much less was it known or designated in the original statute as the town of "Milldale."

In that condition was the "South Covington District" when the statute of September 30, 1892, now chapter 89, Kentucky Statutes, was enacted, wherein, by section 2740, cities and towns of this Commonwealth were classified, "Milldale, Kenton county," being designated as a town of the fifth class; but as there had been no previous legislation incorporating that particular territory as a town, in meaning of chapter 89, and it would have been impracticable and oppressive to do so, as a very large part of it was used for farming purposes, we do not think section 2740 operated or was intended to so operate as to make it a town. The Legislature was then dealing with places which had been already created, and incorporated by statute as towns and cities, and upon the incorrect assumption that the territory in question, or certain described territory, had been so created and incorporated as a town, called Milldale, it was simply classified as such. That the Legislature did not intend thereby to create towns, not before existing as such, is shown by section 2713, same chapter, where creation and organization of towns is provided for.

Judgment affirmed.

FARMERS BANK OF KENTUCKY V. MARSHALL AND STAPP.

(*Filed May* 14, 1896—*Not to be reported.*)

Husband and wife—Business carried on in wife's name—Rights of husband's creditors—Where a mercantile and a milling business were each carried on in the name of a firm of which a married woman, who was empowered to trade as a *feme sole*, was an ostensible member, but the business was in each case controlled and managed by the husband, who furnished the capital and credit, and was in fact the real owner and beneficiary, the husband's creditors were entitled in this action, upon a return of no property, to subject the property used in the business, after giving to the wife a sum of money which the husband obtained and invested in the business for her. But there should be first deducted from the amount to be paid to the wife whatever she has received from either firm. And, while the debts of each firm are payable out of the property thereof, it was error, in view of the fraudulent device to hinder and delay the husband's creditors, to direct the payment out of the property of any debts the wife may have contracted upon the faith of her being a *feme sole*.

John T. Handley and H. F. Turner for appellant.

S. B. & R. D. Vance and W. B. Pentecost for appellees.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge Lewis.

In 1887 the Farmers Bank of Kentucky recovered judgment against John L. Marshall and E. H. Stapp for $10,000, upon which

an execution was issued, and April 16, 1892, returned no property found, though about $1,000 of the debt had in the meantime been paid. Thereupon this action was brought to subject, for satisfaction of the unpaid part of the judgment, an alleged interest of E. H. Stapp in real and personal property of "The Corydon Dry Goods Co.," R. H. Harness being the other partner, and his alleged interest in a steam flouring mill, B. K. Turner being the other member of that firm, and having in his possession money and property belonging to it.

It is stated in plaintiff's petition that, although M. M. Stapp, wife of E. H. Stapp, claims to be and is ostensible owner, instead of him, of the partnership interest in the two firms mentioned, he is the real owner, and it has been held in her name for the fraudulent purpose of hindering and delaying plaintiff, his creditor.

They were married December 18, 1888, and February 11, 1889, a judgment upon their petition was rendered empowering her to use her own property, and act in regard to it as a *feme sole;* and February 14, 1889, she and R. H. Harness made a written contract to carry on the mercantile business under the firm name of the Corydon Dry Goods Co., she to put in $2,800, keep books of the firm, attend to its correspondence, do the collecting, and everything else usually done by a bookkeeper in similar establishments, while he was to put in $1,200, devote his entire time to the business, and pay the salary of one clerk. The firm, in addition to their purchasing from Dickey, their predecessor, a stock of goods, also purchased the storehouse, the entire capital invested being $4,500, of which M. M. Stapp claims to have put in $3,000 and Harness about $1,400.

In February, 1891, E. H. Stapp and B. K. Turner entered into a contract to carry on as partners the business of manufacturing flour, each to put in $3,000, though, according to the testimony of Turner, the actual amount paid was $4,000 by him and $1,700 by E. H. Stapp. Afterward M. M. Stapp took the place of her husband, paying in, instead of him, the money, and the business was carried on in her name as a member of the firm.

According to a settlement of accounts of her guardian, made June, 1888, about six months before her marriage and less than eight months prior to her alleged venture in the mercantile business, M. M. Stapp had just $444.39; and it does not satisfactorily appear she had any greater estate, but probably not so much at the time of her marriage.

There is no evidence showing she had any previous experience in or capacity for the mercantile or milling business; that she ever did, as bookkeeper or otherwise, give the slightest attention to either; ever was consulted by her alleged co-partners or knew what was going on in either the store or mill. E. H. Stapp, on the contrary, was evidently an intelligent, enterprising and shrewd business man; and, though at the time owning no visible property, must have owned a considerable amount of money, for he had previously been earning and getting wages at the rate of $50 for some time, and for about two years previously $80 per month.

Both ventures were projected and both co-partnerships negotiated by him, and he had, exclusive of her, control and management of each; for the partnership was agreed upon between him and Harness, and arrangement made by them to purchase the stock of goods and storehouse in January, 1889, and she did not acquire an interest, if ever, until February, after the judgment giving her the rights of a *feme sole* was rendered; and Turner testifies she was not known or recognized by him as partner in the mill until some time after the contract of partnership between himself and E. H. Stapp.

The greatest amount that even E. H. Stapp says his wife owned or put into the mercantile business was $900, and the residue of $3,000 required for that purpose was not nor could have been furnished by her, for she had no commercial credit or friends to aid her. E. H. Stapp states his brothers and wife of one of them loaned her the money; but it is not a reasonable supposition that they advanced the money on her credit, and if they loaned any at all it was for his benefit. There are, however, circumstances which satisfy us that the greater part, if not all, the money ostensibly loaned by his brother and sister-in-law was really his own.

It is not claimed that she put any money in the milling business except the profits made in the other business.

We are thus called on to give credence to the case of a woman recently married, without knowledge, experience or credit, and with a capital of not over $444.39, that her husband could, and we think did, reduce to possession, for her own benefit and at her own risk embarking in a mercantile venture requiring an immediate outlay of $3,000, and having for a partner a man just arrived at full age and likewise without requisite experience, and within two years engaging in the milling business, requiring an additional outlay of $1,700.

The circumstances proved, independent of the admissions which Turner testifies E. H. Stapp made to him, render it plain that for the purpose of evading payment of plaintiff's debt, both the mercantile and milling business were carried on in the name of his wife, while E. H. Stapp furnished the capital and credit, controlled and managed it, and was in fact the real owner and beneficiary.

The court below found that E. H. Stapp received from his wife $900, which he invested in the Corydon Dry Goods Co. as her money, but that he also invested other money procured upon his own credit, and had an interest in both firms. It was, therefore, adjudged that M. M. Stapp be paid that sum, and interest from January, 1889; that debts which she had contracted upon the faith of her being a *feme sole* prior to issuing of the attachment in this case, and also a fee of $100 to attorneys employed by her in an action against R. A. Harness to settle the partnership, be paid out of the attached funds, and that the balance be paid to plaintiff on their debt against E. H. Stapp.

Although not satisfied that as much as $900 of money belonging to M. M. Stapp, if any at all, was invested in the Corydon Dry Goods Co., we are not disposed to disturb the finding of the lower court in that respect; but we think it was error to direct absolute payment of that sum to her, because it appears she has already received assets or money from that firm and from the mill company, and whatever she has so received should be deducted from the $900, and no part of it should be paid to her if she has received from that source an amount equal to it.

As the services for which $100 was allowed to the attorneys appear to have been rendered in an action to settle the partnership, we think the court did not err in that respect; but as the arrangement by which M. M. Stapp became ostensibly a member of the two firms, and claims a share of the assets and profits thereof, was, in our opinion, a fraudulent device to hinder and delay creditors of E. H. Stapp, it was error to direct paid out of the property or funds attached in this case any debts she may have contracted upon the faith of her being a *feme sole*. Whatever debts either firm may owe are payable out of the property thereof, but we see no reason why her own individual debts should be thus paid. However, no such debts as con-

templated in the judgment were reported by the court's commissioner, although he was directed to do so at the succeeding term.

As this record stands the plaintiff was, when the court overruled its motion to have it paid over, entitled, in satisfaction of its debt, to the entire proceeds of the attached property, after deducting proper costs of suit, the $100 payable to the attorneys and the $900 adjudged to M. M. Stapp, though not subject to deduction of the last-named sum, if she has already received that much of the property or assets of the two firms.

The judgment, on appeal of the Farmers Bank, is reversed for further proceedings consistent with the opinion, and affirmed on cross appeal of E. H. and M. M. Stapp.

NEWMAN, &C. v. HUGHES.

(*Filed May* 16, 1896—*Not to be reported.*)

Verdict supported by evidence—In this action upon a special commissioner's bond to recover an amount alleged to have been collected by the commissioner and ordered to be paid to plaintiff, as no error was committed upon the trial, and the evidence is sufficient to authorize the verdict of the jury in favor of plaintiff, the judgment will not be disturbed.

John M. Wilkins and E. W. Hines for appellants.

Lewis McQuown for appellee.

Appeal from Allen Circuit Court.

Opinion of the court by Judge Guffy.

This suit was upon the bond of John W. Newman, a special commissioner of the Allen Circuit Court, in which plaintiff sought to recover judgment against said Newman and his sureties for $400, money alleged to have been collected by the commissioner and ordered to be paid to plaintiff.

Appellants relied on several grounds of defense, jointly and separately. A trial resulted in a verdict and judgment in favor of plaintiff for the amount claimed, and, appellants' motion for a new trial having been overruled, they have appealed to this court.

We deem it unnecessary to recite the evidence and contention of the parties. We think that the demurrer of appellants was properly overruled; also their motion for judgment, notwithstanding the verdict was properly denied.

It seems to us that the court did not err in giving or refusing instructions, and, the evidence being sufficient to authorize the verdict of the jury, we do not feel authorized to disturb the finding.

Judgment affirmed.

ALLENSWORTH V. LOWDERMILK, &C.

(*Filed May* 20, 1896—*Not to be reported.*)

1. *Pleading*—In this action upon a note executed for the purchase price of land, in which the only defense was that there was a deficit, on account of which the defendant claimed a credit upon the note sued on, the plaintiff

having replied to the answer, can not now complain that the answer was not good because it was not denominatsd a counterclaim or set-off.

2. *Vendor and vendee—Deficit*—Although the number of acres in each of the two tracts sold was given in the deed without the addition of the words "more or less," the deed, the notes and the other evidence in the case, when considered together, show that the sale was in gross and not by the acre. And the whole number of acres being 452, the alleged deficit of eighteen and one-half acres is too small to entitle the vendee to any relief. But even if a sale by the acre had been established the evidence as to the deficit claimed is so conflicting it may well be doubted whether the vendee would be entitled to any relief.

3. *Bar*—Even if it should be conceded that three or four acres were held adversely, yet as the persons who were alleged to be the adverse claimants were made parties, and failed to assert any claim to the land, their claim, if any, is now barred by the judgment of the court below.

E. W. Hines, W. E. Garth and Thomas H. Hines for appellant.

G. Terry and W. H. Holt for appellees.

Appeal from Todd Circuit Court.

Opinion of the court by Judge Guffy.

This action was instituted by the appellees against the appellant in the Todd Circuit Court to enforce the collection of a $2,500 note executed by appellant to L. P. Kimbrough, it being the last payment for land purchased by appellant from Kimbrough, and conveyed by Kimbrough and wife to appellant. Kimbrough died not long after the conveyance, and appellee Lowdermilk, his widow, administered on his estate, and assigned the note sued on to appellee Terry, guardian, as collateral to secure a debt she owed him.

Appellant's demurrer to the petition was properly overruled. The substance of the defense is that the purchase of the two tracts of land was made by the acre, and that the whole number of acres sold was 452, and that the surveys lacked about 18½ acres of containing the number of acres bought. These allegations were denied by appellees. A trial resulted in a judgment in favor of appellees for the amount claimed, and appellant has appealed to this court.

It is insisted by appellees that as the answer was not denominated a counterclaim or set-off that it was no pleading sufficient to constitute a defense. The answer was replied to and treated as a defense, and, under a former decision of this court, must be now held and treated as a valid plea.

Appellant contends that the reply failed to sufficiently deny the deficit of 18½ acres, hence that the alleged deficit must be taken as true. We do not think that contention well taken. The deficit was the subject of much proof, and seems to have been one of the chief issues in the case. The exceedingly earnest as well as able presentation of the contentions of both parties has not escaped our attention, hence we have carefully considered the law and facts, but deem it unnecessary to recite the evidence or discuss at length the law applicable to the case.

Numerous exceptions were filed to depositions which need not be noticed further than to say that appellant was not a competent witness to testify as to the transaction between him and Kimbrough, except as to such as other witnesses testified to. It seems to us that, taking into consideration the deed, notes and all the proof introduced, it conduces to show the purchase was in gross, not by the acre, and, that being true, the deficit, if any has been shown, is too small

to authorize and require an abatement in the price under the oft-repeated decisions of this court.

If a sale by the acre had been established, the proof is so conflicting that it might well be doubted whether appellant would be entitled to any relief. If it be conceded that 3 or 4 acres was held adversely by the Scruggs heirs, yet they were made parties, and failed to assert any claim to the land, hence their claim, if any, is now barred by the judgment of the court below.

The appellant was acquainted with the land. It was surveyed preparatory to making the conveyance. He accepted the deed, executed the notes, and for several years seems to have been satisfied. It must be conceded that the burden was on him to show by a preponderance of the evidence that he was entitled to relief. This he has failed to do.

The judgment of the court below is, therefore, affirmed.

WHEELER, &C. V. BLEAKLEY.

(*Filed May* 21, 1896—*Not to be reported.*)

1. *Enforcement of vendor's lien—Notes not due at institution of suit*—In an action against husband and wife upon notes executed by them for the purchase price of land conveyed to the wife, the petition set up all the notes, including one which had not then matured, and prayed personal judgment against the husband upon the notes past due and judgment upon the other note when it shall mature also, and for the enforcement of the vendor's lien, the prayer being for a sale of so much of the land as might be necessary to satisfy the matured notes, it being alleged that the land could be divided without materially impairing its value. The court rendered judgment for the amount due and ordered a sale of as much of the land as might be necessary to pay that judgment. The commissioner had the whole of the land appraised and offered it for sale as a whole, the husband of the owner becoming the purchaser at a price in excess of the amount of the judgment but he was required to execute bond for only that amount. At the next term of the court after the sale was confirmed, the case being still on the docket, it was suggested of record that the last note had become due, and the court then rendered personal judgment against the husband for the amount thereof and ordered a sale of so much of the land as might be necessary to satisfy that judgment. Upon this appeal from that judgment, *Held*—That the defendants have no ground to complain, as the cause of action upon which the supplemental decree was rendered was properly stated and described in the petition, and the case had been retained on the docket.

2. *Supplemental decree of sale*—The court was authorized to order a sale of enough of the land to pay the notes due at the date of the judgment, or when the action was commenced, if the land was susceptible of division without materially impairing its value; and, while it was irregular for the commissioner in making the sale under the first judgment to have the whole of the land appraised and then offered for sale as a whole, yet, as the defendants did not except to the report of sale upon that ground, they can not complain of that irregularity upon this appeal from the supplemental decree.

Lane & Burnett for appellants.

R. L. Stitt for appellee.

Appeal from Hardin Circuit Court.

Opinion of the court by Judge Landes.

This case originated in the circuit court of Hardin county, and is an action in equity, brought by the appellee against the appellants, C. C. Wheeler and Sarah A. Wheeler, his wife, on four notes which were executed by the said C. C. Wheeler to the appellee for deferred installments of purchase money for land conveyed by him to the said Sarah A. Wheeler. Two of the notes were for $300 each, due respectively March 1, 1890, and March 1, 1891, and two of them were for $400 each, one due March 1, 1892, and the other due March 1, 1893. The action was commenced on the 22d day of April, 1892, nearly a year before the last note would become due, and it was sought to recover personal judgment against appellant, C. C. Wheeler, on the notes that were due, a part of only one of them having been paid, and on the last note when it became due, and to subject as much of the land, upon which a lien had been retained in the deed to secure the unpaid purchase money, as might be sufficient to pay all of said past due notes, which it was alleged could be divided without materially impairing its value. After an unsuccessful defense to the action the court, on the 8th day of June, 1892, rendered judgment against the appellant, C. C. Wheeler, for the amount due, and, finding that the land could be divided, adjudged that as much of it as was necessary to pay the amount of the judgment be sold and the master commissioner was directed to carry the judgment into effect. The master, in executing the judgment, duly advertised the sale and caused all of the land to be appraised as required by the statute, the amount at which it was appraised being $1,650, and at the sale, which was made on the 14th day of November, 1892, the appellant, C. C. Wheeler, bought the land, which was stricken off to him for the sum of $1,400, the amount of his bid. But the amount which was required to be made by the judgment being only the sum of $891.47, he was required by the master to execute bond, with security, for that sum only, which he did.

The report of the sale was promptly made by the master, to which exceptions were filed by the appellants, but which having been heard were overruled by the court on the 23d day of December, 1892, and the report of sale confirmed.

The record does not show that a deed was presented to court from the master to Wheeler, or that the cause was finally disposed of at that term. During the June term, 1893, however, it was suggested of record that the last note for $400 of the purchase money, which was set up and filed with the petition, had become due on the 1st day of March, 1893, and the court gave personal judgment against appellant, C. C. Wheeler, on the note. A lien was adjudged in favor of the appellee on the land for the amount of the note, and a quantity thereof sufficient to satisfy this last judgment was adjudged to be sold, and the master commissioner directed to execute the judgment. Exceptions were duly taken by the defendants, who are prosecuting this appeal from the judgment.

It is claimed by counsel for the appellants that the judgment appealed from is erroneous, because the first judgment, which did not embrace the last note for the purchase money, was satisfied by the sale of the land, and which, it is alleged, brought no more than enough to pay off the judgment, and that the action not having been retained for any purpose, the court having made and confirmed the sale had no jurisdiction to order the land to be sold again to satisfy the purchase money that was not embraced in the first judgment.

That there was some irregularity in the manner of making the

first sale is sufficiently plain, but it does not appear that complaint as to any irregularity or illegality in making the sale was included in the exceptions of appellants to the report of the sale as made by the master, nor can it be said, upon the record before us, that this irregularity was of such a character as to make it error prejudicial to the substantial rights of the appellants for which the judgment ought to be reversed. The appellee had the right to sue when he did on the past due notes for the purchase money, and before the last note was due, and, owning all of the notes, it was proper for him to set up and describe in the petition the note not due, as well as those that were due at the commencement of his action, and to ask for judgment on the former when it became due. In such a case, under section 693–4 of the Civil Code, the court was authorized to order a sale of enough of the land to pay the notes due at the date of the judgment, or when the action was commenced, if the land was susceptible of division without materially impairing its value. (Ward v. Coffey, 11 KY. LAW REP., 339.)

This the court did. In making the sale, however, the master had the whole of the land appraised, and then offered it for sale as a whole, and this is the irregularity referred to. As has been stated, the appellant, C. C. Wheeler, bid for the land as offered by the master the sum of $1,400, which was less than its appraised value by $250, and $508.53 more than enough to satisfy the judgment for the amount of the past due notes and the costs of the action. Doubtless the court would have set the sale aside if attention had been called to this irregularity on the part of the master in the exceptions of the appellants to the sale. But since the appellant, C. C. Wheeler, was bound on the unmatured note, and knew it was not embraced in the judgment under which the sale was made, and since he bought the land, which was at the lowest estimate worth $758.53 more than the amount due on the said judgment, we can not see that the substantial rights of the appellants have been prejudiced by the judgment on the last note, and the order to sell enough of the land to satisfy it. In our view of the case, as it is presented in the record before us, it would be inequitable and unjust to allow the appellants to defeat, by these methods, the plain remedy afforded by the law to the appellee for the collection of his debt, and the enforcement of his lien on the land by which it was secured.

This case is not like the case of Brown v. Vancleave, 86 Ky., 381, which counsel for appellants rely on for a reversal of the judgment. In that case an amended petition was filed setting up a new and distinct cause of action after judgment was rendered in the action and satisfied, and it was properly held that this ought not to have been allowed, and that all proceedings on the amended petition after the judgment was satisfied were void. But here there was no amended petition or new cause of action set up different from or in addition to what was properly set up in the petition at the commencement of the action. It was *a cause of action* which was in existence, but upon which *the right of action* had not accrued when the action was commenced, but which, as we have seen, was properly stated and described in the petition. And the action, although not by formal order retained, was actually retained and kept on the docket, as it was manifest that further proceedings were necessary to be had in the action before the cause could be said to be finally disposed of. Under the circumstances it would have been improper for the court to strike the cause from the docket and thus require the appellee to bring another action on the last note, and it was not error to render

judgment on the last note upon suggestion of record that it had become due, or to order a sale of so much of the land which could be divided as might be necessary to satisfy it.

There being no reversible error, the judgment is affirmed.

DEWITT V. MATHEY & CO.

(*Filed May* 27, 1896—*Not to be reported.*)

Trade name—Injunction—The plaintiff and his predecessors in business having for more than thirty years conducted a saloon in a particular building under the name of "The Saratoga," and plaintiff having purchased from his immediate predecessor the right to the use of the word "Saratoga" as a business name, title, trade-mark and brand for goods sold under that name, he had the right, upon moving his business into another building, to continue the use of the trade name and trade-mark, and in this action brought by him the chancellor properly enjoined the defendants, who had moved into the building formerly occupied by the plaintiff, from using the same business title in conducting a like business, the name used not being merely the name of a locality or building where the business was transacted.

Gibson, Marshall & Lochre for appellant.

Dodd & Dodd for appellees.

Appeal from Jefferson Circuit Court, Chancery division.

Opinion of the court by Judge Hazelrigg.

Beginning in 1858 and continuing for some thirty years, Hunt first and then Knauer, the predecessors of the appellees, conducted a saloon for the sale of whiskies, wines, cigars, etc., at the corner of Fifth and Jefferson streets in Louisville, under the name of "The Saratoga." Knauer sold to the appellees in 1888, and the latter continued the business under that name until 1893, when, failing to renew their lease of the building, they started a new saloon under the same business title about a block away. Finding that the appellants, who had moved into the old quarters at Fifth and Jefferson streets, were about to use this name in their trade and in the conduct of a like business, this suit was brought to prevent it.

It clearly appears from the proof, and the chancellor so found, that the appellees purchased of Knauer the sole and exclusive right to the use of the word "Saratoga" as a business name, title, trade-mark and brand for goods sold under the name. The business was extensively advertised by labels on the bottles of the firm and by circulars, and, while this name did not indicate the make of the goods, it came to indicate with the trade a superior selection of pure goods by D. Mathey & Co., proprietors. The value of the name as a trade name and trade-mark, for it was both, is shown by satisfactory proof.

The legal principles controlling the case are not in dispute, but it is the contention of appellants that the name "Saratoga" was merely the name of the locality or building where the goods were sold and the business was transacted. We think the proof shows otherwise, and the chancellor properly perpetuated the injunction. (Menendez v. Holt, 128 U. S., 514; McCarder v. Peck, 28 How. [Pa.], 124; McLean v. Fleming, 96 U. S., 254.)

Judgment affirmed.

LOUISVILLE & NASHVILLE R. R. CO. v. WEBB, BY, &C.

SAME v. WEBB.

(*Filed May* 29, 1896.)

1. *Railroads—Injury to child—Peremptory Instruction*—Where a boy eleven years of age was injured while swinging upon the side of a moving freight train as it was leaving a water tank to which he had been carried upon the train, a distance of several miles from the town in which he lived, it was necessary, in order to render the railroad company liable, to prove that the conductor of the train persuaded or invited the boy to get on the train and ride to the water tank; that the accident that happened there in which he was injured was one that might reasonably have been expected to happen to him in the ordinary course of events; that the servants of the company negligently failed to exercise care for his protection commensurate with the danger to which they had voluntarily exposed him; and that the accident resulting in his injuries happened without the intervention of any other independent efficient cause. And as none of these things appeared in either of these actions against the company, the one brought by the boy to recover for the permanent injuries and the other by the father to recover for loss of services, a peremptory instruction to find for defendant should have been given in each case.

2. *Duty of freight conductor*—As the conductor did not discover the presence of the boy on the train until after it was in motion, it was not his duty to stop the train and put the boy off before reaching the tank, which seems to have been the next stopping place.

3. *Negligence—Proximate cause*—The railroad company was not guilty of negligence in placing a pile of coal on its right of way for its necessary use, and as the proximate cause of the injury was the dislocation of the lumps of coal when they were struck by the infant plaintiff's feet, thus throwing him under the train, the company is not liable even though the conductor was negligent in permitting the boy to ride to the tank.

4. *Even though the conductor committed a wrong in inviting other boys*, companions of plaintiff, to ride to the tank without the knowledge or consent of their parents, that fact does not render the company liable to plaintiff, to whom no invitation was given

5. *Evidence*—What was said by the conductor to plaintiff and his companions about helping to take freight from the train and riding to the tank on days previous to the day on which the accident happened was not competent as evidence and ought to have been rejected. And the court properly refused to admit testimony tending to show that the conductor had on previous days encouraged plaintiff and his companions to swing upon the ladders of the freight cars.

6. *Res gestæ*—A declaration of the conductor after the accident happened to the effect that he had been expecting such an accident was not a part of the *res gestæ*, and ought not to have been admitted as evidence.

7. *Same—Evidence*—The conductor having denied that he had made such a statement in the presence of a certain witness, it was error to permit that witness to contradict him as to that matter, for the statement not being competent as evidence and the jury being directed not to consider it, the effect of permitting the conductor to be contradicted in that way was to get before the jury the excluded testimony, and the caution to the jury not to consider it except for the purpose of contradiction could not remove from the minds of the jury its effect.

8. *Discretion of children*—While a child is required to exercise only such a degree of discretion and care as may reasonably be expected of children of his age and intelligence, the mere immature age of the person injured can not be allowed to have the effect to raise a duty where none otherwise existed. Nor is age alone, without regard to intelligence and natural capacity, the test of the degree of care required of children.

9. *Instruction*—An instruction telling the jury that the infant plaintiff "was bound to exercise only such care as a boy of like age and discretion would ordinarily exercise under the same or similar circumstances," being submitted without any connection with the acts of the infant plaintiff and the circumstances surrounding him, was misleading.

B. D. Warfield, H. W. Bruce, William Lindsay and Gordon & Gordon for appellant.

E. W. Hines, Waddill, Nunn & Waddill for appellees.

Appeal from Hopkins Circuit Court.

Opinion of the court by Judge Landes.

By agreement these two cases were heard together in this court. They originated in the circuit court of Hopkins county, and the first-named case was an action brought by Willie Webb, an infant, suing by his father, W. H. Webb, as his next friend, to recover from the appellant damages for the loss of his right foot and ankle, alleged to have been the result of the negligence of the servants and agents of the appellant in charge of one of its freight trains on what is known as the Henderson division in the system of railroads owned and operated by the appellant. The other case was an action brought by the said W. H. Webb to recover damages against the appellant for the loss of the services of his said son, and the expenses incurred by him in procuring the necessary surgical attention, etc., for him during the period of his suffering from the aforesaid injuries, and all alleged to have been occasioned by and to have been the result of the same negligence and wrongful acts that were alleged in the first-named action as the ground of recovery therein. Both cases are based upon substantially the same state of facts.

In the action of the infant appellee the jury rendered a verdict in his favor, and fixed the damages at the sum of $5,000, and in the other action the jury rendered a verdict in favor of the father, and awarded him the sum of $400, and a judgment having been rendered on the verdict in each case, and the court having refused to set aside the verdicts and grant the appellant new trials, the cases have been brought before us by appeals and a reversal of the judgment in each case is sought for various alleged errors, which will be noticed as far as the merits of the cases may require.

The accident occurred and the injury was inflicted upon the infant appellee at the Deer creek water tank on the line of the appellant's railroad, situated about three miles south of Sebree City, in Webster county, on the 9th day of August, 1893. Four days before that date he reached the age of eleven years. He was living with his father and step-mother at Sebree City, and from the testimony detailed by his witnesses before the jury on the trial of his case, much of which was objected and excepted to at the time by counsel for the appellant, we gather substantially the following state of facts in his case: The infant appellee and several boys at Sebree City, who were his companions and of about his age, had occasionally assisted in unloading freight at the depot from the appellant's local freight train previous to the day on which the accident occurred, and so employed themselves on the day before; this local freight ran regularly between Howell, near Evansville, Indiana, and Earlington, in Hopkins county; on such occasions the conductor, Peter J. Hurb, in charge of the train, encouraged the boys to assist in unloading freight by promising them that they might ride on the train from Sebree to

the water tank, and did permit them to take the ride; the infant appellee had ridden twice on the train to the tank before he was injured; on the day before he was injured he and the other boys carried watermelons from the train, and on that day they rode on the train to the tank; when they rode to the tank they walked back to Sebree; on the day he received the injury the infant appellee was not at the depot when the train arrived, but other boys were there, and assisted in unloading freight, the conductor having promised them the ride if they would do so; the infant appellee did not on that day assist in unloading freight, and the conductor did not say anything to him about it, and did not promise him a ride to the tank, and did not invite or request him to ride there on the train, but the infant appellee reached the depot while the other boys were unloading and saw them at work, and just before the train started from the depot on its journey southward and towards the tank he and some of the other boys boarded the caboose, which was in the rear of the train and was standing several car lengths back from the depot platform, and other boys boarded some of the other cars.

There was no proof that the conductor saw the infant appellee board the caboose, but the proof does show that the conductor was standing on the platform when the train started, and that he jumped or swung himself on the caboose from the platform while the train was in motion, and that he saw the infant appellee in the caboose after he entered it, and that he did not stop the train to put him off before it reached the tank, where it stopped to take on a supply of water for the locomotive.

The train was a long one, and it arrived at the tank without accident or injury to any one, and after it stopped, and while water was being taken from the tank, the infant appellee and the other boys got safely off and ran along the side of the standing train to the tank, where the infant appellee took a drink of water. He and some of the other boys then went back towards the rear of the train, and after the train had started from the tank, and while it was in motion, the infant appellee and other boys took hold of the ladders on the side of the cars and swung to them, and, letting go, jumped from them to the ground while the train was moving; but when the infant appellee loosed his hold and jumped, his feet struck a pile of coal which had been placed on the right of way and was for the use of the pumping engine at the tank, and the coal slipped or gave way under his feet, and in this way his right foot went under the cars, and was run over and mashed, so that his foot and about three inches of his leg had to be amputated.

There is no proof that the conductor or any of the other employes of the company saw the infant appellee or other boys when they took hold of the ladders on the sides of the cars or when they were swinging from them, and they were not warned by any of them not to do so, or of the danger of doing it, and appellee did not see any of the trainmen at the time; but the step-mother of the infant appellee had told him to keep away from the railroad and from the trains, and his father had told him to keep out of town and away from trains, and to stay at home in the yard, and his unloading freight at the depot and riding on the train to the tank were without their knowledge or consent.

After the accident happened the train was stopped, having crossed the bridge which spanned the creek a short distance from the tank, and the conductor ran back, and came up to where the infant appellee was lying.

Over the objections of the counsel for the appellant the court per-

mitted several of the witnesses to testify that when the conductor came up he said that "this is just what I 've been expecting for several days, but it is not my fault. If the boys had minded me Willie would not have been hurt."

Counsel for the appellant also objected to all of the testimony of each of several witnesses, which the court permitted to be introduced in behalf of the plaintiff, that showed what the conductor said to the boys on the days previous to the accident with reference to their helping to unload freight at Sebree and riding to the tank.

The proof shows that the infant appellee was a boy of ordinary sprightliness and intelligence. One witness said that, in this regard, "he was just like the common run of boys."

Dr. Parker, the physician and surgeon who attended him and who, with the assistance of Dr. Agnew, amputated his leg, said: "I consider him a sprightly boy—sprightly as other boys of his age and size."

The appellee said to Patrick Williams, one of his witnesses, who carried him away after he was hurt, that "if I had minded my father it would not have happened." On cross-examination the appellee said that he "did not know it was dangerous to try to get on or swing from the train."

At the conclusion of the testimony in behalf of the appellee, counsel for the appellant moved the court to exclude from the jury so much of the evidence, already excepted to, as detailed what occurred at the depot at Sebree between the conductor and the infant appellee and other boys with reference to the boys helping to unload the cars and riding to the tank, and also all evidence of the statements of the conductor after the accident, to the effect that he had been expecting, for several days, some such accident to happen; and also moved the court to instruct the jury "to find for the defendant."

It seems that the court did not at the time act upon either of the motions to exclude testimony from the jury, but overruled the motion for a peremptory instruction, to which exception was taken at the time, and the first question to be considered arises upon the action of the court in overruling the motion to instruct the jury to find for the appellant.

The motion for the peremptory instruction carried with it an admission of the truth of the material facts brought out in the testimony of the witnesses for the appellee before the jury, and if, by this evidence, it was made to appear that the agents or servants of the appellant, who were in charge of the local freight train which carried the infant appellee to the Deer creek water tank from Sebree on the day he was injured, were guilty of negligence, which was the proximate cause of the injury, then the court did not err in overruling the motion. Otherwise, the instruction ought to have been given, and the court erred in refusing to give it.

The important inquiry, therefore, is whether the facts thus in evidence were sufficient to sustain a finding that the agents or servants of the appellant were guilty of negligence, and, if so, whether such negligence was the proximate cause of the injury suffered by the infant appellee.

The facts being admitted by the motion, which is in the nature of a demurrer to the evidence, these inquiries are purely questions of law, which must be decided by the court. After a careful study of the facts under consideration and investigation of the questions involved, in the light of the authorities relied on and quoted in the briefs of counsel on both sides, and other authorities, we have reached the conclusion that the facts do not show that the agents or

servants of the appellant were guilty of negligence or of any act or omission of duty toward the infant appellee which can be said, in any sense, to have been the proximate cause of the unfortunate accident, the results of which were so painful and are so much to be deplored.

This case must be governed by the ordinary principles of law applicable to cases involving questions of negligence and contributory negligence, except so far as the immature age of the infant appellee may affect the question of contributory negligence on his part. But it is manifest that his immature intelligence and unripe experience, by which he may have been, as alleged, unable to estimate the danger of swinging upon and jumptng from a moving train of cars, can not be invoked to fix liability upon the appellant unless the agents or servants of the appellant voluntarily and knowingly exposed him to the dangers which resulted in his injuries, or, knowing that he was in danger, negligently failed to use such means as were in their power to relieve him from the danger and thus avoid the injuries, by reason of which failure the injuries resulted. In this view of the case, in order to render the appellant liable, it was necessary to prove that the conductor of the train persuaded or invited the infant appellee to get on the train and ride to the water tank; that the accident that happened there in which he was injured was one that was likely or might reasonably have been expected to happen to him in the ordinary or natural course of events; that the agents or servants of the appellant negligently failed to exercise care for his protection commensurate with the danger to which they had voluntarily exposed him; and that the accident did so happen, resulting in his injuries, without the intervention of any other independent efficient cause. The principles of law upon which liability in such cases is based is well settled by the authorities. (Am. & Eng. Enc. of Law, volume 10, page 674; Wood on Railroads, section 319, pages 1437 to 1439; Paducah & Memphis R. R. Co., 12 Bush, 41; Bransom's adm'r v. Labrot, &c., 81 Ky., 638; Shields v. L. & N. R. R. Co., 16 KY. LAW REP., 849; Kentucky Hotel Co. v. Camp, 17 KY. LAW REP., 297; Van Natta v. People's Street Railway, Electric Light & Power Co., &c., 34 S. W. Rep., 505; Ky. Central R. R. Co. v. Gastineau's adm'r, 7 KY. LAW REP., 3; L. & N. R. R. Co. v. Hunt, 11 KY. LAW REP., 825.)

Applying these principles to this case it is clear that the evidence under consideration wholly failed to fix liability on the appellant. It shows that the infant appellee went into the caboose attached to the train of cars voluntarily, knowing that he was acting contrary to the wishes and commands of his parents, without being invited or persuaded so to do by the conductor and without his knowledge. The conductor boarded the train while it was in motion and on the way to the tank; and, assuming that the evidence shows that the appellee was inside the caboose when the conductor entered it and that the conductor discovered him as soon as he entered, still it was not the duty of the conductor to stop the train and put the appellee off before reaching the tank, which seems to have been the next stopping place.

When the train reached the tank it stopped to supply the locomotive with water, and the appellee and the other boys got off safely, and the evidence fails to show that the conductor, or any of the trainmen, saw the appellee after reaching the tank until after his foot was mashed. He was not carried to a place where danger was naturally to be apprehended, nor was there any evidence that indicated that the infant appellee was so deficient in intelligence, by

reason of immature age, or the want of natural capacity, as to render it necessary that especial care and watchfulness should be exercised to prevent him from exposing himself to danger whenever it might become apparent. If this was necessary then his parents were at fault in failing to enforce obedience to their commands, which were given in order that he might be saved from harm. But as they trusted him to obey, they exhibited their belief that his intelligence was sufficient to enable him to appreciate the necessity of avoiding contact with moving trains. But after all the immediate or proximate cause of the accident was the dislocation of the lumps of coal when his feet struck the pile, by reason of which his foot was turned and projected on the railroad track, where it was crushed by the car wheels.

It can not be said that the placing of the coal there on its right of way by the company for its own necessary use was negligence, or that it was likely to be the occasion of such an accident. And so it is clear that the injuries which the infant appellee suffered were not proximately caused by any wrongful or negligent act or omission of the agents or servants of the appellant. We do not mean to be understood as holding that the conductor was guilty of no wrong in inviting and taking on his train of cars young boys without the knowledge or consent of their parents. We only mean to say that whatever wrong he may have committed in this regard respecting other boys on the day of this unfortunate accident he was not on that day, according to the evidence we have been considering, chargeable with wrong respecting the infant appellee. And it follows from what has been said that the court below erred in overruling the motion made by counsel for the appellant for a peremptory instruction, and on that account the judgment in this case must be reversed.

As the case must be tried again, it will be proper to refer to some of the testimony introduced after the motion for a peremptory instruction was overruled, and to pass on exceptions taken during the progress of the trial to the action of the court in admitting and rejecting testimony offered, and in giving and refusing requests for instructions. But we shall do this for the most part in a general way, since the views we have already expressed as to the law applicable to the case are sufficiently explicit. After the motion for a peremptory instruction was overruled by the court a number of witnesses were introduced in behalf of the appellant, and among them the conductor, P. J. Herb, who had been in charge of the local freight trains between Howell, Indiana, and Earlington, Kentucky, for twelve years.

The bill of exceptions contains no evidence introduced by either party that showed that the conductor either invited or induced the infant appellee to ride to the water tank on the day he was injured, or that the conductor was aware that he intended to board the train, or when he did so. The conductor testified that he did not know he was on the train until it was within about three-fourths of a mile from the tank, and that when he first discovered him he was on the front end of the caboose, which the conductor himself boarded while the train was in motion; that as soon as he saw him with some other boys he made them get on the inside of the caboose, and that when the train stopped at the tank he ordered them off, and told them to stay off.

Another witness testified that he saw him and other boys standing on the steps on the front end of the caboose when the train had reached a point which was about half way between Sebree and the

tank. Other witnesses, however, testified that they saw him in the caboose at about that time, showing a conflict in the testimony as to the time when he entered the caboose. These facts are important in this connection only as they show the character of the testimony on both sides that was finally submitted to the jury, and upon which the instructions of the court as to the law of the case were given. Over the objections of counsel for the appellant testimony was admitted to prove what was said by the conductor to the boys, including the infant appellee, about helping to take freight from the train and riding to the tank on days previous to the day on which the accident happened. This testimony ought to have been rejected. The case was between the infant appellee and the appellant, and the subject of the investigation was what occurred on the day the injuries were inflicted, and what occurred on previous days had no necessary connection with and was in no sense a part of the transactions of that day. For this reason also the court properly refused to allow proof to be made in behalf of the appellee of what it was alleged the conductor and the trainmen said to the boys on occasions before that day about swinging on the ladders attached to the sides of the cars, and telling them to do this in order to learn to be "hoppers" and the like, and that the boys were in the habit of practicing in that way on previous occasions when they rode to the tank. The testimony of what was said by the conductor after the accident as to his having expected such an accident to happen ought not to have been admitted over the objections of counsel for the appellant, because these statements, if made, were not part of the *res gestae*, and although the statement as testified to by some of the witnesses included a protest by the conductor that it was not his fault, and that "if the boys had minded me Willie would not be hurt," still it was to the prejudice of the appellant, and being incompetent testimony it ought not to have been admitted by the court. True, the court excluded it before the case was submitted to the jury, but it was error from the first to admit it against the objection of the appellant. But after the conductor in his testimony denied that he made the statement attributed to him by the witnesses, or any recollection of it, and said that he did not make the statement in the presence of a certain witness, the court permitted that witness to testify over the objection of appellant's counsel that he did make the statement in his presence, but this testimony was admitted, as the court cautioned the jury only for the purpose of contradicting the conductor. This was likewise error. The testimony of the conductor denying that he made the statement attributed to him was given before the evidence on the subject of his alleged statement was excluded as incompetent, and his denial that he made the statement in the presence of the contradicting witness was brought out on cross-examination by counsel for the appellee. After the exclusion of the testimony as incompetent and irrelevant the conditions were the same from a legal standpoint as if it had not been admitted. Under these circumstances it was improper to permit the contradicting witness to testify that he heard the conductor make a statement which in itself was not competent or relevant to the issue on trial. This was an indirect method of getting before the jury the excluded testimony, and no cautionary words addressed by the court to the jury were adequate to remove from their minds the effect of such testimony. It is well settled by the authorities that this method of contradicting a witness is not proper. (Am. & Eng. Enc. of Law, volume 29, page 793; 1 Greenleaf on Evidence, section 462; Crittenden v. Commonwealth, 82 Ky., 164; Commonwealth v. Hourigan, 89 Ky., 311.)

Although some of the instructions given by the court contain a fair statement of the principles of law applicable to the case, yet, taken as a whole, they are not in accord with the views we have expressed. The same may be said of many of the requests that were refused by the court. The question regarding the degree of care that an infant is required to exercise to avoid injury in circumstances of peril becomes material in such cases as bearing on the question of contributory negligence when the evidence tends to establish negligence on the part of the person whom it is sought to make liable for the injury inflicted on the infant. The well-settled rule in such cases is that a child is required to exercise only such a degree of discretion and care as may be reasonably expected of children of his *age and intelligence* in any given circumstances of danger. But the mere immature age of the person injured can not be allowed to have the effect "to raise a duty where none otherwise existed." (Nolan v. N. Y. & N. H. R. R. Co., 25 Am. & Eng. R. R. cases, 342.)

And none of the authorities make age the only test of the degree of care required of children in such cases. The abstract proposition of law embraced in instruction No. 5 that the infant appellee "was bound to exercise only such care as a boy of like age and discretion would ordinarily exercise under the same or similar circumstances" may be conceded. But as a single proposition, submitted without any connection with the acts of the infant appellee and the circumstances surrounding him, it was misleading and erroneous because of the implied assumption that the appellant was chargeable with negligence, and that a boy of eleven years of age, irrespective of intelligence and natural capacity, could not be held guilty of contributory negligence. (L. & N. R. R. Co. v. Hunt, 11 KY. LAW REP., 825; Erwin v. St. Louis, &c., R. R. Co., 35 Am. & Eng. R. R. cases, 390.)

On this line instructions "T" and "U," given at the instance of counsel for the appellant, are unobjectionable; and instruction "J," asked for by them and refused by the court, contains a correct statement of the duty of the conductor after he discovered the infant appellee on the train, and ought to have been given. After discovering him the conductor was under no obligation to stop the train to put him off short of the most convenient and reasonably safe place for that purpose. Instruction "A," asked for by counsel for the appellee, was properly refused by the court, because it was based on the assumption, without any evidence to support it, that the conductor *induced* the infant appellee to ride on the train on the day of the accident, and that he induced or permitted him to swing from it while it was in motion, and for the further reason that it virtually made his immature age alone, without regard to his intelligence and natural capacity, the test of the degree of care required of him. (Van Natta v. People's Street Railway, &c., Co., *supra*.)

Instruction "B," asked for by appellee's counsel contained also the same unwarranted assumptions as were contained in instruction "A," and instruction "C" was the same as No. 5, and they were both properly refused by the court. With regard to the instructions given by the court on its own motion, without entering into details, we find that taken together they do not conform to our views as herein expressed of the law applicable to the case upon the evidence as set out in the bill of exceptions, and upon the return of the case the court will, in instructing the jury, conform to the principles of law as we have stated them.

The other case of W. H. Webb, the father of the infant appellee

in the first case, as we have stated, rests upon almost precisely the same facts in evidence. The two records presenting nearly the same question, our opinion in the first case settles the questions raised in the other. No testimony was introduced in behalf of the appellantt and at the close of the testimony for appellee counsel for appellant moved for a peremptory instruction, which was refused, and which we are of the opinion ought to have been given.

For the reasons given the judgment in each of the cases is reversed and the causes remanded, with directions to set aside the verdict and award a new trial in each case, and for proceedings in each consistent with this opinion.

ARMENDT, &C. V. PERKINS.

(*Filed May* 29, 1896—*Not to be reported.*)

Little & Little for appellants.

C. S. Walker for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Paynter.

The record makes perfectly manifest that the error in the judgment was misprision of the clerk, and the court properly entered the judgment *nunc pro tunc.*

Judgment affirmed.

PEARCE V. MASON COUNTY, &C.

(*Filed May* 29, 1896.)

Repeal of local statutes—Act providing for free turnpikes—Local or special acts of the Legislature in force at the time of the adoption of the present Constitution, which are not inconsistent with that instrument, and which have not been repealed by a general law, remain in force. And a general law will not be regarded as repealing by implication such special acts unless there is substantial identity of subject-matter and purpose in the general and in the special acts. Nor does special legislation upon subjects with respect to which special acts are now prohibited stand repealed by the mere force of such prohibition.

The act of March, 1886, entitled "An act to provide free turnpike roads in Mason county," is yet in force, the fragmentary and incomplete legislative enactments upon that subject since the adoption of the Constitution not being sufficient to authorize the inference of an intention to repeal the local act.

William Lindsay, A. M. J. Cochran, L. W. Robertson and W. H. Wadsworth for appellant.

E. L. Worthington, W. H. Holt, Garret S. Wall, Charles D. Newell, L. W. Galbraith, Milton Johnson and G. W. Adair for appellees.

Appeal from Mason Circuit Court.

Opinion of the court by Judge Hazelrigg.

The principal question involved here is whether the local act of March, 1886, entitled "An act to provide free turnpike roads in Mason county," is yet in force.

The learned counsel for appellant rest their contention that it is no longer in force, not upon any provision of the Constitution expressly repealing it, or upon legislation subsequently had, if its effect be determined by the ordinary rules of statutory repeal, but the contention is that the policy of the Constitution, which demands the substitution of general laws for all local ones, is inconsistent with the act, and, therefore, when a general law on the subject of free turnpikes, such as may be found in the fragmentary and incomplete legislative enactments on that subject since the adoption of the Constitution, was adopted, it must be taken as a full and complete expression of legislative will on that behalf, and if even important omissions are observable in the general act, it is yet the whole law on the subject, so far as intended to be kept alive by the Legislature.

This principle may be admitted in a limited sense, but we are not prepared to accept the conclusions reached by counsel in the application of the principle. Surely if an inspection of the alleged general act shows an utter absence of legislative intent to affect the local act, by reason of not embracing its leading and essential features, we are not required to distort the legislative meaning in furtherance merely of a supposed constitutional policy.

While in view of this policy the courts may declare the general act to be in substitution of local ones, without it appearing that a repeal would be effected by the ordinary rules of statutory construction, where one statute can be held to repeal another, yet certainly the courts must, in the nature of things, before so declaring, be satisfied that there is substantial identity of subject-matter and purpose in the general and in the special acts, otherwise the conclusion must be reached that if the Legislature fails to enact a general law at all on a given subject, affected by local acts, it is the legislative intent that there shall be no law on that subject, and local acts with respect thereto must stand repealed. No such policy is apparent in the Constitution.

The intent and purpose of the Legislature, therefore, in adopting a general law is the proper subject of inquiry, and in this case we are satisfied, as we were in the O'Mahoney-Bullock case, 17 KY. LAW REP., 523, that it was no part of the legislative purpose to enact a general law in lieu of all local ones on the subject here involved.

It is contended further, that the provisions of subsections 15 and 16 of section 59 of the Constitution, and of sections 171 and 181 of the same instrument, when taken together effect a repeal of the local act, not perhaps in themselves, but when quickened or made effective by the legislation subsequently had.

This argument is of kin to the former one, and at last depends for its efficacy upon the nature, character, and especially the comprehensiveness of the subsequent legislation—elements, as we have seen, which are wholly wanting in the subsequent acts referred to.

Section 59 prohibits the passage of local or special legislation regulating or authorizing the levy or collection of taxes (subsection 15), or authorizing the opening, altering, maintaining or vacating roads, highways, streets, alleys, etc. (subsection 16.)

These provisions look altogether to future legislation, and mani-

festly do not affect, directly or indirectly, the laws already in force. The existing special legislation on the subjects named in the various subsections of section 59, with respect to which special acts are now prohibited, does not stand repealed by the mere force of such prohibition. The General Assembly may repeal any of these special acts by a special act for that purpose, or by substitution of comprehensive general laws, or, with respect to such of them as may be inconsistent with those provisions of the Constitution which require legislation to enforce them, by the enactment of laws effectuating such constitutional provisions. Such special acts as are inconsistent with those provisions of the Constitution which do not require legislation to enforce them stand repealed.

So where, by a former special law, a city was authorized to incur an indebtedness beyond the constitutional limit, no question of contract right intervening, it has been held that the power could not be exercised under the special act (Beard, &c. v. City of Hopkinsville, 95 Ky., 239); and where the organic law requires the jurisdiction of justices' courts to be equal and uniform throughout the State, it has been held that the special acts conferring jurisdiction were inconsistent with the constitutional provision, and stood repealed when the general law fixing the jurisdiction was enacted (McTigue v. Commonwealth, 17 KY. LAW REP., 1418); and, moreover, this would afford an illustration of a repeal after six years had there been no general law passed.

The act in question here does not stand in any of these attitudes. Manifestly the provision requiring that "all taxes shall be levied and collected by general laws" looks to the future, as held in Long v. City of Louisville, 17 KY. LAW REP., 253, and can not be held to affect the powers conferred in the pre-existing law. It seems to us that the schedule of the Constitution conclusively settles this question of repeal.

In order that no inconvenience might arise by reason of the alterations and amendments of the law by that instrument, it was deemed proper to provide that the Constitution left in force all laws of the Commonwealth with which it was not inconsistent. This provision, instead of emphasizing the alleged policy of hostility to existing special legislation, expressly continued it in force unless inconsistent with the Constitution; and when it is admitted or becomes manifest that a local or special act is not inconsistent with the Constitution, and has not been repealed by a general law, the question is settled and the law stands.

The positive mandate is against local and special legislation in the future, and, even if we concede that the Constitution breathes a spirit of hostility to past legislation of that class, it is expressly continued in force until repealed in the manner we have heretofore pointed out; nor does the fiscal court lack the power to carry out the provisions of the act in lieu of the old court of claims and levy. The provisions of the law creating such a court, and conferring authority on it, seem ample. (Section 144, Constitution; section 1840, Kentucky Statutes.)

We do not regard the amendment of 1890, which repealed the section requiring a vote to put the law in force, as destroying the whole act. It was not so intended. The principal questions involved have been determined in O'Mahony v. Bullock, heretofore cited.

Judgment affirmed.

CITY OF OWENSBORO, &C. V. SPARKS.

(*Filed May* 29, 1896.)

1. *Validity of city ordinances—Appeals*—As there is no provision in the charter for cities of the third class for testing the validity of city ordinances, the only method of testing the validity of any such ordinance is by appeal from the judgment of the police court enforcing it, and such appeal must be prosecuted in the same way provided for taking appeals in other cases.

2. *Jurisdiction of police court*—The police court of a city of the third class has jurisdiction concurrent with the circuit court of a prosecution under section 1977 of the Kentucky Statutes for the offense of gaming committed within the city, the punishment being limited by the statute to a fine not exceeding $100. And while such a prosecution should be in the name of the Commonwealth and not of the city, the fact that it is in the name of the city, while it is error, does not deprive the police court of its jurisdiction, and, therefore, does not entitle the defendant to a writ of prohibition restraining that court from trying the offense.

3. *Same*—When a municipal legislative board is authorized by statute to pass an ordinance affixing a penalty for an offense, it may in its discretion fix the penalty at any sum within the jurisdiction of the police court, provided it is not less than the penalty provided by statute for the same offense.

4. *City ordinance—Gaming*—An ordinance of a city of the third class providing for the punishment of the offense of gaming is void, no authority being conferred by the charter for cities of the third class to pass such an ordinance. The authority "to prohibit and suppress all gambling houses" is not sufficient to authorize such an ordinance.

Powers & Atchison and LaViga Clements for appellants.

C. S. Walker for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Landes.

The board of council of the city of Owensboro, which is a city of the third class, passed an ordinance, which was approved June 4, 1894, designated as "Ordinance No. 50," for the purpose of punishing gaming in the city, and which is as follows: "That any person or persons who shall, in or on any house-boat, float, tenement of said house-boat, float or premises, or shall on any of the streets, alleys, sidewalks or public grounds of the city, engage in any game of hazard, at which money or property is bet, won or lost, such person or persons engaged in such game or games shall each be fined for each game thus played not less than fifty nor more than one hundred dollars."

In the following August the appellee, who was charged with violating the said ordinance, was arrested by virtue of a warrant issued by the police judge of the city of Owensboro, and brought before the police court to answer the charge. A demurrer to the warrant was entered by him, which was overruled by the court, and the court having set the case for trial, the appellee brought suit in the Daviess Circuit Court against the city and the judge of the police court, seeking to prohibit them from proceeding against the appellee under the ordinance, with alleged ground that the police court had no jurisdiction to enforce the ordinance, which, it was alleged, was passed by the board of council without constitutional or legislative authority, and was, therefore, null and void.

At the commencement of the action the judge of the circuit court

issued a temporary order or writ of prohibition, and, on parol hearing of the case, adjudging that the ordinance was passed without authority, and that it was invalid, perpetuated the order of prohibition, and adjudged the costs of the action against the appellants, and that judgment is before us on this appeal.

We have not been able to find in the act for the government of cities of the third class or in the Kentucky Statutes any special provision for testing the validity of ordinances passed by the municipal legislative board. In the absence of such provisions with reference to ordinances of cities of this class, the only method for testing the validity of any such ordinance is that of appeal from the judgment of the police court enforcing it, and such appeal must be prosecuted in the way provided for prosecuting appeals in other cases.

Section 25 of the Criminal Code authorizes the circuit court of any county by writ of prohibition to "restrain all other courts of inferior jurisdiction in the limits of the county from exceeding their criminal jurisdiction."

But this remedy is not applicable in this case because under the statute (Kentucky Statutes, section 3359) the police court of the city of Owensboro has "concurrent jurisdiction with the justices of the peace of all violations of the laws of the Commonwealth occurring within the corporate limits of the city." And justices of the peace have jurisdiction, exclusive of circuit courts, "in all penal cases, the punishment of which is limited to a fine not exceeding twenty dollars;" and jurisdiction concurrent with circuit courts "of all penal cases, the punishment of which is limited to a fine not exceeding one hundred dollars, or imprisonment not exceeding fifty days, or both." (Kentucky Statutes, section 1093.)

The statute punishing gaming (Kentucky Statutes, section 1977), which is manifestly the same offense which the ordinance in question was intended to apply to, is as follows: "If any person or persons shall engage in any hazard or game on which money or property is bet, won or lost, such person or persons shall be subject to a fine of not less than twenty dollars nor more than one hundred dollars."

It is clear that the violations of this statute, committed within the limits of the city of Owensboro, are within the jurisdiction of the police court of the city, and that the police court was not exceeding its criminal jurisdiction, conferred by statute, in proceeding with the trial of the offense charged in the warrant against the appellee. It is true that the proceedings were in the name of the city of Owensboro, and, conceding the ordinance to be invalid under the statute denouncing a penalty against the offense charged in the warrant, the proceedings ought to have been in the name of the Commonwealth (Kentucky Statutes, section 3360). But the offense charged was the offense denounced by the statute, of which the police court had jurisdiction, and the prosecution in the name of the city, and not in the name of the Commonwealth, is an error which might have been corrected by appeal. In such cases the remedy by writ of prohibition is not applicable, and for this reason the judgment of the court below must be reversed.

But the important question is presented as to the power of the board of council to pass the ordinance referred to, which ought to be settled. It is contended that the ordinance is invalid because the penalty provided *exceeds the penalty* provided by the statute for the same offense, which it is claimed is opposed to the provisions of section 168 of the Constitution. That section prohibits municipal corporations from fixing by ordinance a penalty "for a violation thereof at *less* than that imposed by statute for the same offense."

In this case the penalty fixed by statute for gaming is "not less than *twenty* dollars nor more than one hundred dollars;" and the penalty fixed by the ordinance is "not less than *fifty* nor more than one hundred dollars." This is not prohibited by the Constitution, and under its provisions, where a municipal legislative board is authorized by statute to pass an ordinance affixing a penalty to the violation thereof, it may, in its discretion, fix the penalty at any sum within the jurisdiction of the police court, provided it is not less than the penalty provided by statute for the same offense (Kentucky Statutes, section 3364 and section 3294, chapter 22). This ground of objection, therefore, can not be entertained.

Another ground of objection is that the municipal legislative board has no statutory authority to pass the ordinance, and this objection, we think, is well taken.

By the act for the government of cities of the third class we do not find that the boards of council of such cities have the authority to pass ordinances punishing gaming, which is fully covered by the statute quoted. They have the authority "to prohibit and suppress all *gambling houses*" (Kentucky Statutes, section 3290, chapter 13). This clause also authorizes the board of council of such cities "to prohibit and suppress" bawdy houses.

Under this provision we held in recent case of City of Owensboro v. Simms, 17 KY. LAW REP., 1393, that the board of council of the city of Owensboro was empowered to pass the ordinance contested in that case, the object of which was to suppress bawdy houses; but in this case the ordinance is not to prohibit and suppress "gambling houses," but to punish gaming, which is not embraced in the authority conferred by the clause referred to, nor by any other provision of the act that we have been able to find or that has been referred to by counsel. Without statutory authority plainly conferred the board of council of cities of the third class can not create offenses by ordinance, and enforce penalties for violating them.

For the reasons indicated, however, the judgment is reversed and cause remanded, with directions to dismiss the petition.

MORTON V. WOODFORD, &C.

(*Filed May* 30, 1896.)

1. *Constitutional law—Power of circuit courts to establish towns*—The statute conferring upon circuit courts the power, under certain conditions, to establish towns, is not in violation of the Constitution.

2. *Appeals—Legislative power*—It is within the power of the Legislature to determine from what judgments appeals may be taken, and as the statute provides that no appeal shall lie from a judgment of the circuit court establishing a town this court has no jurisdiction of this appeal from such a judgment.

J. A. Dean for appellant.

Eli H. Brown for appellees.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Guffy.

This appeal is prosecuted by the appellant from a judgment of the Daviess Circuit Court, establishing the town of Kenwood.

The only questions which we deem it necessary to determine are: First, whether the circuit court can legally establish a town; second, has this court jurisdiction of an appeal from such a judgment of the circuit court?

Article 8, chapter 89 of the Kentucky Statutes confers upon circuit courts the power under certain conditions to establish towns, and provides that no appeal shall lie from the judgment. We think the power so conferred on the circuit courts is constitutional.

Section 126 of the Constitution provides that the jurisdiction of circuit courts should remain as then established by law, giving the Legislature power to change the same. The Constitution also prohibits local legislation, hence some department of government must of necessity be invested with power and authority to establish towns, and it seems to us that the circuit courts are proper tribunals to be invested with such power.

The act in question is not, in our judgment, at all in conflict with section 28 of the Constitution. The power conferred is not legislative. This court has appellate jurisdiction only, and section 110 of the Constitution provides that such jurisdiction shall be under such rules and regulations, not repugnant to the Constitution, as may from time to time be prescribed by law.

The act of the Legislature of the 10th of June, 1893, provided that no appeal to this court should be allowed from judgments in many cases enumerated in the act, and then provided that in all other civil cases appeals might be taken, but after the passage of this act the act of July 3, 1893, conferring the jurisdiction on circuit courts to establish towns, was passed and appeals from judgments in such cases disallowed.

It has always been recognized as within the power of the Legislature to determine from what judgment appeals might be taken.

For the reasons indicated we are of opinion that this court has no jurisdiction of this appeal, and the same is dismissed.

SMITH V. KENNEDY.

(*Filed June* 2, 1896—*Not to be reported.*)

Attachment—The evidence in this case is sufficient to support the judgment of the lower court sustaining an attachment upon the ground that defendant did not have sufficient property subject to execution to satisfy plaintiff's demand, and that it would be endangered by delay in obtaining judgment and return of "no property."

B. H. Robinson and Jno. P. Norvell for appellant.

W. H. Holt and Hanson Kennedy for appellee.

Appeal from Nicholas Circuit Court.

Opinion of the court by Judge Paynter.

There was no defense interposed to the debt upon which this action is based.

An attachment was sued out on the alleged grounds that the defendant did not have sufficient property subject to execution to satis-

fy the plaintiff's demand and that it was endangered by a delay in obtaining judgment or a return of no property found.

The order of attachment was levied on certain real estate in Nicholas county subject to two mortgages, amounting to nearly $3,500.

There was a conflict in the evidence as to the value of the land. A number of witnesses testified in relation to the matter. The testimony of the witnesses for plaintiff tended to prove that the land, after allotting the homestead to defendant, was not of sufficient value to pay the mortgage debts and that due plaintiff, while the testimony of the witnesses for defendant tends to prove the value of the land, after the allotment of the homestead, to be a little greater than the aggregate amount of the mortgages and plaintiff's debt.

The defendant's personal property had been seized under execution. The testimony conduced to prove that the defendant drank to excess, and that he gambled. The defendant did not deny that he drank, but said "I don't know as I ever was so drunk that I could not attend to business." And he also testified that he had not gambled for the preceding three years.

We cannot reach the conclusion that the court erred in sustaining the attachment.

Judgment affirmed.

LOUISVILLE & NASHVILLE R. R. CO. V. DAUGHERTY, &C.

SAME V. DAUGHERTY.

(*Filed June* 2, 1896—*Not to be reported.*)

1. *Nuisance*—The maintenance of a dam in such a way as to emit disagreeable or unwholesome odors affords a right of action to those who may be made sick or even inconvenienced. And this is true, however innocent of intentional wrong may be the party erecting the nuisance, or however needful the structure in his business.

2. *Same—Consent to creation of*—One who actively procures another to create a nuisance will be presumed to consent to its continuance until such consent is withdrawn by a notice to that effect or until objection is made.

In these actions against a railroad company to recover damages for injury to health of plaintiffs resulting from the maintenance by defendant of a pond, a good defense was presented by a paragraph of defendant's answer alleging that plaintiffs were active and influential in the negotiations resulting in the purchase of the ground where the pond was erected, having reason to know at the time from previous observations of similar conditions there that vegetable matter would work into the pond and become offensive and unwholesome; for if these facts are true the company was at least entitled, before these suits were instituted, to some notice from the complainants that the pond was offensive or obnoxious to them.

R. P. Jacobs, Jno. McChord and H. W. Bruce for appellant.

Jno. W. Rawlings and Robt. Harding for appellees.

Appeal from Boyle Circuit Court.

Opinion of the court by Judge Hazelrigg.

In 1890 the railroad company built a dam or embankment along its road, some 80 yards from the premises of the appellee, James Daugherty, and constructed a large pond, from which it used water in the operation of its trains. Theretofore there had been a smaller

dam at the same place, but not so constructed as to materially obstruct a small stream or rivulet which ran through it, though decayed vegetable matter accumulated there to some extent and became offensive. This matter accumulated to a greater extent after the construction of the large pond and in dry seasons became offensive and unhealthy.

These actions were brought by appellee James Daugherty and by him and his wife, Jane, for damages for impairment of their health caused by the construction of the pond.

It may be assumed that the proof conduces to show that the sickness of the appellees was caused by the construction complained of, although somewhat similar conditions existed there prior to such construction. It is also well settled that the maintenance of dams in such way as to emit disagreeable or unwholesome odors affords a right of action to those who may be made sick or even inconvenienced. And this is true however innocent of intentional wrong may be the party erecting the nuisance, or however needful the structure in his business. But here, in addition to the general issues presented by the answers, it is alleged, in paragraphs of the answers to which demurrers were sustained, that the company procured the ground for the purpose of constructing the pond as it was constructed and confined the stream so as to make the pond complained of with the consent of the appellee, James Daugherty, and with full knowledge on his part of the company's purpose, and that he was active and influential in the negotiations resulting in the purchase of the ground where the pond was erected.

It is, therefore, insisted by the company that, whether the appellees are estopped or not in maintaining their actions, the company was at least entitled to some notice from the complainants before the institution of these suits that the pond was offensive or obnoxious to them. And this we believe to be the law of the case.

If the ground on which the pond was constructed had been purchased from appellees and used for the purpose for which it had been bought, the vendors knowing that purpose, and from the condition of the old dam and previous accumulations of decayed matter, had reason to believe that such accumulations would continue or be increased by reason of the new structure, and they yet sold the ground for that purpose and consented to the construction, then no action could be maintained at all. And where, though not the owners of the pond site, they procured or aided in procuring it for another, knowing or having reason to know, from previous observation of similar conditions there, that vegetable matter would work into the pond and become offensive and unwholesome, their continuous consent to such use by the parties so aided will be presumed until such consent is withdrawn by a notice to that effect or until objection is made to such use. As said in Johnson v. Lewis, 13 Conn., 303, and quoted with approval by this court in West v. L., C. & L. R. R., 8 Bush, 408: "A plaintiff ought not to rest in silence and finally surprise an unsuspecting purchaser by an action for damages, but should be presumed to acquiesce until he requests a removal of the nuisance."

Here there was no acquiescence in the continuance of the nuisance, but there was an active participation by the plaintiffs in procuring the construction by the defendant of a dam, the results from which they must have foreknown.

In Ray v. Sellers, 1 Duvall, 256, it is said: "Generally the creator of a private nuisance, like any other wrongdoer, is liable to any person he may injure, without notice to desist from the wrong or

request to repair the injury. But if during several years before the act complained of the plaintiff permitted the place in question to be used by the neighbors generally as a common receptacle for carcasses, the defendant had a right to infer that she consented to such use of it by him; and we believe it would be unjust to hold him liable for damages unless she gave him some notice or request informing him of her dissent."

That was a case of a continuance of a nuisance and consent was *inferred* from previous acquiescence. Here, as we have seen, there was positive consent given and active part taken in the erection of the dam; and knowledge that it would likely prove offensive and unwholesome is fairly chargeable to the plaintiffs. The demurrers to the second paragraph ought to have been overruled.

For the reasons indicated the judgment in each case is reversed for proceedings consistent herewith.

LOUISVILLE & NASHVILLE R. R. CO. V. ROBINSON.

(*Filed June* 4, 1896—*Not to be reported.*)

Carriers of live stock—Delay in transportation—Where two car loads of cattle shipped a distance of 144 miles should at least have reached their destination at a very early hour in the morning of the next day after they were shipped, but did not in fact reach there until 9 or 10 o'clock next morning, and too late for that day's market, for which they were intended, some of the hogs having died from suffocation on account of the delay, which is not satisfactorily accounted for, the railroad company is liable for that loss, and also for the keep of the stock until it could be offered in the first regular market succeeding its arrival, and this is true, though no written notice of the loss of the hogs was given the company as required by the contract, there being proof that such notice was waived by the general freight agent of the company.

Breckinridge & Shelby for appellant.

Robert Harding and Mort Rothwell for appellee.

Appeal from Garrard Circuit Court.

Opinion of the court by Judge Hazelrigg.

The company undertook to ship for the appellee two car loads of hogs and cattle from Lancaster, Ky., to Cincinnati, Ohio, the stock being consigned to appellee, care Greene & Embry, F. & D. yards, Cincinnati, Ohio.

The stock left Lancaster at about 1:30 o'clock P. M. on December 6, and reached its destination at about 9 or 10 o'clock next morning, and too late for that day's market for which it was intended. Some of the hogs were dead, and all had to be kept over until disposed of at a subsequent market.

For damages growing out of this delay the appellee recovered a judgment for $180, of which the appellant now complains. It appears that it is some 144 miles from Lancaster to Cincinnati, and giving a reasonable time for stopping for other stock, etc., the appellee's stock ought at least to have reached its place of consignment very early on the morning of the 7th, and this delay does not appear to be satisfactorily accounted for.

The hogs appear to have died from suffocation, consequent on the

length of time they were on the road, and for their loss and for the keep of the stock until it could be offered in the first regular market succeeding its arrival the company should be held liable; and this, though no written notice of the loss of the hogs was given the company as required by the contract, there being proof that such notice was waived by the general freight agent of the company. This question, as well as that of the unreasonable delay in the delivery of the stock, was properly submitted to the jury, and the judgment must be affirmed.

JOHNSON V. OWENSBORO & NASHVILLE R. R. CO.

(*Filed June* 4, 1896—*Not to be reported.*)

1. *Railroads—Injury to abutting property from construction of road*—In this action against a railroad company to recover damages for injury to plaintiff's property, resulting from the construction of defendant's road in front of his lot, and the throwing up an embankment there for the roadbed, as it appears that the ground on which that part of defendant's road is located was at the time the road was constructed outside the city limits, although intended as an extension of one of the streets of the city, the fact that it was afterward brought within the city limits did not give to the city council the right to compel the railway company to remove its tracks from that part of the street which was outside the city limits at the time the road was constructed, as the right to maintain the road there had vested in the company before the extension of the city limits, and the right was not derived either directly or indirectly from the city or its government, and this is true, although the company had failed to comply with the terms upon which it was permitted to use that part of the street inside the city limits at the time the road was constructed. Therefore, the question of limitation is not affected by ordinances of the city requiring the removal of the tracks in front of plaintiff's property.

2. *Same—Pleading—Limitation*—The allegation of the answer that twenty-two years had elapsed from the making of the embankment before the commencement of the action was sufficient foundation for the plea of limitation without a statement of the date or time when it was made, it being reasonably clear that the making of the embankment in front of plaintiff's lot was coincident with if not prior to her ownership of it.

3. *Same*—The right of action, if any, accrued when the embankment and roadbed were constructed in front of plaintiff's lot, if she owned it then, and the action was barred in five years after that time.

Sweeney, Ellis & Sweeney for appellant.

Wilbur F. Browder for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Landes.

The appellant sued the appellee to recover damages to her property, resulting from the construction of the appellee's railroad in front of her lot, and throwing up an embankment there for the roadbed, which, it was alleged, interfered with the use of her lot, and caused it to be flooded when it rained.

The appellee is the successor of the Owensboro & Russellville Railroad Co., which latter company was incorporated by an act of the General Assembly, passed in 1867, and constructed the road, and made the embankment complained of about the year 1869, as we gather from the indefinite information as to the time derived from

the record. It seems that the appellant purchased her lot in 1869 from Griffith and Sweeney, but the deed of conveyance is not exhibited in the record. Soon after she purchased the lot she built a dwelling house upon it, and has been occupying it ever since, and the said roadbed and embankment in front of her lot has been used as the track of the railroad during all of that time. At the time the appellant bought the lot, and the embankment was thrown up in front of it, the lot was not in the limits of the city of Owensboro, but was in what was called Griffith and Sweeney's addition to the city, and the roadbed and embankment in front of the lot was made in what was intended eventually to be an extension southward of Lewis street, one of the streets of the city, over and upon which the road was extended from the city limits to the bank of the Ohio river.

It is alleged in the petition that the embankment was originally thrown up or constructed without authority, and that it has since been maintained unlawfully and without right. This allegation is denied by the answer, but the answer does not account for or attempt to show the authority upon which the embankment was made, or the roadbed constructed on what was intended at the time to be an extension of Lewis street, and which was afterwards brought within the limits of the city by an act of the Legislature extending the limits of the city southward. But it is alleged in the answer that the embankment was constructed and had been in use for the purposes of the railroad for more than twenty-two years before the commencement of the action, and the claim is made that the appellant's right of action is barred by the statute of limitations in such cases. A reply was filed to the answer, which was held bad on demurrer. It contained no denial of the allegation of the answer as to the length of time the embankment had been thrown up in front of the appellant's lot, and had been used for the purposes of the railroad, upon which the plea of the statute of limitation was based. An amended petition and reply in one pleading, and also as separate pleadings were offered, but the court refused to permit them to be filed. None of these proposed amendments negatived the statement of the answer as to the length of time the embankment had been constructed and used by the company. But in them the facts were attempted to be set up showing the date of the permission of the common council of the city for the railroad to be constructed on and over Lewis street to the river bank, and the terms upon which the permission had been given, both to the Owensboro & Russellville Railroad Co. and to the appellee, its successor, and showing also that the terms had not been complied with, and that in consequence thereof the common council of the city had passed one or more ordinances requiring the company to take up the track of its road from and to relinquish the use of the street, which the company had failed to do.

The statements of the facts as made, however, show also that this permission was given to both companies to use Lewis street as aforesaid before the appellant's lot and the embankment and roadbed in front of it were brought within the limits of the city by act of the Legislature.

For the trial of the case counsel for the appellant demanded a jury, which was refused by the court, and on motion of counsel for the appellee the petition was dismissed, and the appellant adjudged to pay the costs, and the case is before us by appeal from that judgment.

It is plain that the only material question in the case is upon the

plea of limitation. At the time the roadbed was constructed in front of the appellant's lot, although it was in what was intended as an extension of Lewis street southward, that territory being outside the limits of the city, it was not necessary that the company should have the permission of the common council of the city to locate, construct and use its road there. And notwithstanding the fact that it was afterwards brought within the city limits the common council of the city did not thereby acquire the right to compel the company to remove the track of its road from that part of Lewis street extended by reason of the failure of the company to comply with the terms upon which it was permitted to use the original street, then one of the streets of the city, for the extension of its track to the river.

It appears that counsel for the appellant base their claim mainly upon this alleged authority of the common council of the city to require the track of the railroad to be removed from the extension of Lewis street. But we hold that whatever power and authority the common council had over the streets of the city, conferred by its act of incorporation, it had no power, by the passage of the ordinances referred to, to interfere with rights which had vested in the company before the extension of the city limits, and which rights were not derived, either directly or indirectly, from the city or its government. And the setting up of this alleged authority in the city government, or the pleading of the said ordinances, was not sufficient to avoid the plea of the statute. Therefore, the court did not err in refusing to permit the proposed amended petition and reply to be filed. But it is contended by counsel that in order to make the defense of limitation good it was necessary to state in the answer the time or date of the erection of the embankment, and that the statement that twenty-two years had elapsed from the making of the embankment before the commencement of the action was not a good plea of the statute without a statement of the date or time when it was made. We can not concur with counsel in this contention. The pleadings on both sides are indefinite and unsatisfactory, the one not more so than the other. But, as has been stated, there is enough in the pladings to make it reasonably certain that the making of the embankment in front of the appellant's lot was coincident with, if not prior to her ownership of it, and in view of this fact the statement that the embankment had been made and the roadbed there used for twenty-two years before the commencement of the action was a sufficient foundation for the plea of limitation. This statement was a statement of a traversible fact, but it was not put in issue by a denial or by the statement of any facts which raised the issue. A denial of the statement would have made the issue and would have thrown the burden of proving it on the appellee. In this case the right of action, if any, of the appellant accrued when the embankment and roadbed were constructed in front of her lot, if she owned it then, about which a doubt is raised by the pleadings. Such actions are barred in five years after the accrual of the right of action. (Louisville & Nashville R. R. Co. v. Orr, 91 Ky., 109.)

It was evident from the pleadings that the right of action was barred, and it was, therefore, not necessary to impanel a jury to try the case. This being the case, the court below did not err in dismissing the petition, and the judgment is, therefore, affirmed.

BOARD OF COUNCILMEN OF FRANKFORT, &C. V. MURRAY.

(*Filed June* 10, 1896.)

1. *Street improvements at cost of lot owners*—While it seems that the council of a city of the third class may require a street to be improved at the cost of the lot owners, under the mayor's contract with some other person, without affording them an opportunity of doing it themselves, yet the fact that such an opportunity is afforded by the ordinance does not render it invalid, the lot owner failing to avail himself of the opportunity, and the improvement being made at last under a contract by the mayor with another person.

2. *Validity of ordinance*—An ordinance providing for a street improvement which requires the sidewalks to be of "brick, and curbed with stone and provided with stone gutter-ways," is not invalid because the kind of stone and its width and thickness are not prescribed. Some of the details of this kind of work may properly be left to the city engineer without a violation of the law forbidding the delegation of legislative power.

Hugh Rodman and W. H. Julian for appellants.

Geo. C. Drane for appellee.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Hazelrigg.

The common council of the city of Frankfort, a city of the third class, adopted an ordinance requiring the appellee and other owners of certain described property, within thirty days, to construct sidewalks, curbing and gutter ways, of a particular description, in front of their respective lots.

The appellee, failing for the time indicated to comply with the ordinance after notice of its passage, the mayor, after advertisement as provided by law, contracted for the construction of the work with the appellant, Noonan, which contract was ratified by the council. The work was thereupon completed under the supervision of the mayor and engineer, and the cost apportioned among the property owners as required by the charter of the city. The board approved the estimates and apportionment, but the appellee, insisting that the ordinance is invalid, refuses to pay the assessment against him of $138.60.

The ordinance is alleged to be invalid because not in accordance with the provisions of the city charter.

Section 3449 of the Kentucky Statutes provides that the common council shall have power to pass ordinances to require the improvement of streets and alleys, subject to the mode and manner herein designated, either by grading and paving or by grading, paving and macadamizing at the cost of the owner or owners of the ground fronting such improvement, and the cost of such improvement to be apportioned according to the number of feet front each may own, etc.

Section 3450 provides that "before the passage of any ordinance requiring the improvement of streets and alleys or parts thereof it shall be the duty of the mayor to enter into a contract with any person or persons offering or agreeing to do the work required to be done by such ordinance upon the best and most advantageous terms, etc."

The contention of appellee is that the ordinance is violative of the law, in that it requires *the lot owners* to construct the improvement in front of their respective lots, when the section quoted does not au-

thorize the council to so require, but on the contrary provides that upon the passage of the ordinance the mayor shall enter into a contract with any person, etc.

The trial court seems to have been of that opinion. At any rate it sustained a demurrer to the petition seeking to enforce the lien provided by the statute upon the ground, as argued by appellee's counsel, that the ordinance was invalid because it did not conform to the sections quoted. We can not reach this conclusion.

It may be that the council may require the improvement to be done at the cost of the owner under the mayor's contract with some other person without affording the owner an opportunity of doing it himself, and we are inclined to think that the law admits such a construction. But it does not follow because such an opportunity is afforded by the ordinance that the owner can complain. Very serious complaint is often urged in cases of this kind because such an opportunity is not given, and with a better show of reason than where the owner is given a chance to do the work himself. Besides, the work here has in fact been done, and done under the mayor's contract with Noonan, after approval by the council, as required by the charter.

It is also argued by counsel that the ordinance does not "fully declare and prescribe the kind and extent of improvement to be made." (Section 3449.)

An inspection of the ordinance, however, shows a substantial compliance with this provision. In Hydes & Goose, &c. v. Joyes, 4 Bush, 264, a case relied on by counsel, the ordinance provided that certain sidewalks, "or such portions of said sidewalks as the city engineer may direct, be graded and paved at the costs of the owners of property binding thereon, said work to be done subject to the supervision and control of the city engineer, etc." And this court held it invalid because it was an attempted delegation of legislative power. The engineer might have determined, the court reasoned, to pave one portion with brick, one with stone and another with plank without transcending his authority, though such an ordinance could hardly have received any support in the legislative body of the city. Here the location of the streets to be improved, and the lots and parts of lots of the owners were sufficiently designated in the ordinance, and the sidewalks were to be of "brick and curbed with stone and provided with stone gutterways, the sidewalk to be eight feet wide from the line of the respective lots to the inside line of the curbing, and to be at the grade or elevation heretofore fixed by the city engineer and adopted by this board, and as shown and established by stakes already set in front of said respective lots or parts of lots."

We do not think the ordinance invalid because the kind of stone and its thickness and width are not prescribed. Some of the details of this kind of work may properly be left to the city engineer without a violation of the law forbidding the delegation of legislative power.

In our opinion, therefore, the petition of the appellant states a good cause of action under the provisions of the statutes, and the demurrer ought to have been overruled.

Judgment reversed for proceedings consistent with this opinion.

The Kentucky Law Reporter.

EDITOR:
WALTER G. CHAPMAN, ... Frankfort, Ky.

VOL. 18. NOVEMBER 1, 1896. No. 9

KENTUCKY COURT OF APPEALS.

EMERY, &C. V. VAUGHAN, &C.

(Filed June 3, 1896—Not to be reported.)

Marshalling of securities—Notice—Where one creditor has a lien upon two pieces of property, and another has a junior lien upon only one of them, the junior lienholder may require the holder of the senior lien to look first to the piece of property upon which there is but one lien before subjecting the other piece of property upon which the junior lien exists. And if the senior lienholder, having notice of the junior lien, releases his lien upon the piece of property in lien to him alone, out of which he might have made his debt, the junior lienholder will be given priority as to the other piece of property. And the senior lienholder will be regarded as having notice of the junior lien if he has notice of facts sufficient to put him upon inquiry, and fails to make any investigation. Whether the record of the junior lien is constructive notice to him is not determined.

J. W. Bloomfield and Sam Houston for appellants.

Husbands & Husbands for appellees.

Appeal from McCracken Circuit Court.

Opinion of the court by Judge Guffy.

This appeal is prosecuted by Hobson & Co. and the First National Bank of Paducah from a judgment rendered by the circuit court of McCracken county in the suit of appellants against G. Vaughan & Co. and S. C. Vaughn.

It appears that S. C. Vaughn had mortgaged to Hobson & Co. a certain lot in Paducah, known as lot No. 120, to indemnify them as his surety in a note executed to the appellant bank, and perhaps to secure other debts. The amount due the bank at the time of suit was near $3,000. G. Vaughan & Co. also held a mortgage on the same lot, and claimed a superior lien thereon for the balance of a debt alleged to be due to them from S. C. Vaughan.

The firm of G. Vaughan & Co. was composed of E. W., J. P. and

Q. D. Vaughan, all brothers, S. C. Vaughan being also a brother. All of them dealt more or less in tobacco in Paducah.

It is claimed by appellees that the firm of G. Vaughan & Co. loaned to S. C. Vaughan $5,500 December 15, 1888, and to secure the same S. C. Vaughan mortgaged to the firm certain property. The note was due in twelve months, calling for eight per cent. interest from date until paid. The property mortgaged was an interest in a warehouse known as the Kentucky Warehouse, lots Nos. 143 and 120, also a note on Frank L. Scott (a son-in-law of S. C. Vaughan) for $1,000, dated 15th of December, 1888, and on the 1st of January, 1889, S. C. Vaughan, by consent of the mortgagees, sold the interest in the warehouse to one Terrell for $5,500, of which $3,500 was paid to the firm on the 2d day of January, 1889, and credited on the note, and the lien on said property so sold released on the margin of the mortgage in the clerk's office by the firm, and on the 1st of June, 1889, S. C. Vaughan sold the house and lot, No. 143, to Powell for $2,675; that up to that time Scott had paid to the said firm on said $1,000 note as follows: $200 on 22d January, 1889; $50 on February 14, 1889; and $65 on March 7, 1889, in all $315, and on the 1st day of June, 1889, the said firm handed over to S. C. Vaughan the Scott note, and S. C. Vaughan paid them $685; and that S. C. Vaughan afterwards collected the balance of the Scott note; that on the same day, viz., June 1, 1889, the said firm entered on the margin of the mortgage a release of their lien on lot No. 143, and on December 30, 1890, the said firm, on the margin of the mortgage book, released their lien on the Scott note.

The contention of the firm of G. Vaughan & Co. is that they had no notice of appellants' mortgage until November, 1890, and that the release of their lien on the Scott note was made in December, because S. C. Vaughan had collected it, and they supposed that they could be compelled to release the same, they having given over the note to S. C. Vaughan in June, 1889. They also claim that they acted in the utmost good faith in the matter.

The contention of appellants is that the lien of G. Vaughan & Co. should be held inferior to that of appellants.

If both mortgages had been in full force at the institution of this suit it is clear that the appellee company would have been required to look first to the property in lien to them alone before they could have subjected lot No. 120, upon which both appellants and appellees had liens. (Glass v. Pullen, 6 Bush, 349, and cases there cited.)

It is contended by appellees that they were not required to take notice of the recording of appellants' mortgage, while appellants' contention is the reverse.

It is not necessary to discuss the question of constructive notice to appellees, resulting from the recording of appellants' mortgage, because other facts and circumstances seem to determine the rights and equities of the parties.

It appears that to secure the $5,500 S. C. Vaughan mortgaged to the appellee firm about all of his property, when in fact much less would have been ample security, and, although his note had twelve months to run, bearing a usurious rate of interest, yet within less than a month $3,500 is paid on the note, a lien released on $5,500 of the mortgaged property, and within less than six months another payment was made out of the proceeds of another piece of property which the appellee firm had allowed S. C. Vaughan to sell for $2,675, and the mortgage released on that piece of property, and the Scott note also, as is claimed, given up, but the lien on it was not released of record until December 30, 1890.

This Scott note was dated December 15, 1888, same date of the mortgage, due in twelve months, with interest from date, and yet within but little over a month Scott pays to the firm $200 on the note, and during the next two months paid $115 more, and yet as late as May, 1890, a considerable part of the Scott note was still unpaid.

Only one of the firm of G. Vaughan & Co. testified in the case, but his testimony and that of S. C. Vaughan conduces to show that the other members of the firm had no knowledge of the business. It also seems that appellees were unable to give the time and manner in which S. C. Vaughan was furnished the sum of $5,500, except the $3,500 paid in a check.

We think that the facts and circumstances in this case were such as to either charge the appellee firm with actual notice of appellants' mortgage as such as to have caused a reasonably prudent man to have made some inquiry, and it does not appear that appellees made any investigation at all as to S. C. Vaughan's obligations to appellants, although the circumstances warrant the conclusion that they had good reason to know, or at least believe, that S. C. Vaughan was indebted to appellants.

After a careful consideration of the facts and circumstances of this case we are of the opinion that the court below should have held appellants' lien on lot No. 120 to be superior to that of G. Vaughan & Co.

The judgment of the court below is, therefore, reversed and cause remanded, with directions to adjudge appellants' lien on the said lot and the proceeds thereof superior to that of G. Vaughan & Co., and for proceedings consistent with this opinion.

WHITMER v. WHITMER.

(*Filed June 5, 1896—Not to be reported.*)

Alimony—The husband having abandoned his wife without cause, leaving her no means of support, and brought charges as to the paternity of his children, unsupported by proof, the chancellor properly placed the children under the control of the mother and made an allowance for the support of herself and children.

E. W. Hines and Charles Eaves for appellant.

Appeal from Muhlenburg Circuit Court.

Opinion of the court by Chief Justice Pryor.

An inspection of the record satisfies the court that no injustice is done the appellee by continuing the allowance for the support of his wife and children. He abandoned his wife without cause, leaving her no means of support, and made charges of such a serious character as to the paternity of his children, unsupported by proof, as forced the chancellor to place them under the control of the mother. He has money in bank, with a farm, the rental value of which is $275 per year, and, if the wife had no children, under the circumstances of this case the allowance is not too much for her own support.

The judgment discontinuing the allowance is reversed, with directions to overrule appellee's motion to either discontinue or reduce it.

BURCH V. CITY OF OWENSBORO.

(*Filed June 5, 1896—Not to be reported.*)

Ordinance—License tax—The provision of an ordinance of a city of the third class "that all moneys received from licenses under the provisions of this ordinance shall be paid to the treasurer and placed to the credit of the general revenue fund of said city, and shall be used and expended in defraying the current and incidental expenses of the said government, except fifteen per cent thereof shall be paid to the treasurer of the board of education, etc.," is not so vague or indefinite as to render it void under the provisions of section 180 of the Constitution that every ordinance passed by a municipal board levying a tax shall specify distinctly the purpose for which the tax is levied.

C. S. Walker and John Feland & Son for appellant.

J. D. Atchison for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Guffy.

The appellant, Burch, instituted this action in the Daviess Circuit Court, seeking to enjoin the appellee from collecting from him the sum of $100, license fee or tax.

It is substantially alleged in the petition that the city council of Owensboro, a city of the third class, passed an ordinance fixing and regulating license in said city, etc., which act went into effect on the 16th of April, 1894. It provides in section 45 as follows: "That all moneys received from licenses under the provisions of this ordinance shall be paid to the treasurer, and placed to the credit of the general revenue fund of said city, and shall be used and expended in defraying the current and incidental expenses of the said government, except fifteen per cent. thereof shall be paid to the treasurer of the board of education for the use of the public schools of the said city, and shall be paid over by the said treasurer to the treasurer of the board of education monthly."

The appellant is a wholesale dealer in poultry, butter and eggs. No license is required of retail dealers. A demurrer was sustained to the petition and the action dismissed, and from that judgment this appeal is prosecuted.

Appellant's contention is that the ordinance is unconstitutional and void for the reason that it does not comply with section 180 of the Constitution, which provides that every ordinance and resolution passed by any county, city, town or municipal board or local legislative body levying a tax shall specify distinctly the purpose for which said tax is levied.

Section 3290 of the Kentucky Statutes, authorizing the imposition of licenses and taxes, is a substantial repetition of the provisions and requirements of the Constitution.

It may be that the ordinance in question is not as specific as it might have been, yet we do not think it is so vague or indefinite as to render it void. It does not appear that the license is oppressive to the business, and the power of a city to require license fees seems to be beyond question.

It results, therefore, that the judgment of the court below was proper, and the same is affirmed.

WITHERS V. COMMONWEALTH.

(*Filed June* 6, 1896—*Not to be reported.*)

C. C. Bagby for appellant.

W. S. Taylor for appellee.

Appeal from Boyle Circuit Court.

Opinion of the court by Chief Justice Pryor.

Upon an examination of the record we find no motion or ground for a new trial, without which this court can only look to the indictment and the testimony. The indictment is good, and the charge sustained by the evidence heard.

Judgment affirmed.

RAINS V. LEE, &C.

(*Filed June* 10, 1896—*Not to be reported.*)

1. *Compromise—Consideration for note*—The compromise of a claim against defendant and the dismissal of an action thereon was a sufficient consideration for the note sued on in this action.

2. *Revivor of action*—Before rendering judgment the court ought, by proper orders, to have abated the action as to one of the plaintiffs upon the suggestion of his death, and to have revived it in the name of his personal representative; and it would have been proper for the court to have revived the action without delay in the name of the deceased plaintiff's administratrix upon her petition to be made a party plaintiff, accompanied by letters of administration.

H. P. Cooper for appellant.

John McChord for appellees.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Landes.

The compromise of the claim of the appellees against the appellant, asserted in the action brought by them against A. K. Russell and the appellant in the Marion Circuit Court to recover railroad taxes alleged to have been collected by them, and for which they had not accounted, and the dismissal of the action as to the appellant constituted a sufficient consideration for the note sued on, which was executed by the appellant to the appellees, secured by mortgage on his property for what was supposed to be the amount for which the appellant was liable. (McDaniel, &c. v. Evans, &c., 90 Ky., 568.)

There was no plea of fraud or mistake whereby the appellant was induced or led to execute the note, and there is no hint in the evidence of any such defense, and the judgment of the court below on the merits is without error; but before rendering judgment the court ought, by proper orders, to have abated the action as to plaintiff, Thomas Durham, on the suggestion of his death, and to have revived it in the name of his personal representative.

We think that upon the suggestion of his death and the consequent abatement of the action as to Durham, it would have been proper for the court to have revived the action without delay in the name

of his administratrix upon her petition to be made a party plaintiff accompanied by letters of administration.

The evidence shows that the appellant's claims for $207.35 for making tax sales at the instance and for the benefit of the appellees, who were sureties on the bond of Russell as collector of the taxes, and for $100 for services in overhauling the settlements made by Russell for taxes collected, are just, and they both ought to have been allowed as credits to the appellant by way of set-off against the note sued on.

For the reasons indicated the judgment is reversed and the cause remanded, with directions that further proceedings be had consistent with this opinion.

GRAZIANA, &C. V. GRAZIANA, &C.

(*Filed June* 10, 1896—*Not to be reported.*)

Reformation of deed—The evidence in this case is not sufficient to show that a deed by a father to his daughter by which he conveyed to her by way of advancement a life estate in land, remainder to her children, was intended to convey to the daughter the fee, although the other children of the grantor took the fee in what was given to them, and, therefore, the chancellor properly refused to reform the deed.

Wright & Anderson for appellants.

Appeal from Campbell Circuit Court.

Opinion of the court by Chief Justice Pryor.

We have no doubt from an examination of the record before us that it was the intention of the father of the female appellant to give her a life estate only in the property conveyed to her by way of advancement, and while the other children may have the fee in what was given to them, the children of the appellant get the remainder interest. She has children who are defendants to her petition, and there seems to be no reason why the remainder should be taken from the children and given to the mother, when to do so the conveyances under which she holds will have to be reformed on the idea of her ignorance as to their contents.

Judgment affirmed.

BULLOCK, &C. V. O'MAHONEY.

(*Filed June* 13, 1896—*Not to be reported.*)

County bonds—Election to take sense of voters as to issue of—The chancellor properly enjoined an issue of county bonds for the purchase of turnpike roads as the proposition to issue the bonds was not assented to by two-thirds of all the voters voting at the general election at which the proposition was submitted. A favorable vote of two-thirds of those voting upon that question was not sufficient under section 157 of the Constitution.

Jno. R. Allen for appellants.

Breckinridge & Shelby and Jno. B. James for appellee.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge DuRelle.

This was a suit to restrain the members of the Fiscal Court of Fayette county from issuing bonds of the county to the amount of $200,000 for the purchase of certain turnpike roads, upon the ground that the issue of the bonds would create a debt of the county greater than its revenue for the year. The answer of the members of the fiscal court and the separate answer and cross petition of R. J. Spurr present the same question which was decided to-day in the case of Belknap v. Louisville.

At the November election, 1895, the question of authorizing the issue of bonds was submitted to the voters of Fayette county. 2,502 votes were cast in favor of the issue and 662 were cast against it; but 6,517 votes were cast at the election. It is clear that this case falls within the rule laid down in Belknap v. Louisville, and that two-thirds of the voters voting at said election did not assent to the issue of bonds within the meaning of section 157 of the Constitution.

Wherefore, the judgment of the circuit court enjoining the issue of bonds is affirmed.

MIZE V. GODSEY.

(*Filed June* 13, 1896—*Not to be reported.*)

Evidence as to cause of action not pleaded—In this action by appellee against appellant to recover money alleged to be due on several different accounts, it was error to permit the plaintiff to prove that defendant had promised to pay him a check which defendant had given him and which he had not collected because of the subsequent failure of the bank upon which it was drawn, as the action was not brought to recover on that promise or for the nonpayment of the check.

Thos. H. Hines for appellant.

Jas. Andrew Scott for appellee.

Appeal from Wolf Circuit Court.

Opinion of the court by Judge Guffy.

This appeal is prosecuted from a judgment of the Wolf Circuit Court rendered in the action of appellee against the appellant. The plaintiff in the court below declared on an alleged indebtedness due him on account of land sold to J. F. Day, and which defendant, appellant here, assumed to pay, and also some other accounts and for usury alleged to have been paid appellant by appellee.

Appellant denied the indebtedness and also pleaded payment.

A trial resulted in a verdict and judgment in favor of appellee, and, appellant's motion for a new trial having been overruled, he appealed to the Superior Court, which court reversed the judgment but certified an appeal to this court.

The appellee was allowed to prove that appellant promised to pay to him a check for $500, given to appellee by appellant, on the New Farmers Bank, of Mt. Sterling, which appellee had not collected after holding the same for nearly twenty days, and the bank having failed in the meantime, and of this appellant complains.

The suit was not brought to recover on that promise nor for the nonpayment of the check. Hence it was clearly error to admit such

proof. The court also erred in giving the peremptory instruction to the jury to find for the plaintiff the $88.60 usury; and the same may be said of the instruction given to find for plaintiff the amount of the check.

The pleadings in the case are not very clear as to the issues intended to be submitted for trial. And upon the return of the case the circuit court should allow the parties, if they so desire, to amend their pleadings.

For the reasons indicated the judgment of the circuit court is reversed and cause remanded, with directions to set aside the verdict and judgment and award the appellant a new trial, and for proceedings consistent with this opinion.

CITY OF COVINGTON V. MCKENNA.

(*Filed June* 19, 1896.)

1. *Towns and cities—Limitation of indebtedness*—Where at the time of the adoption of the present Constitution the debt of the city of the second class was fourteen per cent of the assessed value of the property therein, the city had the right, under section 158 of the Constitution, to incur an additional debt not exceeding two per cent of the assessed value.

2. *Assent of voters to issue of bonds*—Bonds issued by a city in ten series, maturing annually through a period of ten years, constitute a debt of the city incurred in the year in which the bonds are issued, although the debt does not then mature, and if the debt exceeds the city income provided for that year it must be assented to by two-thirds of the voters as required by section 157 of the Constitution, although the debt is created to pay the cost of street improvements and a special assessment is made upon the abutting property to pay the bonds as they mature. Although the assessments provided to meet the bonds are a lien upon the abutting property, "the faith and credit" of the city are pledged to pay the principal and interest of the bonds, and it is therefore the creation of an indebtedness within the meaning of the Constitution.

W. McD. Shaw for appellant.

C. B. Simrall for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge DuRelle.

This is an agreed submission of a question for decision.

By section 158 of the Constitution it is provided that cities of the second class, to which appellant belongs, shall not be permitted to incur indebtedness to an amount, including the then existing indebtedness, in the aggregate exceeding ten *per centum* on the value of the taxable property therein, to be estimated by the assessment next before the last assessment previous to the incurring of the indebtedness.

After providing for indebtedness authorized by laws in force prior to the adoption of the Constitution, and for the completion of public improvements undertaken prior thereto, this section further provides that "if, at the adoption of the Constitution, the aggregate indebtedness of the municipality, including that which it is authorized by the section to contract, shall exceed the prescribed limit, then it shall not be permitted to increase its indebtedness in an amount exceed-

ing two per cent. in the aggregate upon the value of the taxable property therein until the aggregate of its indebtedness shall have been reduced below the limit fixed, and thereafter it shall not exceed the limit, except in case of emergency."

By section 3096, Kentucky Statutes, cities of the second class are authorized to improve streets by original construction, at the cost of abutting property holders, upon the petition of the holders of a given proportion of such property, and by section 3101 such improvement may be paid for on the ten year plan, the owner of the abutting property having the option to pay in cash or in ten annual payments. To provide for the immediate payment of the proportion of the cost of the improvement assessed against those property holders who elect to pay on the ten-year plan, the city is authorized to borrow the money and issue bonds therefor, "*pledging the faith and credit of the city for the payment of the principal and interest thereof*," the bonds to be in ten series, maturing annually through the ten-year period.

It is provided that the bond issue thus authorized is to be "in anticipation of the collection of a special tax or assessment for such improvement or re-improvement from such property holder;" that the property shall be in lien for the assessment until it is paid; and in the succeeding section, that no local assessment for street improvement shall exceed one half of the value of the property assessed.

Under these statutory provisions an ordinance was passed providing for the issue and sale of bonds of the city, and providing a fund for the payment of the improvement of Twentieth street with brick pavement.

By the agreed statement of facts it appears that all the statutory prerequisites to the bond issue had been regularly performed—by the petition of the property owners, the passage of the ordinance in accordance with the charter provisions, advertisement for bids, contract for the improvement, etc.

It further appears that no general tax levy will be necessary to pay the bonds if issued, but that they will be paid by the tax levied and assessed upon the property abutting on the improvement; that at the time of the adoption of the present Constitution the debt of the city was fourteen per cent. of the assessed value of the property therein, and has never since that adoption reached two per cent. of the assessed value, in addition to the percentage which existed at the time of the adoption, or of any subsequent valuation thereof.

The assessed value of property in the city in 1891, when the Constitution was adopted, was $17,470,965, and the city debt was $2,444,300, or about fourteen per cent. of the assessed value. An addition of two per cent., or $349,419.30, would make a total of $2,793,719.30, the maximum which the city can incur until the assessed value shall so increase that the ten per cent. of it will be greater than its indebtedness. It is agreed that the debt of the city has never reached that figure, though the assessment has increased in amount.

Upon this state of facts the court below held, first, that section 158 of the Constitution does not prevent the issue of the $6,000 of bonds provided for by the ordinance, and in this conclusion we concur; and, second, that neither section 157 of the Constitution nor section 3073 of the Kentucky Statutes required the assent of two-thirds of the voters of the city before the bonds could be issued.

The latter conclusion was reached upon the theory that "the amount of the debt incurred and maturing each year will be met by the special tax, and will not exceed the city income or revenue pro-

vided for that year;" and that, therefore, the assent of two-thirds of the voters is not required by section 157 of the Constitution.

Section 3073, Kentucky Statutes, permits the additional two *per centum* indebtedness allowed by the Constitution (section 158) to cities of the second class, which had already a ten *per centum* debt at the adoption of the Constitution, *provided* the assent of two-thirds of the voters, voting at an election, etc., be obtained. It provides further for the issue of bonds for such increased indebtedness, and for the levy of an annual tax to pay the interest and create a sinking fund for the payment of the principal; and the tax thus provided for is evidently a general one, to be levied on all the taxable property of the city.

It is very plausibly argued that as this section provides for a general indebtedness, which will be a charge upon all the taxable property of the city, it can have no application to the street improvement bonds provided for by section 3101, which are intended to be paid out of the sums realized from the assessment upon the abutting property. It is unnecessary, however, to pass upon this question.

The main question remaining is whether, under section 157 of the Constitution, the issue of the bonds in question will cause the city to become indebted to an amount exceeding, in any year, the income and revenue provided for such year.

It is claimed for the appellee that the amount of the debt *incurred and maturing* each year will be met by the special tax, and will not exceed the city income provided for that year. This is clearly erroneous. If it is a debt of the city it is incurred in the year in which the bonds are issued, though it does not then mature. It is an anticipation of the income of future years.

In Beard v. Hopkinsville (which with extensive annotations is given in 23 L. R. A., 403) this court held that a contract by a city to pay an annual rental for the use of water hydrants and electric lights is a contracting of indebtedness within the meaning of section 158 of the Constitution; but it is contended that because the bonds are to be paid out of the assessments, which are a lien upon the property abutting on the improvements, they are, therefore, not an indebtedness of the city; and that, as the obligation is a current one, to be paid out of the current revenue of each year, as the installments fall due, such disposition and appropriation of future revenue to meet and discharge an obligation which is but a contingent one, and is to mature in the future at the time at which the provision is made to meet it, is not the creation of an indebtedness within the meaning of the Constitution.

It must be remembered that the statute under consideration (section 3101), while it provides for a special assessment to meet the bonds, provides also for "pledging the faith and credit of the city for the payment of the principal and interest thereof;" and, though it is required in section 3102 that no local assessment for street improvement shall exceed one-half the value of the property assessed, values may fall, and the amount realized from the sale of the land assessed may be inadequate to pay the bonds, to say nothing of the assessments proving uncollectable.

As said in the case of Beard v. Hopkinsville, *supra*, * * * "if the words used in the Constitution are to be given their usual and commonly accepted meaning, by the contract in question the city does 'incur an indebtedness' in the sense these terms are used in the Constitution, and that this indebtedness is in excess of the limitation imposed is apparent."

So in Springfield v. Edwards, 84 Ill., 626, in discussing a similar constitutional provision, the court said: "The prohibition is against becoming indebted—that is, voluntarily incurring a legal liability to pay in any manner or for any purpose—when a given amount of indebtedness has previously been incurred. It could hardly be probable that any two individuals of average intelligence could understand this language differently. It is clear and precise, and there is no reason to believe the convention did not intend what the words convey. A debt payable in the future is obviously no less a debt than if payable presently; and a debt payable upon a contingency, as upon the happening of some event, such as the rendering of service or the delivery of property, etc., is some kind of a debt, and, therefore, within the prohibition."

In United States v. Fort Scott, 99 U. S., 152, under a statute very similar to the one in question providing for local improvement bonds upon a three-year plan, and that "*for the payment of said bonds assessments shall be made each year*," etc., the court said: "That the bonds for the amount for which the relator obtained judgment constitute a 'debt' or a portion of 'the bonded indebtedness' of the city, within the meaning of the statute, can not well be doubted;" and this, though the ordinance under which the bonds were issued provided that they should "be paid, principal and interest, solely from the special assessments," etc. (Culbertson v. Fulton, 127 Ill., 30; Law v. People, 87 Ill., 385; Prince v. Quincy, 105 Ill., 138, and 44 Am. Rep., 785.)

We, therefore, conclude that the bonds proposed to be issued would create an indebtedness, and, being an appropriation of the income of future years, it would be to an amount exceeding the income provided for the year in which they might be issued, within the meaning of section 157 of the Constitution, and must, therefore, be submitted to the vote of the people.

Wherefore, the judgment is reversed and the cause remanded for further proceedings consistent with this opinion.

RATLIFFE V. LOUISVILLE COURIER-JOURNAL CO.

(*Filed June* 10, 1896.)

1. *Libel*—In a suit for libel the general character of the plaintiff is in issue, and, while some of the witnesses who testified for the defendant in this case upon that issue did not show clearly that they were acquainted with plaintiff's general reputation, their testimony, in the light of the evidence, was not prejudicial to the substantial rights of plaintiff on the merits.

2. *Same—Evidence*—As the libelous publication complained of was that plaintiff "had been in more rows than any other one man in the county," it was competent for defendant to prove specific acts of disorder on the part of plaintiff for the purpose of establishing the truth of the libelous charges, although such testimony would not have been admissible to impeach the general character of plaintiff.

3. *Instructions*—The court properly instructed the jury that they should find for defendant if the publication was proved to be true in fact, or "substantially true as published."

4. *Same*—While it was error after submitting to the jury a state of facts from which, if proved, they were told, malice was to be implied, to tell them further that they were to find for defendant if the publication was made "without actual malice" and in the belief that it was true, yet, looking at the whole case, the substantial rights of plaintiff were not prejudiced by this objectionable instruction.

Thompson & McChord and L. S. Pence for appellant.

F. Hagan for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Landes.

This was an action to recover damages for an alleged false, malicious and libelous publication concerning the appellant. It was a dispatch sent by a special correspondent to and published in "The Times" newspaper, describing the alleged tragic killing and decapitation of the appellant by one Mahoney at his distillery in Marion county, as the result of a quarrel which it was stated the appellant "picked with Mahoney," who was described as "a quiet and peaceable man," while of the appellant, whose home was said to be in Marion county, it was stated "he has been in more rows than any other one man in this county." The dispatch was embellished in the columns of "The Times" with startling and sensational headlines like the following: "BRAINED HIS ADVERSARY!" "AND THEN DELIBERATELY CHOPPED OFF HIS HEAD!" These were designed and had the effect to attract the attention of the readers of "The Times" to the libelous dispatch, and thus cause it to be widely circulated in Marion county "among his friends and acquaintances, and the public in general," resulting in great damage to "the good name of plaintiff," who, it was alleged, by reason of "said false publication," had already been exposed "to hatred, contempt and ridicule."

In proof of the extensive circulation of the libel and in aggravation of the damages, during the progress of the trial the court, over the objections of counsel for the appellees, permitted the appellant to exhibit in evidence before the jury a copy of the "Police Gazette," Published in New York, containing the substance of the obnoxious publication, illustrated with a picture representing Mahoney in the bloody act of decapitating the appellant with the hatchet with which he had dealt him the fatal blow.

The answer of the appellee company contained a denial of the malice charged in the petition and of injury to the character of the appellant by reason of the publication of the alleged libel, and an averment in substance of the truth of the statement that the appellee picked a quarrel with Mahoney at his distillery, who struck him a fearful blow with a hatchet, and that appellant's home was in Marion county, "and he had been in more rows than any other one man in this county."

The issue being joined, the case was submitted to a jury, and, after the evidence was heard and the instructions given, the jury returned a verdict for the appellee, upon which a judgment was rendered dismissing the petition and for appellee's costs against the appellant, from which judgment this appeal is prosecuted.

During the progress of the trial many witnesses were introduced in behalf of the appellee, and testified concerning the general character of the appellant. This was proper, for in such cases the character of the plaintiff is deemed in issue, as it is the foundation for his claim for damages (Sutherland on Damages, second edition, section 152); but the appellee was permitted, over the objections of the appellant, to bring out in testimony before the jury many instances of quarrels and disturbances in which the appellant had been concerned or engaged in Marion county, and this is earnestly urged as error by counsel for the appellant.

We hold, however, that this testimony was properly admitted, as it was pertinent to the issue made by the averment in the answer of the truth of that part of the obnoxious publication which represented the appellant as having been in more rows than any other one man in the county, which may be said to be the only part of it that was libelous *per se*.

Just how far the testimony as to specific acts of disorder on the part of the appellant went towards establishing the truth of the libelous charge was for the jury to decide. Such testimony would not have been admissible to impeach the general character of the appellant, and it was not offered or admitted for that purpose; but that the appellee had the right to prove the truth of the alleged libelous charge in this way there can be no doubt.

Exception was also taken in behalf of the appellant to the testimony of some of the witnesses who were introduced to impeach his general character on the ground that they did not qualify themselves as witnesses as to his general character by showing that they were acquainted with it. A few of the witnesses did not show clearly that they were acquainted with appellant's general reputation, in strict compliance with the rule on that subject, but on examining their testimony, we do not think, in the light of all of the testimony, that it was prejudicial to the substantial rights of the appellant on the merits.

The instructions given by the court contained a fair presentation of the law of the case. After properly defining malice, in its legal sense, to be a wrongful act done to another without just cause or excuse, the jury were told in substance that the appellant was entitled to a verdict at their hands if the evidence showed that the publication was untrue, and that, in that event, the amount of recovery was to be fixed by them, not exceeding the amount claimed, from a consideration of all the facts and circumstances proved in the case. This was done at the request of the appellant, and, although excepted to by the appellees, it was not objectionable when taken in connection with other instructions that were given.

Two other instructions were requested by the appellant, and refused by the court. In one of them the court was requested to submit a state of case in which the jury might give punitive damages, and was properly refused because there was no evidence that would have authorized such an instruction. The other was properly rejected because it was substantially covered by the instruction above recited, submitting the state of fact upon which the appellant was entitled to recover, from the standpoint of the appellant.

In behalf of the appellee counsel requested the court to instruct the jury in substance, first, that if the dispatch containing the alleged libelous statements was published *without actual malice*, but in good faith, and in the belief that it was true; and, second, that if the publication was proved to be true in fact, or *substantially true as published*, they should, in either event, find for the appellees. These requests were granted, and exception was taken in behalf of the appellant.

The second request was properly granted (Vance v. Louisville Courier-Journal Co., 95 Ky., 41); but the first is subject to the objection that it based the immunity of the appellee upon the absence of *actual malice*, when the state of facts had been submitted upon which the jury were told the appellees might be held liable, from which, if they were proved, malice was to be implied; but, looking at the whole case, we are satisfied that the substantial rights of the appellant on the merits were not prejudiced by this objectionable instruc-

tion. And, upon the facts and circumstances in evidence and the law as given, the jury having found in effect that the libelous part of the publication was substantially true, and there being sufficient evidence to support that finding, and no error having been committed that was prejudicial to the substantial rights of the appellant, the judgment is affirmed.

McDoel v. Ohio Valley Improvement & Contract Co.'s assignee.

(*Filed June* 10, 1896—*Not to be reported.*)

Principal and agent—Agent for both buyer and seller—Voidable contract—Where the president of a corporation volunteered to act as agent for appellant to purchase for him some of the stock of the corporation, representing that the company had no stock to sell, but agreeing to procure it from some of the original subscribers, and, in carrying out this arrangement, the president of the corporation purchased stock for the corporation and sold it to appellant at a profit to the corporation, the appellant upon discovering the facts had the right to repudiate the contract, for, although there was no fraud or intentional wrong on the part of the president, he acted practically as the agent of both buyer and seller without disclosing his double agency; and acts done by appellant after the purchase of the stock, but before he had knowledge of the facts, can not be regarded as a ratification of the acts of the agent.

Pirtle & Trabue, Helm & Bruce and G. W. Kretzinger for appellant.

Rozel Weisinger and John B. Baskin for appellee.

Appeal from Jefferson Circuit Court, Common Pleas division.

Opinion of the court by Judge Hazelrigg.

The trust company as assignee of the Ohio Valley Improvement & Contract Co. sought in this action to recover of the appellant a balance of $2,500 due from him on account of his alleged purchase of one hundred shares of the stock of the contract company.

The averment of the petition is that the defendant, McDoel, induced the contract company to procure the transfer to him of subscriptions made by other parties to its capital stock to the amount of 100 shares, and in consideration thereof agreed to accept and purchase same and pay therefor the sum of $11,000, etc. In the amended petition it is alleged that McDoel agreed and promised to accept and purchase from the contract company 100 shares of its capital stock and pay therefor the sum named.

The chief defense of the appellant is that he made no contract whatever with the contract company and authorized none to be made with that company; but that Richards, the president of the contract company, though volunteering to act as his agent to procure stock for him from certain subscribers because the company, he alleged, had none to sell, actually sold him stock owned or controlled by the company, and in fact made a profit for this company, and was, therefore, practically the agent of both buyer and seller though not disclosing his double agency.

His counsel contend that, while there was no fraud or intentional wrong in this on the part of the agent, yet, upon discovering the

fact, McDoel had his election to repudiate or ratify the contract, and that he elected to repudiate it upon discovery of the facts.

It appears from the proof that the contract company was organized to construct the Richmond, Nicholasville, Irvine & Beattyville railroad, and, about October, 1889, had concluded a contract with the Louisville, New Albany & Chicago Railroad Company, known as the Monon road, by which the former undertook to guarantee the bonds of the latter, an arrangement supposed to be of great advantage to the contract company and add greatly to the value of its stock.

Richards, on behalf of his company, was anxious to have appellant and others, who were officers in the Monon, take some of this stock and suggested such taking to McDoel. He represented to McDoel that all the capital stock of his company had been subscribed for, but that he thought he could buy the stock for him from some of the original subscribers, though he would have to pay a premium for it.

To this McDoel assented. Richards was thus the agent of McDoel and as such proceeded to have certain subscribers agree to surrender to him as trustee a certain number of their shares, to be placed at cost or par and ten *per centum* premium.

It appears, however, that he already had in his hands or under his control a large block of stock originally subscribed for by the Louisville Southern Railway Co., and which had not been paid for by that company, and the bulk of which had been replaced by Richards, but a part of which McDoel got. The stock surrendered by the subscribers, including that surrendered before as well as after the Richards-McDoel contract, was reissued by the contract company directly to McDoel and his associates, and McDoel, at Richards' instance, was entered on the books of the company as a subscriber for 100 shares of stock at the price of $11,000.

The premium of $1,000 paid by McDoel was divided about equally between the contract company and some of the subscribers who surrendered their stock, and, to the extent of this premium at least, Richards made for his company a profit of $550 out of his transaction with his principal, McDoel.

While McDoel knew that Richards was president of the contract company, it was not disclosed or intimated in the negotiation between them that Richards was selling any of the company's stock or that that company would get any profit out of the deal. And, if we concede that at that time the company in fact had no stock to sell, as Richards represented to McDoel it had not, yet, in carrying out the transaction, it did get it, and through Richards, and without the knowledge or authority of McDoel, sold it to McDoel at a premium, it is upon this contract with the company made by Richards for McDoel that this suit is brought.

It is altogether manifest that no intimation was given McDoel that he was having any transaction with the contract company and certainly none out of which that company was to make a profit, and it may be fairly inferred that had he been so informed the solicitations of the president of that company to be permitted to act as his agent would have received less consideration. Richards testifies "that the premium on the stock went partly to pay the parties who had already subscribed for it and agreed to retransfer it and partly to the Ohio Valley Contract Co. for stock that it did not pay any premium on for getting the subscription cancelled."

So the agent of McDoel made for himself as stockholder of the company and for his company a clear profit out of his principal, as

it is conceded no premium was paid for part of the surrendered stock.

It is wholly immaterial that Richards believed the stock a good investment. His good faith is unquestioned, as he proved it by investing largely in the enterprise and in the stocks of the company. The contract is clearly voidable at the option of the principal.

Much is said of the ratification of the contract by McDoel. It appears that he forwarded the sum of $6,500 at one time and $1,000 in two other calls by the company. But evidently the contract he was thus ratifying was the one he supposed his agent had made in pursuance of the authority conferred on him and not one out of which a profit had been made for the agent and his company.

The judgment is reversed, with directions to dismiss the petition.

LOUISVILLE & NASHVILLE R. R. CO. v. JACKSON.

(Filed June 10, 1896—Not to be reported.)

1. *Railroads—Carrying passengers beyond station—Punitive damages*—In this action against a railroad company to recover damages for the act of defendant in carrying plaintiff beyond her station and putting her off at the next station, it was error to give an instruction as to punitive damages, there being no testimony conducing to show that any of the servants of defendant were insulting in words, tone or manner.

2. *Same—Instructions*—Even had it been proper to submit the question of punitive damages, an instruction telling the jury that they might award such damages if the defendant was guilty of "willful" neglect, or if defendant's servant's were "rude and insulting in words, tone or manner," was erroneous, as the term "willful neglect" has no proper place in the instructions in a case like this; and especially was its use prejudicial in this case, as the court, instead of defining the term, told the jury it was the judge of the degrees of negligence.

Fairleigh & Straus for appellant.

J. F. Combs and J. W. Croan for appellee.

Appeal from Bullitt Circuit Court.

Opinion of the court by Judge Paynter.

Appellee purchased a ticket at Shepherdsville which entitled her to ride from that point to the "Gap-in-Knob," on a regular passenger train of appellant. She boarded the train and before reaching the Gap-in-Knob the conductor on the train took up her ticket. While he was looking after a drunken passenger the train passed the station without stopping, thus carrying appellee beyond her destination. The conductor refused to carry her back to the station because it would have been in violation of the rules of the railroad company. Huber was the next station on the road.

The conductor testified that he proposed to carry appellee to South Louisville and put her on a train which would, within less than an hour, carry her to the Gap-in-Knob. The brakeman testifies to the same effect. The appellee denies such offer was made, and says that the conductor refused to carry her back to the station but told her she would have to get off at Huber; that he took her by the arm and went to the steps with her and, when the train stopped, stood on the steps and assisted her to alight from the train; that she was

carried two or three hundred yards beyond the station and put off on some rocks that were broken up; that the conductor said, after helping her off the train, if he had any conveyance he would have her conveyed back. What occurred after she got off the train is not material for the purposes of the present inquiry as to the correctness of the instructions which the court gave the jury.

It was admitted in the pleadings and on the trial that appellee was carried beyond the station where she was entitled to leave the train. The company was liable to the appellee for the act of the conductor in carrying her beyond her station for such damages which proximately resulted from such act.

The facts did not warrant the court in giving an instruction authorizing the jury to award punitive damages. There is no testimony conducing to prove that the conductor, in assisting the appellee from the train, was insulting either in words, tone or manner. That he was such can not be fairly deduced from the testimony of appellee. It is perfectly manifest that he took her by the arm to assist, not to force her off the train. According to her testimony the conductor stood on the steps to assist her off the train; but expressed regret that he did not have a conveyance to carry her back.

The regret the conductor expressed that he did not have a conveyance shows that neither his words, tone nor manner were insulting.

The court told the jury that they were authorized to award punitive damages if appellant's agents, etc., in putting appellee off the train, were "rude and insulting in words, tone or manner."

There was no evidence upon which to base such an instruction. Had it been proper to submit the question of punitive damages to the jury, the instructions given were erroneous.

The court told the jury in instruction No. 2 that they were the judges of the degrees of negligence, etc., and that if the defendant was guilty of "*ordinary*" negligence the damages were compensatory.

In No. 3 the court told the jury that if the defendant was guilty of "*willful*" neglect, etc., or if the defendant's agents, etc., were "rude and insulting in words, tone or manner," they were authorized to award punitive damages.

The word *willful* has no proper place in instructions in a case like this. If it had, there was no instruction defining these degrees of negligence; on the contrary the jury was told that it was the judge of the degrees of negligence. There being no instruction defining degrees of negligence the jury was made judge of the law in this respect, as well as of fact.

The instructions were substantially correct except in the particulars mentioned. The verdict was for $800, and the jury could not have awarded this sum as purely compensation for the injury complained of.

The judgment is reversed, with directions to grant appellant a new trial, and that further proceedings conform to this opinion.

BRANDENBURG V. LOUISVILLE TIN & STONE CO.

(*Filed June* 4, 1896—*Not to be reported.*)

1. *Action to quiet title*—One can not maintain an action to quiet his title to land unless he has the legal title.

2. *Fraudulent conveyances*—The evidence in this case is sufficient to show that a conveyance, or title bond for the conveyance, by a debtor of all his.

property to his minor son was executed with intent to defraud creditors, and that the son was a party to the fraud. And although the son was in possession of the property it was subject to sale under execution as the property of the father, the son's possession not being adverse to the father.

H. L. Wheeler and W. H. Holt for appellants.

E. W. Hines and J. M. Beatty for appellee.

Appeal from Lee Circuit Court.

Opinion of the court by Judge Landes.

The facts presented in the record of this case show conclusively that the alleged purchase of the land in controversy by the appellant from his father, Patrick Brandenburg, was not a *bona fide* transaction, but that it was designed by both father and son to defeat the appellee in its efforts to collect a debt against the former. It is true that the appellant was in possession of the land at the time it was sold as the property of his father under the execution in favor of the appellee, and the purchase of it by the appellee at that sale. But at the time of the alleged purchase of the land by the appellant he was not of age, and was living with his father, and he knew of the existence of the debt due from his father to the appellee, and that the land he pretended to purchase was all of the property owned by his father at the time out of which the debt could be made. Besides, in his pleadings and testimony, while claiming *to be the owner* of the land, he did not claim to have the legal title to it, without which, under the statute, although holding the possession, he could not maintain his action to quiet his title to the land. (Ky. Statutes, section 11.)

The instrument of writing which was executed by his father but which was never acknowledged by him or put to record, although in the form of a deed of conveyance, is denounced in the petition and reply as a bond for the title and not as a deed. The price he was to pay for the land was the sum of $200, which, according to the evidence, including the certificate of the appraisers, who were appointed and sworn by the sheriff, was far below the real value of the land. The so-called title bond shows on its face that the purchase money was paid, and the petition sworn to by the appellant states that it was paid. But the testimony of both father and son shows that it was not paid at the time, but that the agreement was that it was to be paid in installments of $25 per annum, thus extending the time of payment over a period of eight years. In the meantime no notes were executed for it, and no provisions were made for paying interest on the installments, and at the time of giving their testimony, which was about two years after the alleged purchase of the land by the appellant, no actual payment had been made of any part of the purchase money, although by some arrangement between the appellant and his father a pretended credit of $50 had been allowed on account of the purchase money. Under these circumstances, which it is not necessary to dwell upon, there is shown to be an utter lack of *bona fides* in the transactions, and the possession of the land by the appellant can not be held to have been adverse to his father at the time of the execution sale, and the land was subject to sale under the said execution. It follows that the court below did not err in refusing to grant the relief prayed for in the petition. On the cross petition of the appellee the right of ap-

pellee to the land in controversy was fully shown, and the court properly adjudged that the appellee was entitled to the possession of the land.

The judgment is, therefore, affirmed.

LANCASTER V. LANGSTON.

(Filed June 12, 1896—Not to be reported.)

1. *Malicious prosecution—Probable cause*—In an action for malicious prosecution malice may be inferred from the want of probable cause, but probable cause can not be inferred from anything else; therefore, the fact that plaintiff was acquitted of the charge against him does not create a presumption that the prosecution was without probable cause.

These principles applied in this action to recover damages for the malicious prosecution of a civil action in which an order of arrest was obtained.

2. *Same*—What facts and circumstances amount to probable cause is a question of law for the court. Whether they exist or not in any particular case is a question of fact for the jury.

3. *Same—Advice of attorney*—In such an action the defendant is not liable if he acted in good faith upon the advice of an attorney after laying the facts before him; and it was proper for the court in this case to submit to the jury the question whether the defendant obtained such advice fairly and acted upon it in good faith. But it was error to require them to believe, in order to find for defendant upon that ground, that he acted "solely" upon the advice of the attorney.

4. *Right of real estate agent to commissions*—Where a real estate agent undertakes to find a purchaser for property upon certain terms his commission is earned if he presents a purchaser upon modified terms who is accepted by the principal; and it was error in this case to instruct the jury that the principal became indebted to the agent if the agent found or assisted in finding a purchaser upon the terms "substantially prescribed by the contract," the purchaser found having been accepted by the principal.

G. C. Lockhart and J. W. Lucas for appellant.

Ward & Dickson for appellee.

Appeal from Bourbon Circuit Court.

Opinion of the court by Judge Paynter.

Lancaster is a real estate agent at Paris. He brought suit in the Bourbon Circuit Court against Langston to recover $254 for services rendered under a contract with him to sell his farm.

Lancaster claimed that he was instrumental in effecting a sale of the farm, and under the contract Langston owed him the sum named as commission for his services. In the action an order of arrest was obtained, by virtue of which he was arrested by the sheriff of Bourbon county and incarcerated in jail.

On the trial of the case Langston defeated a recovery. This action is to recover damages because, as it is alleged, defendant prosecuted the former action and had him arrested maliciously and without probable cause.

The trial resulted in a verdict and judgment for the plaintiff for $1,000. The only question to be determined is as to the correctness of the instructions which the court gave the jury. The fact that on the trial of the case wherein the order of arrest was obtained the judgment was for the defendant therein does not create the presump-

tion on the trial of this case that the suit was prosecuted maliciously and without probable cause. As the plaintiff must prove malice, the proof of the want of probable cause devolves on him. The defendant is not required to prove anything until the plaintiff shall have given some evidence of malice independent of any inference to be drawn from the judgment in his favor. (Ullman v. Abrams, 9 Bush, 743.)

Where a want of probable cause is shown, then the law decides that the prosecution or action was commenced with malicious motives alone. (Cox v. Taylor's adm'r, 10 B. M., 20.)

In Stone v. Crocker, 24 Pickering, 84, the Supreme Court of Massachusetts said: "The want of probable cause is the *essential* ground of this action. Other things may be inferred from this. But this can not be inferred from anything else. It must be established by positive and express proof. It is not enough to show that the plaintiff was acquitted of the charge preferred against him, or that the defendant abandoned the prosecution. But the *onus probandi* is upon the plaintiff to prove affirmatively by circumstances or otherwise as he may be able, that the defendant had no grounds for commencing the prosecution.

* * * * * * * * * *

"The functions of the court and jury are different and generally distinct.

* * * * * * * * * *

"If these functions encroach upon each other it will not be because their respective provinces are not separated by plain boundaries. What facts and circumstances amount to probable cause is a pure question of law. Whether they exist or not in any particular case is a pure question of fact. The former is exclusively for the court; the latter for the jury. This subject must necessarily be submitted to the jury when the facts are in controversy, the court instructing them what the law is."

We think the foregoing is a correct statement of the law. Plaintiff's evidence tending to establish a want of probable cause was sufficient to warrant the court in submitting the question to the jury; therefore, the court did not err in refusing to instruct the jury to find for the defendant.

Before bringing the action against Langston Lancaster consulted a competent attorney and, as he claimed, layed all the facts before him, who advised him that he had a cause of action and was entitled to the remedy pursued. Lancaster claims that he acted in good faith upon the advice which his counsel gave him.

It was proper for the court to submit the question to the jury as to whether he obtained such advice from counsel, and as to whether he obtained it fairly and in good faith acted upon it.

It is said in Walter v. Sample, 25 Pa. St., 275, "professors of the law are the proper advisers of men in doubtful circumstances, and their advice, when fairly obtained, exempts the party who acts upon it from the imputation of proceeding maliciously and without probable cause. It may be erroneous, but the client is not responsible for the error. He is not the insurer of his lawyer. Whether the facts amount to probable cause is the very question submitted to counsel in such cases, and when the client is instructed that they do he has taken all the precaution demanded of a good citizen. To manifest the good faith of the party it is important that he should resort to a professional adviser of competency and integrity. He can not, in the language of Judge Rogers, to make such resort 'a mere cover for the prosecution,' but when he has done his whole duty in the pre-

mises he is not to be made liable because the facts did not clearly warrant the advice and prosecution." To the same effect is Stuart v. Someborne, 98 U. S., 187.)

In giving an instruction, No. 4, on this phase of the case, the court told the jury that if they believed from the evidence that the defendant acted *solely* on the advice of the attorney, etc. To use the word "solely" was misleading to the jury. He had the right to act not *only* on the advice of the attorney, but independently upon any knowledge he possessed of the facts as to his contract with Langston. This instruction would be proper with the omission of the word *solely*.

Lancaster claimed that under his contract with Langston he was to ask $115 per acre for the farm to secure $110 per acre. Langston claimed that he only authorized him to sell for $115 per acre.

Instruction No. 3 is as follows: "If there was a contract between plaintiff and defendant before the institution of this action in the circuit court, mentioned in the first instruction, to the effect that plaintiff would pay defendant 2 per cent. commission on the purchase money if said Lancaster would effect a sale of plaintiff's farm in Bourbon county, and defendant, in pursuance of said contract and while said contract was in effect, did find, or assist in finding, a purchaser for plaintiff's farm upon the terms substantially prescribed by plaintiff in contract, then the plaintiff became indebted to the defendant in the sum equal to 2 per cent. of the amount of the purchase price of land sold, and if the jury believe from the evidence that at the time defendant's action was instituted in the circuit court mentioned, and the order of arrest was obtained against the plaintiff, the defendant had such evidence as would authorize a man of ordinary prudence and discretion to believe in the justness of his debt as stated above, and to believe that said debt would be sustained by the court, they should find for the defendant on the ground that he had probable cause for the institution of the action aforesaid and the procuring of the order of arrest."

The words "upon the terms substantially prescribed by the plaintiff in contract" were misleading to the jury. Although by the terms of the contract the farm was to be sold at $115 per acre, yet if Lancaster furnished the purchaser upon modified terms the commission is earned. (Coleman's ex'or v. Meade, 13 Bush, 363.)

The jury may have thought that selling at $110 per acre was not on terms substantially prescribed by plaintiff in the contract. While this court does not reverse this case on the facts, yet after a careful examination of the evidence in the case the court is of the opinion that the jury must have been misled by the errors which we have suggested appear in the instructions.

The court did not err in failing to give an instruction defining in terms probable cause. The court was submitting the question of probable cause in instructions Nos. 3 and 4, and when given on any subsequent trial, with the changes which the criticisms of this opinion suggest, probable cause is sufficiently defined.

The judgment is reversed, with directions that further proceedings be had in conformity with this opinion.

HOFFMAN V. TRUSTEES OF THE TOWN OF SHEPHERDSVILLE.

(Filed June 12, 1896—Not to be reported.)

1. *Conveyance of part of courthouse square by town trustees*—The trustees of a town have no control of the courthouse square, and can not make a valid conveyance of any part of it or place any one in the rightful possession thereof; and the authorities of the county are the proper parties to sue for possession of the property or for a trespass thereon.

2. *Same—Pleading*—In this action in which the plaintiff alleges in his petition that the trustees of the town have attempted to sell and convey to defendants a part of the main street of the town and also a part of the courthouse square, and that defendants are erecting a building upon the ground thus conveyed, which the plaintiff alleges will obstruct his ingress and egress to and from a lot which he owns fronting upon that street and contiguous to the public square, as the boundary set out in the petition shows the lot which the trustees of the town have attempted to convey to defendant does not embrace any part of the street, the allegation that it embraces a part of the street is but an erroneous conclusion of the pleader; and as it is alleged that the building being erected by defendant is upon the ground conveyed to him by the trustees it can not be an obstruction of the street.

3. *Pleading*—Pleadings must be construed most strongly against the pleader.

J. W. Croan for appellant.

Fairleigh & Strauss for appellees.

Appeal from Bullitt Circuit Court.

Opinion of the court by Judge Paynter.

The appellant filed a petition and secured amendments thereto, in which it is alleged that the trustees of the town of Shepherdsville on the 2d day of July, 1894, executed and delivered to Troutman Bros. a deed conveying to them a "certain portion of the public streets and public square in the said town of Shepherdsville, the same described in the said deed as follows, to-wit: Beginning on the north corner of the lot conveyed to Troutman Bros. by. J. I. Rickerson and wife, lying on Main street and running north with Main street 12 feet; thence east about 40 feet to line of lot owned by H. F. Troutman, lying on Second street; thence south 12 feet with the line of H. F. Troutman's lot to the line of the lot purchased by Troutman Bros. of J. I Rickerson; thence with the line of said lot about 40 feet to the place of beginning."

A copy of the deed is filed as part of the petition. It is further alleged that a part of Main street, in the town of Shepherdsville, and a part of the court-house square is attempted to be conveyed by the deed.

It is also alleged that plaintiff is a citizen and taxpayer of the town; that he owns and occupies a lot contiguous to the public square and abutting on Main street on the opposite side from the ground embraced in the deed; that Troutman Bros. are erecting a brick building on the ground purported to be sold them by the trustees; that plaintiff and other citizens will suffer great and irreparable damage by the obstruction of the aforesaid (Main) street; that plaintiff is a physician; that he has been using Main street daily with horse and vehicles as a way of ingress and egress to his place of business, and that the obstruction will "depress and narrow" his ingress and egress to his place of business and result in his irreparable injury and for which he has no adequate remedy at law.

The foregoing is all that is essential to be stated as to the allegations of the petition. A demurrer was sustained to it as amended, and a judgment was entered dismissing it. From that judgment this appeal is prosecuted.

On this inquiry it is needless to consider and decide what right the trustees of the town of Shepherdsville had to sell and convey a part of a public street of the town, or as to whether a citizen and taxpayer of the town has the right to have them enjoined from making such sale, or their vendee enjoined from erecting a building thereon, because it is alleged that Troutman Bros. are erecting a building on the ground which the deed purports to convey. The description of the ground given in the petition and deed shows that the trustee did not attempt to nor did they convey any part of Main street. The deed calls to run "north with Main street," and does not purport to embrace any part of it. The description of the ground given in the petition (being the same as in the deed), and the deed shows conclusively that no part of Main street had been conveyed to Troutman Bros.; and, as they are having the house erected on the ground embraced in the deed, it follows that it could not be on any part of Main street.

Pleadings must be construed most strongly against the pleader, but in this case the conclusion which we have reached is only a fair deduction from plaintiff's pleadings. Where the pleadings alleged the facts with reference to the conveyance, and gave the language of the deed, description of the ground conveyed, and which shows it conveys the ground only *to* Main street and not a part of Main street, then a statement that it conveys part of Main street is a conclusion of the pleader, and appears to be a very erroneous one. Under the law the trustees of the town in which a courthouse square is situated have no control of it, nor could they make a valid conveyance of any part of it, or place anyone in the rightful possession thereof. If Troutman Bros. entered upon the courthouse square the authorities of Bullitt county are the proper parties to recover the possession of the property or damages for a trespass thereon. There are no allegations that the plaintiff or the public have been or will be deprived of the uses for which it was intended, or that the county authorities have or will decline to take such steps as are necessary to preserve the courthouse square for the use of the public.

The judgment is affirmed.

LOUISVILLE & NASHVILLE R. R. CO. v. OFFUTT.

(*Filed June* 12, 1896.)

1. *Conclusiveness of opinion on former appeal*—While as a general rule an opinion of the Superior Court upon a former appeal in the same case is to be regarded as the law of the case upon a second appeal, yet the former opinion will be followed only in so far as it applies to the facts in the record before the court on the second appeal.

2. *Master and servant—Employment for indefinite time*—An agreement by a railroad company to give one "regular work" as long as he shall do "faithful and honest work," is an employment indefinite as to time, and, therefore, subject to be terminated at any time at the discretion of either party to it; and under such an employment the servant can not recover damages of the master for his discharge.

Where the agent of a railroad company agreed with a discharged conductor that if he would assist the company in moving its trains pending a strike

the company would pay him a certain sum per day while thus employed, and after the strike should be ended would give him his former position as conductor, and retain him in it as long as he should do faithful and honest work, the company had the right under this employment, indefinite as to time, to discharge him whenever it might see fit, and, having done so, he can recover only reasonable pay for the time he waited for employment up to the time he received notice of discharge, the company having placed him upon the pay roll, with directions to wait until a place could be found for him. There being no agreement upon the part of the servant to serve for any length of time, there was no mutuality in the contract to give permanent employment.

8. *Principal and agent*—A "detective" or "special agent" of the railroad company had no authority to employ conductors for regular or permanent service, and as the plaintiff, from his long service with the company, must have known that fact, his employment by such an agent was not binding upon the company except for the special occasion.

J. A. Mitchell, H. W. Bruce and Wm. Lindsay for appellants.

E. W. Hines, Sims & Covington and H. B. Hines for appellees.

Appeal from Warren Circuit Court.

Opinion of the court by Judge Landes.

The appellee, having been employed for a number of years as brakesman and freight conductor by the appellant on its road from Bowling Green, Kentucky, to Nashville, Tennessee, was discharged in the month of April or May, 1890, for violating some of the rules of the company.

Early in the month of July following there was a pending strike among the trainmen of the company at Wilder's Station, near Cincinnati, Ohio, when it became necessary for the company to procure men to take the place of the strikers, in order that it might be enabled to handle its freight traffic promptly. For this purpose one W. J. Stewart, who was at the time a "detective" or "special agent" in the employment of the company, was sent by Mr. Metcalfe, the general manager, to Bowling Green, and under special authority conferred upon him by the general manager proposed to hire the appellee to go to Wilder's and work for the company in moving its trains, which had been stopped by reason of the strike, offering him $5 per day and his expenses for the time he might be thus employed. The appellee accepted this special employment, went to Wilder's on transportation furnished him by the company, worked for the company for two or three days, returned to Bowling Green after the trouble with the strikers was settled, and was paid for the whole time he was absent, including the days of his actual service, making eight days in all, the sum of $40.

The appellee claims that at the time he accepted the employment for the special service referred to he asked Stewart that he might be restored to the position in the service of the company from which he had been discharged as above stated, and that Stewart then and there promised and contracted with him in substance that he should be restored to the position, and that he should keep it so long as he did faithful and honest work for the company. He claims that the same contract was made with him also by G. E. Evans, who was the superintendent of transportation in the service of the company, and whom he met at Wilder's, and subsequently after the special employment was terminated by Mr. Kellohn, who was the assistant

general manager of the company. But each of these men denied in his testimony that he made any such bargain or contract with him, and it appears from the testimony of both Stewart and Evans that they had no authority to make any such contract for the company; that such authority did not appertain to the positions which they held, but that the employment of men for such regular service of the company was within the purview of the authority and duties of the division superintendents and their superior officers. But it appears from the evidence that the appellee was kept on the pay roll as freight conductor, with directions to wait until a place could be found for him, and that besides the $40 paid to him for said special service he received $46 as the balance of his pay for the month of July, and $80 for the month of August, and that on the 26th day of September, 1890, he received formal notice from the company that he would be allowed no more time, which was equivalent to a discharge from the service of the company.

This suit was brought by the appellee on the 11th day of October, 1890, to recover pay for the time, to the 26th day of September, for which he had received no pay, and the sum of $10,000 damages for breach of the alleged contract for regular or permanent employment. There is no controversy between the parties as to the special employment of the appellee by Stewart for service at Wilder's, or as to the pay he was to receive or did receive therefor. But the alleged contract for regular employment is stated in the petition to have been made at the time the contract for the special service was made, and is set forth in these words, viz: "And at said time the said defendant further agreed and promised and contracted with this plaintiff that when said strike was ended, and the regular trainmen returned to their work at said points, it would give to said plaintiff regular work as freight conductor on its road from Bowling Green, Kentucky, to Nashville, Tennessee, and would restore him to his old crew with which he had worked prior to his going to the State of Ohio, *and that said regular work would continue so long as this plaintiff did faithful and honest work for the defendant.*"

In an amended petition the same statement of the alleged contract was substantially made, with this addition, viz: "And that as his compensation for such work they would pay him at the rate of $95 per month, which said sum of $95 they agreed and promised to pay him monthly."

The allegations of the petition and amendments were denied by the answer, and the issue thus made was tried before a jury in the court below in June, 1891, and upon a verdict in favor of the appellee for $575 a judgment was rendered, which was reversed on appeal to the Superior Court, and the case sent back for a new trial. The second trial resulted in a verdict and judgment against the appellant for $1,500, and the court having refused to grant a new trial that judgment on appeal is now before us for revision.

At the conclusion of the testimony the court on its own motion gave to the jury eight instructions which embodied the views held by the court as to the law of the case, all of which were excepted to by counsel for the appellant. Counsel for the appellant also made three requests for instructions which were refused by the court, and the action of the court in refusing the requests was duly excepted to. Error in thus giving and refusing instructions, and that the verdict was not sustained by sufficient evidence, and was contrary to law, were, with others, alleged as grounds for a new trial.

Counsel for the appellee in their brief rely mainly upon the opinion of the Superior Court, delivered in deciding the case on the for-

mer appeal, which, it is claimed, irrevocably settled the law of the case, and in attempting to apply the law as it was held by the Superior Court to the case as it is presented in the record before us, it is contended that the judgment must, therefore, be affirmed. Ordinarily it may be conceded the ruling of this court in such cases has been and should be according to this contention of counsel. (Adams Express Co. v. Hoeing, 88 Ky., 373.)

But we can not allow that it would be proper for us to follow the opinion of that learned court in any such case unless the law as therein held applies to the facts in the record before us on a second appeal. On the former appeal the Superior Court held that the contract alleged in the petition was not illegal or against public policy; that it was not within the statute of frauds, and that a discharged *employe for a fixed term*, who sues and whose case is tried before the expiration of his term of employment, can recover damages from his employer for discharging him only up to the date of the trial. These are undoubtedly correct principles of law, and the first and second, as stated unquestionably apply to this case as it appears in the record before us.

We can conceive of no reason for holding that a contract of employment or of service, either for a fixed term or for an indefinite time, would not be legal or would be against public policy. In actual experience such contracts are constantly made. And on both principle and authority such contracts must be held not to be within the statute of frauds and, therefore, may be made by parol. The third principle or rule is likewise well settled. But whether it applies to this case must be determined from this record. It is clear to us, after a careful examination of the evidence in the record, that the appellee failed to establish that a contract of any kind was made between the appellant and him, except for the temporary and special service that has been stated, and for which he received as he admits the sum of $40. Beyond this he failed either to allege or prove that he bound himself to serve the appellant, either for a definite or an indefinite time, even conceding that the appellant promised to employ him as alleged in the petition. Upon his own showing the appellant had no right to make him answer in damages if he failed or refused to enter its service.

It will thus be seen that the essential element of mutuality of obligation was omitted from the alleged contract of hiring, for the breach of which his suit was brought. In addition to this the evidence clearly shows that the two officers or employes of the appellant, Stewart & Evans, the "special agent" or "detective," and the superintendent of transportation in the service of the appellant, who, he alleged, promised him his old place in the service of the company, had no authority to bind the appellant by any such contract of hiring. And it is scarcely conceivable that the appellee, who had been in the service of the company, as he testified, for twelve or thirteen years, did not know that such employes of the appellant had no authority to employ its conductors for regular or permanent service, or that he was not aware that it was the custom of the appellant, which was shown by uncontradicted testimony, to employ conductors, brakemen, etc., without reference to any length of time of service, and subject to dismi-sal at any time, and with the right on the part of such employes to leave the service at any time. Nevertheless, it further appears clearly from the testimony that the appellant, without being bound by contract so to do, placed the name of the appellee on its pay roll, with directions to him to wait until employment could be found for him, and that it expected and intended to furnish

him employment, doubtless of the character of his former employment from which he had been discharged. Having done this, and having paid the appellee for a portion of the time of his waiting for work as if he were in actual employment, as he was directed or requested to do, the appellee had the right to expect payment for the whole time of his waiting up to the date on which he was notified of his discharge.

But if it be conceded that there was a contract for regular employment, as alleged in the petition and amended petition, still the contract, as alleged and proved, being that "said regular work would continue so long as this plaintiff did faithful and honest work for the defendant," was a contract indefinite as to time or term of employment or service, and was, therefore, subject to be terminated at any time at the discretion of either party to it. (L. & N. R. R. Co. v. Harvey, 17 KY. LAW REP., 1368.)

The inevitable conclusion is that the principle or rule of law laid down in the opinion of the Superior Court as to the recovery of damages by an employe *for a fixed term* who has been discharged without cause by his employer has no application to the facts of this case as they are presented in the record.

The well-settled rule with reference to the character of hiring that is set up in the petition and amended petition is that when the term of service is left discretionary with either party, or when it is not definite as to time, or when it was for a definite time, provided both parties are satisfied, in either event either party has the right to terminate it at any time, and no cause therefor need be alleged or proved. (Wood on Master and Servant, second edition, sections 133 and 136; Am. & Eng. Enc. of Law, volume 14, pages 776, 790; L. & N. R. R. Co. v. Harvey, *supra*.)

In addition to the authorities here referred to the rule as stated is sustained by the cases referred to, and quoted in the brief of counsel for the appellant the case of East Line & Red River Railway Co. v. Scott, 13 Am. St. Rep., 758, being an especially instructive case. In the view that we have taken of the case it is unnecessary to discuss the instructions given to the jury by the court. Being founded upon a theory of the law as applicable to the case radically different from our views, it follows that they were erroneous. Upon the case as it is presented in the record, the appellant had the right to terminate the relation between it and the appellee at will and without cause, and is not liable for damages for so doing. But the appellee had and has the right to reasonable pay for the time he waited for employment or work from the appellant up to the date on which he received notice of discharge, and the third instruction requested by counsel for the appellant on this point ought to have been given. This will entitle the appellee to reasonable pay for his time to the 26th day of September, 1890, deducting what he has received therefor from the appellant.

The judgment is reversed and the cause remanded, with directions to set aside the verdict and award the appellant a new trial, and for further proceedings consistent with this opinion.

AMERICAN ACCIDENT CO. OF LOUISVILLE V. CARSON.

(*Filed June* 13, 1896.)

1. *Accident insurance—Intentional injuries*—When one comes to his death by a shot intentionally fired through his body by another without provocation, death results from "external, violent and accidental" means within the meaning of an accident insurance policy, for, although the injury is "intentional" as to the person by whom it is committed, it is as to the person injured a casualty or mishap not intended to befall him.

2. *Same*—Where such a policy provides that it shall not extend to or cover "intentional injuries inflicted by the insured or any other person," or "injury or death" happening under various specified conditions, the expression "intentional injuries" does not embrace death resulting from such injuries, and, therefore, there may be a recovery under such a policy for the death of the insured resulting from injuries intentionally inflicted by another.

3. *Same—Pleading*—As the policy sued on provided that if the insured should be killed in any occupation or exposure classed by the company as more hazardous than that of druggist his beneficiary was not to get the full amount of the policy, but only a reduced sum, it devolved upon the beneficiary in suing upon the policy to negative that condition by his petition.

O'Neal, Phelps, Pryor & Silligman and Bullitt & Shield for appellant.

R. C. Warren, M. C. Saufley, W. G. Welch and D. W. Sanders for appellee.

Appeal from Jefferson Circuit Court, Law and Equity division.

Opinion of the court by Judge Hazelrigg.

In April, 1891, the appellant company, in consideration of certain agreements, statements and warranties made in the application of one Stephen M. Carson, and the sum of $7.00 issued to him under "division A," wherein Carson's occupation was described as that of a druggist, a policy of insurance, known as an "accident policy," by which, for the term of three months, the applicant was insured against bodily injuries effected through "external, violent and accidental means," (1) which wholly disabled him; (2) such injuries as partially disabled him; (3) such as resulted in the loss of an eye; (4) loss of a hand or foot, and lastly loss of both hands or feet, etc., in which event the full principal sum of $5,000 was to be paid to the insured if he survived, or if he died then to his father, R. Carson, the appellee here.

In the body of the policy it was provided that if the insured was injured or killed in any occupation or exposure classed by the company as more hazardous than that recited in the application, the insured or his beneficiary should be entitled only to such sums as are named in the division so classed as more hazardous. And on the back of the policy, among many other conditions under which the policy was issued, we find the following: "This insurance does not cover disappearances nor suicide while sane or insane, nor injuries, whether fatal or otherwise, of which there is no visible mark upon the body, nor accidental injuries or death resulting from or caused directly or indirectly, wholly or in part, by hernia, fits, * * nor extend to or cover intentional injuries inflicted by the insured or any other person, or injury or death happening while the insured is insane or under the influence of intoxicating drinks or narcotics, etc."

It appears that the insured met his death in May, 1891, and under circumstances to be presently considered. The company denying any liability, the beneficiary, A. Carson, brought this action in the Jefferson Circuit Court for the principal sum indicated in the policy, and upon peremptory instructions at the conclusion of the testimony a verdict was rendered in his favor. From the judgment thereon the company appeals.

After certain preliminary statements the petition avers that "on the 8th day of May, 1891, and before the said term of insurance had expired, the said Stewart M. Carson was shot through the body by a ball from a gun or pistol, and thereby instantly and intentionally killed by one Jesse Burton, in the vicinity of Branford, in the county of said Carson's residence, in the State of Florida;" that "the said shooting and killing by the said Jesse Burton was not done in a mutual affray, was not provoked by any misconduct on the part of the said Carson, and was not foreseen by him in time to have been avoided, but was wanton, causeless, unprovoked and unexpected by him."

It is evident, and it is so argued, that the pleader's object in setting out the fact that the insured came to his death by a shot fired through his body intentionally by another, thus anticipating the probable defense, was to provoke a demurrer, and thus present fairly to the court for construction the meaning of the words, "nor extend to or cover intentional injuries inflicted by the insured or any other person," found on the back of the policy, and, therefore, not necessary to be adverted to in declaring on the contract. The expected demurrer was filed and overruled, and thus is presented for our consideration two questions. First, were the "means" producing the death of the insured "external, violent and accidental?" and second, was the death of the insured "an intentional injury inflicted by another" within the meaning of the policy.

On the first point little need be said. While our preconceived notions of the term "accident" would hardly lead us to speak of the intentional killing of a person as an "accidental" killing, yet no doubt can now remain, in view of the precedents established by all the courts that the word "intentional" refers alone to the person inflicting the injury, and if as to the person injured the injury was unforseen, unexpected, not brought about through his agency designedly, or was without his foresight or was a casualty or mishap not intended to befall him, then the occurrence was accidental, and the injury one inflicted by accidental means within the meaning of such policies.

Thus when one was waylaid and assassinated for the purpose of robbery his death was held to have been caused through "external, violent and accidental means." (Hutchcraft's ex'or v. Traveler's Ins. Co., 87 Ky., 300.)

So death by hanging at the hands of a mob was held to be an accident within the meaning of a policy against injuries through "external, violent and accidental means." (Fidelity & Casualty Co. v. Johnson, 30 L. R. A., 206, — Miss.)

So the death of a person who is shot by one whom he is trying to eject by force from a hotel office is a death by accident and "not a risk voluntarily assumed, where he makes the attempt without knowing that the other person is armed." (Lovelace v. Traveler's Protective Association, 126 Mo., 104.)

See also numerous authorities to the same effect in notes to case last cited in 30 L. R. A., 207.

In the Hutchcraft case, however, and in others cited, a recovery

was denied, because while the killings were accidental within the meaning of the words "external, violent and accidental," as used on the face of the policy, yet certain conditions or provisos protected the company against loss where "the death or injury may have been caused by intentional injuries inflicted by the insured or any other person."

And a consideration of this feature brings us to the second question presented by the demurrer.

In the cases to which our attention has been called, involving accident policies in many different companies, it is noticeable in all that the form of the usual protecting proviso against loss from "intentional injuries" is somewhat different from the corresponding clause in the policy before us. The clause in the Hutcheraft case—Traveler's Insurance Co.—well illustrate this. It is as follows: "And no claim shall be made under this ticket when the *death* or *injury* may have been caused * * * by intentional injuries inflicted by the insured or any other person."

This is not merely protection against *injuries* so inflicted but against *death* as well. In express terms that policy excepts *death* from intentional injuries inflicted by any other person, and does not content itself with providing merely that no claim shall be made when the *injury* may have been intentionally inflicted. The language is "death or injury," and the policy protects against either death or injury when caused by intentional injuries inflicted by the insured or any other person. In the present case, as we have seen, the policy is not to extend to or cover intentional *injuries* inflicted by the insured or any other person. Here we find a difference between the policy under consideration and all others we have examined. The words "death or injury" are used in all of them, and indeed in this policy we find those words separated for the first time in the clause under discussion. We find it provided in the preceding clause that the policy does not cover accidental *injuries or death* resulting from hernia, etc., and immediately succeeding the clause in dispute the language is "or injury or death happening while the insured is insane," etc. We notice, too, that the policy is not to cover injuries, *whether fatal or otherwise*, of which there are no visible marks upon the body, and it appears well settled that this exception, without the words "fatal or otherwise," has reference only to cases of bodily injury which do not result fatally—that is, the word "injury" is used in its usual sense as implying a hurt not resulting in death. McGlinchey v. Fidelity, &c., Co., 80 Me., 251.)

The words "injury or death," and "injured or killed," are used in this policy some eight times or more, and seemingly in sharp contrast, and the significant omission of the word "death" in this particular clause requires us to hold that the exception referred only to nonfatal injuries intentionally inflicted by the insured or any other person.

We conclude, therefore, that the petition stated a good cause of action so far as the points discussed are concerned. It is insisted, however, that as the plaintiff sued for the full principal sum of $5,000 he ought to have negatived the conditions stated in the face of the policy under which, if they existed, that sum must have been reduced and the policy scaled.

The insured agreed that if he was killed in any occupation or exposure classed by the company as more hazardous than that of druggist his beneficiary was to get only a reduced sum, and it seems evident that his beneficiary must allege, if he can truthfully do so, that the insured was not so killed, else the court could not render

judgment for the sum to which the policy under its terms entitled him.

The policy was made part of the petition and forms the basis of the action. The claimant must bring himself within its terms and conditions as stated on its very face.

It can not be said that this should come from his adversary. Whether the insured was engaged at the time of his death in a more hazardous occupation or exposure than that of a druggist was peculiarly within the knowledge of the insured and his beneficiary, who must be held to a general knowledge of the divisions and classifications of risks, and to have acted intelligently in accepting insurance in "division A."

Of course if the true issue is in fact made, it does not matter from whom the exceptional matter comes, and it is true that the company pleaded that the insured was killed while acting as deputy sheriff, and attempted to plead he was insured as a druggist or dealer and not otherwise, but just what its pleas would have been, had the plaintiff been required to set up its cause of action according to the terms of the contract, we do not know, and, convinced of this error occurring at the inception of the proceedings, no other questions need be considered.

Judgment reversed for further proceedings consistent with this opinion.

BROWN V. SCHMIDT, &C.

(*Filed June* 13, 1896—*Not to be reported.*)

Priority of liens—Acceptance of mortgage—In this contest between an execution creditor and a mortgage as to priority of lien the evidence is sufficient to support the finding of the chancellor that the mortgage had not been accepted at the time the execution was levied, and as the mortgage took effect only from the time of its acceptance the execution lien was properly given priority.

Birkhead & Clements and Chapeze Wathen for appellant.

J. G. Taylor and Wilfred Carrico for appellees.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Guffy.

It appears that the appellees had, some time in 1883, recovered judgments against G. S. McClintock, and in 1893 caused executions to be levied upon twenty-seven acres of land in Daviess county as the property of McClintock, upon which appellant Brown held a mortgage, and after the levy and before a sale appellees instituted separate actions, asking a sale of the land to pay their debts, and alleging in substance that the mortgage was fraudulent, or, if the mortgage debt ever existed, that it had been paid. The three suits were consolidated.

Appellant and McClintock answered, and insisted on the validity of the mortgage. Before the trial appellees, by amended petition, pleaded in substance that appellant Brown never accepted the mortgage until after the levy of appellees' executions upon the land in the mortgage named. Appellant Brown and McClintock were the only witnesses examined.

The chancellor was of opinion, and so adjudged, that there had

been no acceptance of the mortgage by appellant until after the levy aforesaid, and that, as matter of law, the mortgage lien took effect only from the time of acceptance, and adjudged that appellee's liens were superior to that of appellant, and adjudged a sale of the land accordingly, and to reverse that judgment John A. Brown prosecutes this appeal.

We deem it unnecessary to recite the facts and circumstances proven in the case. We are of opinion that they fully sustain and authorize the judgment complained of.

Judgment affirmed.

GILBERT, &C. v. MOODY & CO., &C.

(*Filed June* 13, 1896—*Not to be reported.*)

Removal of lien notes—Payment—Where the holder of several notes secured by a material man's lien discounted them in bank, and upon the failure of the obligor to pay thereon took them up, the obligor executing to him other notes for the sums due, referring to the lien notes as collateral security, and the new notes were at maturity renewed, there was neither a novation nor a payment of the lien notes, and a suit brought to enforce the lien before the renewal notes matured was not prematurely brought.

Jno. T. Hays for appellants.

I. T. Woodson, Cook & Dishman and W. R. Black for appellees.

Appeal from Knox Circuit Court.

Opinion of the court by Judge Guffy.

This appeal is prosecuted by Wm. Gilbert from a judgment of the Knox Circuit Court, rendered in the consolidated actions of appellees, G. E. Moody & Co., &c., but the only parties here complaining or insisting on relief are the appellees Moody & Co., John A. Black and the appellant.

It appears that Moody & Co. acquired a materialman's lien upon a house and lot, the property of one Jas. T. Gibson, May 20, 1890, on account of material furnished Gibson to build a house, etc., on said lot. The amount of the lien seems to have been $1,308.65, for which Gibson executed three notes, falling due in 60, 90 and 120 days, respectively. These notes showed that they were lien notes. Gibson on August 7, 1890, paid $221.23 on the first one of said notes, but, as alleged by Moody & Co., never paid any more.

These notes were discounted by Moody & Co. at the Third National Bank of Louisville, but Gibson failed to pay same and appellees took them up, and it appears that Gibson executed other notes to Moody & Co. for the sums due, referring to the said lien notes as collateral security for the new notes, which new notes were in like manner discounted by appellees at said bank, and, Gibson failing to meet same, appellees had also to take them up. Finally Gibson executed a note to appellees for the sum of $1,173.57, dated 4th of May, 1891, due in ten days, and sent the same to appellees before the 4th of May, 1891.

It is said that the $1,173.57 note was for the full amount due from Gibson to appellees.

On the 2d of May, 1891, Gibson made an assignment for the benefit of creditors, and on the 8th of May, 1891, the appellees, Moody

& Co., brought suit to recover judgment for their debt, and for enforcement of their lien upon the property aforesaid. They filed the original lien notes, also the $1,173.57 note. Some months afterward they filed an amended petition, giving fuller and more detailed account of the transactions had with Gibson.

The appellant holds a mortgage upon the same property that Moody & Co. claims to be in lien to them, which mortgage is for between $4,000 and $5,000, of date February 20, 1891.

On the 23d of January, 1893, the sheriff of Knox county sold the lots in contest for taxes for the years 1890 and 1891, the taxes for 1890 being, as is claimed, $137.33, and for 1891 amounted to $156.77. Appellee Black became the purchaser of the lot in question, bidding therefor the sums aforesaid, and he, on his own petition, was made party to their consolidated suits, and claimed a superior lien on the lot in contest for the amount of his bids, with 30 per cent interest.

The court upon final hearing adjudged that appellee Black had a prior lien upon the lot in question for the payment to him of the $137.33, with interest from 23d of January, 1893, and cost, being taxes for 1891, but dismissed the residue of the claim of Black. The court also adjudged in favor of appellees, Moody & Co., and adjudged a sale of the mortgaged property, from which judgments and ruling of the court Gilbert has appealed.

The substance of appellant's contention, as between him and Moody & Co., is that Moody & Co.'s lien was extinguished by the execution of the renewal notes; that the renewal notes were payments of the lien debts, and that at the time appellees brought their suit Gibson did not owe them an enforcible demand, the $1,173.57 note not being due, and that the suit was based on it, and no amendment or suit brought to enforce this lien until more than twelve months after the same was filed and recorded, and that the motion to dismiss appellees, Moody & Co.'s, petition and demurrer thereto ought to have been sustained.

Appellants, Moody & Co., insist that the suit was on the lien notes, and that the renewal notes were neither novations nor payments of the lien notes, and, in our opinion, the contention of Moody & Co. is entirely tenable under the law and facts of this case as disclosed by the record.

Appellant also contends that the judgment in favor of appellee Black is erroneous, but we can not concur in the views expressed and conclusions reached by him in respect to the claim of Black, nor do we think that Black was entitled to any greater or additional sum than that awarded him by the court below, and, besides, it does not appear that he has ever obtained a cross appeal as to Gilbert, and he could not have a cross appeal as to Moody & Co.

Taking into consideration the facts disclosed by this record we are of opinion that the judgment of the court below is fully sustained by the law, and it is, therefore, affirmed as to all the parties to this appeal.

BELKNAP, &C. V. CITY OF LOUISVILLE, &C.

(*Filed June* 13, 1896.)

1. *Election—Incurring indebtedness by city—When election held*—An election under section 157 of the Constitution to take the sense of the voters of a city as to the incurring of indebtedness by the city in excess of the limit fixed by that section can not be held on any other day than that of a regular annual election.

The case of the Fidelity Trust & Safety Vault Co. v. Morganfield, 96 Ky., 564, in so far as it holds otherwise, is overruled.

2. *Assent of voters—Percentage required*—The requirement of the Constitution that such a proposition shall have the assent of two-thirds of the voters "voting at an election to be held for that purpose" makes it essential that two-thirds of all the voters voting at the election held on that day shall vote in favor of the proposition in order to authorize the indebtedness, and not merely two-thirds of those voting upon the question.

At a regular annual election in the city of Louisville the question of the issue of $1,000,000 of bonds for park purposes was submitted to the voters. Upon that proposition there were cast only 9,204 votes, of which 6,483 were in favor of the issue and 2,721 against. There were cast in the general election on that day 32,425 votes. *Held*—That the city is not authorized to issue the bonds.

3. *Issue of bonds not authorized*—Even if the Constitution be not construed as requiring the consent of two-thirds of all the voters voting at the general election, yet the Legislature had the power to provide for a submission with additional restrictions, and as it is manifest that both the statute (section 2854, Kentucky Statutes) and the city ordinance providing for the submission require the favorable vote of two-thirds of those voting at the general election, the issue of the bonds is not authorized.

Judge Landes dissents from that part of the opinion which holds that such questions must be submitted at a regular annual election, being of the opinion that section 157 of the Constitution requires that a special election shall be held, and that such special election can not be held on the regular election day.

R. H. Blain for appellants.

H. S. Barker and Humphrey & Davie for appellees.

Appeal from Jefferson Circuit Court, Chancery division.

Opinion of the court by Judge DuRelle.

This suit was brought for an injunction to restrain the city of Louisville from issuing a million dollars of bonds for park purposes. There were two grounds alleged for the injunction—the first and main ground urged being that at the election of November 6, 1894, the question of the issue of bonds was submitted to the voters of the city, and that the proposition to issue did not receive the assent of two-thirds of the voters thereof, within the meaning of section 157 of the Constitution and section 2854 of the Kentucky Statutes.

It appears that at the election there were cast in the city of Louisville a total of 32,425 votes; that on the question of the issue of park bonds there were cast only 9,204 votes, of which 6,483 were cast in favor of the issue, and 2,721 against it.

Section 157 of the Constitution provides that "no county, city, town, taxing district or other municipality shall be authorized or permitted to become indebted in any manner or for any purpose to an amount exceeding in any year the income and revenue provided for such year without the assent of two-thirds of the voters thereof voting at an election to be held for that purpose, and any indebtedness contracted in violation of this section shall be void."

It is contended for appellants that the total number of votes cast at the election in favor of the bond issue being less than two-thirds of the whole number cast at the election, the bond issue failed to carry upon the ground that the section referred to requires that two-thirds of the total vote cast at the election shall be cast in favor of the issue.

Appellees contend that the words "two-thirds of the voters thereof

voting at an election to be held for that purpose" restrict us to the consideration of the total number of votes cast for and against the question of issuing bonds, and that, therefore, more than two-thirds of the votes of those voting "for that purpose" were cast in favor of the bond issue. In other words, appellee's contention is that in the "election held for that purpose" only the votes cast for that purpose —for and against the bond issue—can be considered, and that no account can be taken of votes cast for other purposes, such as the election of officers, although cast on the same day.

Great stress was laid by appellee's counsel upon the argument that the Legislature might have provided for the submission of the question of the bond issue at a special election held on a different day from the regular annual election, and at which no other question or election was determined; and, as at such special election only the votes cast upon the bond issue could be considered, though the vote might, and probably would be much less than the vote cast at the regular annual election, therefore, "a question submitted to the voters" is not in any way dependent on or connected with an election of officers, although submitted on the same day and by means of the same ballots; and, as the Constitution left it to the Legislature to determine whether the question should be submitted on the day of the general election or on some other day, the action of the Legislature in fixing the submission for the same day as the general election did not commingle or make them interdependent. In support of this contention the case of Fidelity Trust & Safety Vault Co. v. Morganfield, 96 Ky., 564, is relied on. In that case it was held that the submission of an issue of bonds for municipal purposes might be upon a different day from that of the general election.

After careful consideration by a full bench a majority of the court are unable to adhere to the doctrine laid down in that opinion. Section 147 of the Constitution requiring elections by the people to be by secret official ballot provides that "the word 'election' in this section includes the decision of questions submitted to the voters, as well as the choice of officers by them."

Section 148 provides that "not more than one election in each year shall be held in this State or in any city, town, district or county thereof, *except as otherwise provided in this Constitution*. All elections of State, county, city, town or district *officers* shall be held on the first Tuesday after the first Monday in November."

It is otherwise provided as to elections for school trustees by section 155, which excepts those elections from the provisions of sections 145 to 154 inclusive, and as to elections for taking the sense of the people of a county, city, etc., as to whether liquors shall be sold therein, by section 61, which provides "all *elections* on this question *may* be held on a day other than the regular election days."

In this section the word "election" is used in the sense provided in section 147, and this provision indicates clearly that the word is used in section 148 to include questions submitted to the people, for otherwise there would be no need for the permission given by section 61. By section 152 vacancies in the General Assembly may be filled at a special election.

It seems clear that the provision of section 148, that not more than one election each year shall be held in this State or in any city, town, district or county thereof, except as otherwise provided in the Constitution, applies to questions submitted to the voters, and the only provision otherwise in the Constitution in reference to such questions is the one in regard to the submission of questions as to the sale of liquor.

When it is considered that the manifest purpose of the framers of the Constitution, and of the people who ratified and gave it effect, was to put limitations upon the power of the local authorities in the matter of incurring debts, which would result in oppressive taxation, and even to limit the power of the people themselves improvidently to authorize the assumption of such obligations, the wisdom of the restriction of such elections to the day of the general election is evident. Not only is a much larger vote usually brought out on the occasion of the general election, but the people at large are usually better informed of the matters upon which they are entitled to vote by reason of the greater interest taken and the fuller discussion of such matters.

We come now to the main question presented in this record. By section 157 of the Constitution it is provided: "No city * * * shall be authorized or permitted to become indebted, in any manner or for any purpose, to an amount exceeding, in any year, the income and revenue provided for such year, without the assent of two-thirds of the voters thereof voting at an election to be held for that purpose."

The object of this provision was to limit the power of the local authorities and the people to burden themselves and their posterity with taxation, except upon full consideration and by the assent of the people given understandingly. In order to effect that object it was provided that no city should *be authorized* to become indebted in excess of the current year's revenue without the assent of two-thirds of the voters thereof voting at an election to be held for that purpose. It was sought to protect the people from their own improvidence and that of their local officials, and such a construction must be given to the Constitution as will give effect to its manifest purpose.

There could be but one election in the year except in the cases specially provided for. This question was to be submitted to the people at that election. It was one election, though held for several purposes, and was in no sense a collection of elections held on the same day. One of the purposes of the election was to determine this question, which, under authority of the Constitution, the statute and the ordinance passed in accordance therewith was to be submitted to the voters of the city. It was required that two-thirds of the voters of the city voting at such election should give their *assent* to the bond issue. Assent implies action, and is not mere failure to dissent. At the election held for the purpose of electing various officers, and for the additional purpose of determining the question of the bond issue, there were cast 32,425 votes, and of all those voters voting at the election held for those purposes but 6,483, less than one-fifth of the total number, gave their *assent* to the proposition to impose on the city of Louisville the burden of an additional debt of a million of dollars.

The authorities which, to a greater or less degree, bear upon this question are numerous and conflicting. It may be conceded that under a provision like the one under consideration it is not necessary that two-thirds of those entitled to vote should actually vote in favor of the proposition, and that as was said by the Supreme Court of the United States in Carroll County v. Smith, 111 U. S., 565, "the words 'qualified voters' as used in the Constitution, must be taken to mean not those qualified and entitled to vote, but those qualified and actually voting. In that connection a voter is one who votes; not one who, though qualified to vote, does not vote."

To the same effect are many authorities cited by appellees, and the

reason of the rule is well stated in People v. Wiant, 48 Ill., 263, as follows: "It was held, in The People *ex rel* v. Warfield, 20 Ill., 160, that to give this provision of the Constitution a practical operation we must presume that it was the intention of the framers of that instrument that the voters would all vote, and that the majority of those *voting* should determine the question.

"To give it a different construction would involve an inquiry whether there were other voters of the county who had, from any cause, abstained from voting; and this would lead to interminable inquiry and invite contests in such elections which would be embarrassing and baneful, if it did not destroy all the practical benefits of laws passed under these provisions of the Constitution." * * *

But we are met with a very different question when the question is required to be submitted at a general election is one of the purposes for which that election is held, and is required to receive the the assent of two-thirds of the voters of the city voting at that election.

In such case the result depends on a majority of all the votes cast at the election being cast for the proposition, and not merely a majority of the votes cast on the particular question.

In the case of People v. Wiant, 48 Ill., 263, the Constitution required that a majority of the voters should vote in favor of the removal of a county seat, and the court held, referring to the case in 20 Ill., 160:

"In Warfield's case there was no vote taken at that election, except upon the question of the removal of the county seat, and that vote was adopted as the means of ascertaining the number of legal voters of the county, and whether the majority was in favor of or against removal. In this case, however, there was at the same time an election held for circuit judge, which was a regular election. We, therefore, have in this case additional means of ascertaining the whole number of voters of the county. If the return of the various poll books of the county showed a larger number of votes cast for circuit judge or other officer than were cast for and against removal of the county seat, then that should be taken as the number of voters of the county; and it should appear that a majority of the voters at that election had cast their votes in favor of removal before the county seat could be changed. It is not the vote cast upon that single question that is to govern, where it appears that any other election was held at the same time, but it must appear that a majority of all the votes cast at that election were in favor of removal. When there is no other election held at that time the returns of the officers of votes on that question will govern."

So in People v. Brown, 11 Ill., 478, a case of mandamus to compel township organization under a constitutional provision that "the General Assembly shall provide by general law for a township organization * * * whenever a majority of the voters of such county at any general election shall so determine," the court said: "The language is clear and explicit and admits of but one meaning. It does not mean a majority of those voting on the question to be submitted, but a majority of all the legal voters in the county."

In Everett v. Smith, 22 Minn., 53, the Constitution provided that the question should be "submitted to the electors of the county at the next general election after the passage thereof, and be adopted by a majority of such electors," and it was held that the provision required a majority of the electors voting at the election and not a majority of those voting on the question.

So in Ohio (25 Ohio State, 618) the Legislature had authorized

the levy of a tax, with this proviso: That the levy should not be made "until a majority of the electors of said township at some regular election shall vote in favor of said levy," and it was held that a majority of all the votes cast at the regular election was required, and not a majority of those voting on the question.

And in 47 Ohio State (6 L. R. A., 422), Ohio v. Foraker, a provision of the Constitution that * * "if a majority of the electors voting at such election shall adopt such amendments the same shall become a part of the Constitution" was held not to be complied with by a majority of the votes cast on the amendment.

The Ohio Constitution had another provision requiring the adoption of amendments which had been agreed upon by conventions "by a majority of those voting thereon," and the court called attention to the difference in language, saying that "if the framers had had the same intention in framing section 1 as in framing section 3 as to how the majority for the adoption of an amendment should be ascertained they would have provided in that section as in section 3 that it should be a majority of those voting thereon instead of a majority of the electors voting at such election."

This is directly in point in the consideration of the case at bar, for in section 256 of the Kentucky Constitution we find it provided that the passage of an amendment to the Constitution shall be determined by "*a majority of the votes cast for and against an amendment;*" and in section 64 it is provided that no county shall be divided, etc., "unless the majority of all the legal voters of the county *voting on the question* shall vote for the same." So that, in two other sections of the instrument, the convention was at no loss for apt words with which to limit the decision to the determination of those only who should vote *upon the question.*

In State v. Lancaster, 6 Neb., 474, the Constitution provided for a township organization, "whenever the majority of the legal voters of such county, voting at any *general election*, shall so determine;" and it was held that as the affirmative vote on the question submitted was less than a majority of those voting at the election the proposition was defeated.

In State v. Winkelmeier, 35 Mo., 103, authority was claimed under a legislative grant of power "whenever a majority of the legal voters" authorized the same, and the majority of those voting on the question were in favor of the grant; but the court said: "It is evident that a vote of 5,000 out of 13,000 is not the vote of a majority."

The case of Hogg v. Baker, 17 KY. LAW REP., 577, was under section 64 of the Constitution as to the removal of a county seat, which requires two-thirds *of those voting* to decide. That case, however, was decided largely on the ground that the voters were misled, and nothing appears in the record of the case at bar to show that the voters of Louisville were misled, except as it may be argued inferentially from the language of the statute and the ordinance and the smallness of the vote cast upon the question.

Little weight can be given the argument drawn from the fact that at a general election candidates for various offices may be elected, notwithstanding other candidates for other offices may have received more than twice as many votes. The statute of elections provides that the person receiving the highest number of votes for any office shall be declared elected to that office, and the election is decided by a plurality of votes.

Moreover, it may well be considered that there is an essential difference between the action of electors in voting for a candidate for office and in assenting to the creation of a municipal debt. The

former is the exercise of a political privilege, the mere selection of a person to perform officially duties which have been annexed to a particular office, and it is fair to presume that those who do not participate in the election consent to be governed by those who do; but the latter is the authorization of a contract by which the people of the locality incur obligations and bind their property to the payment of a debt; and it is natural to expect that the language used in relation to it will be different; that definite action will be required of a majority of the voters, and that it will be required that their assent thereto shall be *expressed*, and so we find it in the Constitution and the statute.

If the submission were permitted to be and were in fact submitted at an election at which no votes were cast except upon the proposition, it might very well be concluded that the words "two thirds of the voters of the city" meant two-thirds of those who see fit to exercise their privilege, and that the ballot box is the only test to be applied. (L. & N. R. R. Co. v. Davidson county, 1 Sneed, 637.)

In this case the test of the ballot box shows that only one-fifth of the voters who voted at the election gave their assent to the proposition.

There were many authorities cited on both sides of this question, but it would be unprofitable to review them in detail. A very interesting analysis of a large number of them is given in South Bend v. Lewis, 37 N. E., 986. It will be found that they have turned, in some cases, upon the settled policy of the Constitution which was under consideration, as in the case of Metcalfe v. Seattle, 25 Pacific Rep., 1010, which at first blush appears to be directly in point against the conclusion reached by this court.

In most of the cases the courts' conclusions were reached by considering not only the language of the provision in question, but all other relevant sections of the instrument, as well as its general intent. These differ in the different cases, and it is not surprising that the courts have apparently differed in the weight which they have attached to the arguments drawn from them. Several of the cases cited have been doubted or qualified in subsequent cases. One of them, Gillespie v. Palmer, 20 Wis., 544, much relied on by counsel for appellee, has since been referred to by the chief justice of the Wisconsin court as one of a number of cases "which have long been a reproach to the court, as judgments proceeding upon policy rather than upon principle." (Bound v. Wisconsin Central R. R., 45 Wis., 543.)

In all of the cases the object sought was the intent of the instrument.

In the case at bar not much consideration has been given to the debates of the convention, though the members who spoke appear to have given section 157 the same construction with this court: "For, as the Constitution does not derive its force from the convention which framed but from the people who ratified it, the intent to be arrived at is that of the people; and it is not to be supposed that they have looked for any dark or abstruse meaning in the words employed, but rather that they have accepted them in the sense most obvious to the common understanding, and ratified the instrument in the belief that that was the sense designed to be conveyed." (Cooley's Const. Lim., pages 80–1, sixth edition.)

"Its terms must be taken in the ordinary and common acceptation because they have been so understood by the framers *and the people* who adopted it." (6 Neb., 474.)

These considerations have led us to reject the construction con-

tended for by appellees, of which it may be said, in the language of the Ohio court in State v. Foraker, 6 L. R. A., 422: "But one of the most obvious objections to this construction is that it requires to be demonstrated by such a labored process of occult reasoning upon the meaning of words and phrases so different from the apparent meaning as to warrant the belief that it never occurred either to the framers of the Constitution or to the people who adopted it."

And in this case we can not believe that any considerable number of the voters who read section 157 of the Constitution before voting for its adoption thought for a moment that that provision upon its face restrictive of the power to create additional indebtedness could be so construed as to authorize the creation of a million dollar debt upon the vote of some six thousand out of some thirty odd thousand voters actually at the polls.

We are not unmindful of the need for parks in a great city, and the benefits of a park system such as the one proposed and in fact instituted in the city of Louisville, but the people who are to bear the burden must give their assent to the creation of the debt to be incurred for that purpose.

There is another ground upon which this conclusion might be rested. The constitutional provision is restrictive. It forbids the creation of the debt unless upon the assent of two-thirds of the voters, etc. Had section 157 provided, as in section 64, that it should not be authorized unless two-thirds of the voters of the city "*voting on the question* shall vote for the same," that would not have required the Legislature to authorize the submission of the question, nor the city authorities to submit it. So as the right to submit might have been denied altogether, it might be given with additional restrictions, as the requirement of a three-fourths vote; and when the city council by ordinance provided for the submission to the vote of the people, it might have imposed an increased restriction; so that if we were of opinion that the Constitution required only two-thirds of those *voting on the question*, we must still look to the act and the ordinance to find if they, or either of them, require any additional prerequisite to the bond issue. The statute is as follows:

"Section 2854. For the purpose of raising money for the purchase or improvement of lands for park property the general council of a city may, by ordinances, submit to the qualified voters of the city the question as to whether the city shall issue bonds, with interest coupons attached, to the amount and of the character set forth in such ordinances; and when such ordinance is passed it shall, at the next November election, be submitted to the qualified voters of the city; and if it receives assent of two-thirds of those voting the bonds so voted shall be issued by the city and delivered to the board of park commissioners."

This requires the proposition to be submitted at the November election to the qualified voters of the city, "and if it receives the assent of two-thirds of those voting the bonds so voted shall be issued, etc." What is meant by those voting? Clearly those voting at the November election.

The ordinance is still more explicit. It provides:

"Section 5. At the November election of 1894 there shall be submitted to the qualified voters of the city of Louisville the question as to whether the city shall issue said bonds, and the said bonds shall not be issued unless at said election two-thirds of those voting shall vote in favor of the issuing of said bonds as herein provided. In the event that two-thirds of those voting at said election shall vote in favor of issuing said bonds, then the fact that they have done so

shall be certified to by the mayor upon said bonds, and the said bonds shall then, but only in that event, be issued by the city and delivered by the mayor to the board of park commissioners of the city of Louisville, to be by the said board of park commissioners used and disposed of for the improvement of lands for park property as provided by law."

This requires the submission at the November election of 1894, and provides that the bonds shall not be issued "*unless at said election* (*i. e.*, the November, 1894, election) two-thirds of those voting shall vote is favor of issuing said bonds. In that event, that two-thirds of those *voting at said election* (the November election) shall vote in favor of issuing, etc."

It is obvious that both the statute and the ordinance require the favorable vote of two-thirds of those voting at the general election.

Judge Landes dissents from that part of this opinion which holds that questions submitted to the people must be submitted at the regular election, being of opinion that the provision in section 157, requiring the assent of two-thirds of the voters "voting at an election to be held for that purpose," requires that there shall be a special election *held* "for that purpose," and that such special election can not be held on the regular election day, the words quoted being a mandatory *provision otherwise* within the meaning of section 148. Judge Landes concurs, however, in the other principles stated in the opinion.

The other questions raised in the record need not be considered.

For the reasons given the judgment is reversed, with directions to sustain the demurrer to the first paragraph of the answer and for further proceedings consistent with this opinion.

NEW ALBANY WOOLEN MILLS, &C. V. LEWIS.

(*Filed June* 6, 1896.)

Preference of creditors—A mortgage or assignment made by an insolvent debtor for the purpose of preferring one or more of his creditors to the exclusion of others is not on that account fraudulent or void, but may be enforced for the exclusive benefit of the preferred creditors unless the excluded creditor commences action within six months after the act of preference for the purpose of having it declared to operate as an assignment under the statute.

2. *Sale of mortgaged goods by mortgagor—Purchase money due mortgagee*—Where a mortgage executed by a corporation upon a stock of goods provided that the mortgagor might sell or dispose of any part of the goods "in the usual course of trade and business, keeping an account of all such sales and transfers, and applying the proceeds thereof to the payment and satisfaction of the indebtedness hereby secured, and accounting to said parties of the second part, at any time and upon demand, for said proceeds of such sales," or that the mortgagees under certain circumstances might "take, have and hold the absolute and exclusive control and possession of the property, right and credits hereinbefore mentioned," and might "sell the same at public or private sale" to satisfy the indebtedness, one who purchased a part of the mortgaged goods from the mortgagor after the execution of the mortgage, said goods not being shipped to the purchaser until after the mortgagees had taken possession of the stock of goods under the terms of the mortgage, is to be regarded as owing the price of the goods to the mortgagees, and, therefore, their claim to the money due by the purchaser is superior to the lien asserted by an attaching creditor of the mortgagor who had had the purchaser summoned to answer as garnishee.

Wright & McElroy, J. M. Moss and J. W. Thomas for appellants.

W. E. Garth for appellee.

Appeal from Warren Circuit Court.

Opinion of the court by Judge Landes.

The appellee sued the New Albany Clothing Co., a nonresident corporation, in the Warren Circuit Court, to recover on an account for services as a traveling salesman, claiming the sum of $270.

The petition contains a prayer "for a general attachment herein, to be levied on any of defendant's property in this State, and that J. E. Burch be summoned to answer as garnishee herein, and to state what amount he owes said defendant."

The record, however, does not show that the affidavit and bond required in such cases were made and executed, nor does it show that any attachment was actually issued. But the answer of J. E. Burch as garnishee is copied in the record, in which it was admitted that he owed the New Albany Clothing Co. $230 for goods purchased from the company "at their place of business in New Albany, Indiana, for which goods he agreed to pay said New Albany Clothing Co. the sum of $230 on the 15th day of November, 1893." No notice was taken by counsel for the appellants in their brief of the absence of the affidavit and bond and attachment, and we may assume that they are in the original papers of the case, although not copied in the record before us.

The New Albany Clothing Co. was not actually summoned, and made no defense to the claim set up in the petition. The appellants, however, were admitted on their petition as defendants and claimants of the property of the defendant company, and afterwards by amended answer set up a mortgage executed to them by the defendant company on all of its property, alleging that the goods sold and shipped to Burch were part of the goods embraced in their mortgage, and claiming the amount due from Burch for the goods by virtue of the said mortgage, and on their motion the case was transferred to equity. On final hearing the court below sustained the attachment of the appellee, and adjudged in substance that he was entitled to the money owing by Burch for said goods under his attachment, and dismissed the claim of the appellants, and gave judgment against them for costs in favor of the appellee. From that judgment this appeal is prosecuted.

The instrument of writing executed by the New Albany Clothing Co., under date of August 14, 1893, to the appellants, is on its face a mortgage of the property and credits of the said company to secure the debts it owed to the appellants, aggregating the sum of $28,857.83. The mortgage was executed and recorded in Floyd county, Indiana, where the company was engaged in business under its charter, and the debts intended to be secured by the mortgage were all created before it was executed. It was provided in the mortgage that under certain circumstances the mortgagees (the appellants) might "take, have and hold the absolute and exclusive control and possession of the property, right and credits hereinbefore mentioned," and might "sell the same at public or private sale, upon reasonable notice," to satisfy and discharge the indebtedness secured by the mortgage. After this provision the following stipulations were made: "It is further stipulated and agreed between the parties hereto that until such time as the said parties of the second part, or either of them, shall choose to take the possession and control of said property hereby

mortgaged, sold and transferred to them, the said party of the first part may retain the possession and control of said property, and may use such property in the usual course of its business, or may sell or dispose of any part of the same in the usual course of trade and business, keeping an account of all such sales and transfers, and applying the proceeds thereof to the payment and satisfaction of the indebtedness hereby secured, and accounting to said parties of the second part, at any time and upon demand, for said proceeds of such sales."

The transaction was not a secret one, and there is nothing shown in this record that in the slightest degree impugns the good faith of the parties to it. They are not chargeable with a fraudulent purpose or intent by reason of the fact that the mortgagor retained possession of the mortgaged property, nor was there fraud in the attempt to secure the debts owing by the company to the appellants, even though the debts were in existence, and some of them were due at the time the mortgage was made. And although the statute of this State affords a remedy to an excluded creditor in case a debtor, in contemplation of insolvency, by mortgage or assignment attempts to prefer one or more of his creditors, yet a mortgage or assignment made for such a purpose is not on that account fraudulent and void, but may be enforced for the exclusive benefit of the preferred creditors, unless the excluded creditor commences action within six months after the act of preference. (Whitehead v. Woodruff, 11 Bush, 209; German Bank v. Jefferson, 10 Bush, 326.)

There was no attempt to show that the mortgage was void or even voidable as an attempt to prefer creditors under the laws of the State of Indiana, and counsel for the appellee has failed to show that it is opposed to the general policy of the laws of this State in this regard.

It conclusively appears from the evidence that in pursuance of the stipulations of the mortgage the appellants took possession of the mortgaged property through the Fidelity Trust and Safety Vault Co. on the 9th day of November, 1893, and W. C. Nunemacher, who was the treasurer of the mortgagor company, was appointed the active agent of the appellants to take charge of the mortgaged property and conduct the business in selling and disposing of the property. Previous to that time, however, the goods were being disposed of, under the stipulations of the mortgage, in the regular course of business, by the mortgagor company through its officers or agents, for the benefit of the appellants. And about the last of October or the first of November the said J. E. Burch, who was engaged in mercantile business in Bowling Green, purchased a bill of goods amounting to $230, as stated in his answer as garnishee and in the testimony of Nunemacher, the latter being then in charge of the business in the manner above indicated. But the goods purchased by Burch were not shipped to him until the 10th day of November, the day after the appellants took po-session of the property as above stated. And according to Nunemacher's testimony the goods shipped to Burch were on hand at the time the mortgage was executed, and were included in the schedule of property embraced in the mortgage. And notwithstanding the fact that Burch did not know, as testified by him, that the mortgage was in existence at the time of his purchase, and the further fact that they were billed to him in the name of the New Albany Clothing Co., still it is clear that the appellants then had a lien on them under their mortgage, and the sale of them to Burch was actually made by Nunemacher, who was then conducting the business and disposing of the mortgaged prop-

LOUISVILLE WATER CO. V. UPTON.

(Filed June 18, 1896—Not to be reported.)

1. *Master and servant—Damages for personal injury*—In an action by the servant against the master to recover damages for the loss of plaintiff's hand alleged to have resulted from defendant's negligence in furnishing for plaintiff's use a defective rope, the evidence was sufficient to authorize the submission of the case to the jury.

2. *New trial—Excessive verdict*—Upon this appeal from a judgment based upon a verdict in favor of plaintiff for $3,000 the court refuses to reverse upon cross appeal on account of the action of the trial court in setting aside a former verdict for $6,750 because it was excessive, although the court does not wish to be understood as holding that it is every case in which a verdict for that amount for the loss of a hand would be excessive.

3. *Competency of testimony on former trial*—A witness who had testified on a former trial being absent from the State at the time of the last trial, the court did not err in permitting his testimony on the former trial, which was preserved by the bill of exceptions, to be read to the jury.

Lane & Burnett for appellant.

O'Neil & Pryor and Matt O'Doherty for appellee.

Appeal from Jefferson Circuit Court, Common Pleas division.

Opinion of the court by Judge Paynter.

On the 24th day of November, 1890, while the plaintiff was in performance of his duties as a loborer for the defendant, he was injured to such an extent as to impair partially the use of one of his hands.

It is claimed that on the day of the injury, when engaged in the labor assigned him, he was directed by the foreman to take hold of and push with his hands a wire rope attached to a large iron bucket containing sand, which was then being hoisted by the rope pulley, hooks, shears and derricks, with steam power; that, following the direction of the foreman, plaintiff caught hold of the wire rope and pushed with his hand. In doing so his hand was caught on a break in the rope and run into by the shears before he could extricate it, and that his little and ring fingers of his right hand were torn off at the knuckle, etc.

It is claimed that the injury resulted from a defect in the rope; that the plaintiff did not know and could not, by the exercise of ordinary diligence, have discovered the defectiveness and unfit condition of the rope and prevented the injury; and that the defendant knew or could, by the exercise of ordinary diligence, have discovered and known of the defectiveness of the rope, and that the injury resulted from the gross negligence of the defendant.

On one trial the verdict of the jury awarded the plaintiff $10,000. This was set aside by the court presumably because it was excessive. On another trial the verdict was for $6,750. The court set it aside, and after an examination of the record we conclude that it was done because, in the opinion of the court, the verdict was excessive. On the last trial the jury fixed the amount of damages at $3,000. From the judgment on this verdict this appeal is prosecuted. The plaintiff prosecutes a cross appeal.

The injured hand of the plaintiff was in evidence before the jury, which the court saw. Its appearance should have had, and presumably did have, great weight with the court in determining the ques-

tion as to excessive damages for the injury sustained. We can not have the benefit of the knowledge which the court below thus acquired, therefore, we decline to disturb the judgment of the court in setting aside the verdict for $6,750. We do not want to be understood as holding that a verdict for $6,750 for the loss of a hand in some case would be excessive.

The learned counsel for the appellant contends that the court should have given the jury a peremptory instruction to find for the defendant. They have shown much learning in the law relating to the liability of the master to the servant for injuries received by the servant while in the performance of his duty, but after a careful examination of the evidence offered by the plaintiff and the authorities cited we entertain no doubt that the court did not err in refusing to take the case from the jury. Besides, these juries had found for the plaintiff.

The instructions which the court gave the jury are in apt language —state the law of the case with more than ordinary accuracy—and indeed seem to us to be faultless.

Charles Wilkerson testified on a former trial of this case. His evidence was, in a bill of exceptions, made part of the record in the case. The court permitted his testimony given on former trial, and contained in the bill of exceptions, to be read on the trial. He was absent from the State when the trial took place, and it was proper for the court to allow his testimony to be read from the bill of exceptions in this trial. (Reynolds v. Powers, 96 Ky., 481.)

The judgment is affirmed on the original and cross appeal.

NORTHCUTT, &C. V. JOUETT, &C.

(*Filed June* 11, 1896—*Not to be reported.*)

Competency of juror—Kinship to party—The fact that one of the jurors who tried this case was related to appellees in the eighth degree was not sufficient to entitle appellants to a new trial, the juror being ignorant of the relationship at the time he was examined and accepted, and being of kin to appellants in the same degree.

J. T. Simon and W. S. Cason for appellants.

Blanton & Berry for appellees.

Appeal from Harrison Circuit Court.

Opinion of the court by Judge Guffy.

A paper purporting to be the last will of Adam Jouett, sr., was presented to the Harrison County Court for probate, and the same was denied.

From the judgment of the county court refusing to admit the will to probate an appeal was taken to the circuit court by Samuel Jouett, Hester A. Chipman and others. A trial in the circuit court resulted in a verdict and judgment finding the paper in question to be the true last will and testament of decedent. The appellant's motion for a new trial being overruled, they have appealed.

A number of grounds for a new trial were filed, but the only one insisted on in the brief filed is that Geo. P. Martin, one of the jury, was a relative of appellees, being a relative in the eighth degree. It

also appears that he is also of kin to the appellants in the same degree.

It seems to us that the relationship was too distant to prejudice appellants or to entitle them to a new trial. It seems that the juror was not aware of the relationship at the time he was examined and accepted.

It does not appear that the relationship of the juror prevented the appellants from having a fair and impartial trial. It seems to us that the instructions given by the court correctly presented the law of the case, hence no error was committed to the prejudice of appellants in refusing the instructions asked for by them, nor do we perceive any error in the admission or rejection of evidence. It may be conceded that the testimony is conflicting, but it was the province of the jury to weigh and determine the weight to be given to the evidence, and we can not say that the verdict is against the evidence or not supported by sufficient evidence. We see no reason to support the motion made in the circuit court to dismiss the appeal taken to that court from the judgment of the county court.

The judgment below is affirmed.

The Kentucky Law Reporter.

EDITOR:
WALTER G. CHAPMAN, ... Frankfort, Ky.

VOL. 18. NOVEMBER 15, 1896. No. 10

KENTUCKY COURT OF APPEALS.

TODD, MAYOR, &C. v. DUNLAP, &C.

SAME v. TILFORD, &C.

(*Filed June* 13, 1896.)

1. *Removal of officers—Constitutional provisions*—Section 160 of the Constitution, which provides as to "all officers of towns and cities" that the General Assembly shall prescribe "the manner in and cause for which they may be removed from office," applies to offices created by statute as well as by the Constitution, and is not confined in its application to those specified in that section.

2. *Delegation of power*—The Legislature can not delegate to the mayor and board of aldermen the power to determine for what causes city officers may be removed.

3. *Power of removal of officer*—The general power to remove an officer who holds for a definite term does not give the right to remove except for cause upon notice and trial. It is only in cases where the power to remove without a trial is expressly given that it can be exercised.

4. *Same—Removal without cause*—Even if the Legislature had power to provide for the removal without cause of city officers appointed for a fixed term, section 2794 of the Kentucky Statutes, which provides that the mayor "may, by written order giving his reasons therefor, remove from office any head of department, director or other officer appointed by him," and that such order shall stand "unless disapproved by the board of aldermen within thirty days," was not intended to confer upon the mayor and board of aldermen the power of removal without cause. And while the Legislature has not specified the causes, as it is required by the Constitution to do, still the "reasons given" must be based on malfeasance, misfeasance or unfitness for the office. And the party is entitled to a hearing and to be proceeded against as provided in section 2781 of the Kentucky Statutes.

The court assumes for the purposes of this case that members of the board of public safety and members of the board of public works of the city of Louisville who are appointed by the mayor for a term of four years are officers whose removal is provided for by section 2794 of the Kentucky Statutes.

Judge Guffy concurs in the affirmance, but holds that the Legislature has the power, under section 160 of the Constitution, to authorize the mayor to

remove city officers at pleasure, without notice or hearing; but that the power of removal given in section 2794 of the Kentucky Statutes does not clearly include the members of the board of public safety and board of public works.

H. S. Barker, John Marshall, D. W. Fairleigh and Barnett, Miller & Barnett for appellants.

Pirtle & Trabue and Humphrey & Davie for appellees.

Appeal from Jefferson Circuit Court, Common Pleas division.

Opinion of the court by Chief Justice Pryor.

The board of public safety and the board of public works, executive boards of the government of the city of Louisville, instituted these actions in equity in the court below, in which it is alleged the mayor and board of aldermen were about to remove the members constituting the two boards from office without cause, and the sole question in each case is: "Has the mayor the power, with the approval of the board of aldermen, to remove these officials without notice and trial, and without assigning any cause for their action?"

The judge of the law and equity court decided the one case, and the judge of the common pleas court the other, each holding the mayor had no such power.

These executive boards, composed of three members each, are appointed by the mayor, with the approval of the aldermen, for a term of four years, with a salary each of not less than $2,500. The board of public works are invested with the control of all the public ways of the city—the construction of streets and their reconstruction; the supervision of the public buildings; the lighting of public places, with the power of contracting with reference to such matters, and in fact with powers unlimited in this regard, subject to the supervision of the mayor, and when not in conflict with the organic law of the city.

To the board of public safety is given the exclusive control, under the ordinances of the council, of the fire department, the police department, the health department, the department of building, of all the charitable, reformatory and penal institutions of the city, with many other powers given by statute, investing the two boards with the execution and control of nearly all the departments of the city government, and to carry into effect the legislation of the municipality.

They are the creatures of the Legislature, and their term of office, as is contended, may be ended at the legislative will. They have neither a freehold in their office nor a vested right that places their official existence beyond legislative control, yet they are officers of the city, with a responsibility and duty resting upon them that renders their position as important as any other in the conduct of the municipal government.

Section 160 of the State Constitution is as follows: "The mayor or chief executive, police judges, members of city councils of towns and cities, shall be elected by the qualified voters thereof, provided the mayor or chief executive and police judges of towns of the fourth, fifth and sixth classes may be appointed or elected, as provided by law. The terms of office of mayor or chief executive or police judges shall be four years, and until their successors be qualified, and of members of legislative boards two years. When any city of the first or second class is divided into wards or districts,

members of legislative boards shall be elected at large by the qualified voters of said city, but so selected that an equal proportion thereof shall reside in each of said wards or districts; but when in any city of the first, second or third class, where there are two legislative boards, the less numerous shall be selected from and elected by the voters at large of said city, but officers of towns and cities shall be elected by the qualified voters therein, or appointed by the local authorities thereof, as the General Assembly may by a general law provide; but when elected by the voters of a town or city their terms of office shall be four years, and until their successors shall be qualified. No mayor or chief executive or fiscal officer of any city of the first class, after the expiration of the term of office to which he has been elected under this Constitution, shall be eligible for the succeeding term. Fiscal officers shall not include auditor or assessor, or any other officer whose duty is not the collection of or holding of public moneys. The General Assembly shall prescribe the qualifications of all officers of towns and cities, *the manner in and cause for which they may be removed from office*, and how vacancies in such offices shall be filled."

It is claimed by counsel for the two boards that under this provision of the Constitution the Legislature must prescribe the manner in and the cause for which city officials may be removed, and the Legislature having failed to comply with the Constitution in this regard the common-law rule must prevail, and the party sought to be removed is, therefore, entitled to notice of the charges against him and to a hearing in his defense, and by the appellant (the mayor) it is insisted this provision of the Constitution does not embrace or affect any officer of a town or city except those specially mentioned in that section, and its operation confined to the officers therein named.

It must be readily seen by a casual reading of this section that many of the most important offices connected with a city government, and indispensable to its existence, are omitted to be mentioned in the section of the Constitution referred to, and the creation of such offices confided by that instrument to the wisdom of the legislative branch of the government, with the duty of prescribing their qualifications, and the cause or causes for which they may be removed.

The mayor, police judges and members of legislative councils of cities of the first, second and third classes must be elected by the people, and like officers of towns and cities of inferior classes may be appointed or elected as provided by law; and in the same section, after defining the mode in which these constitutional officers are to be chosen, and knowing that other officers must of necessity be created, further provided: "But other officers of towns or cities shall be elected by the qualified voters therein, or appointed by the local authorities thereof, as the General Assembly may, by a general law, provide; but when elected by the voters * * * their term of office shall be four years, and until their successors are qualified," and concluding the section by vesting in the Legislature the power to prescribe the qualifications of all officers of towns and cities, the *manner in and cause for which they may be removed from office*, the provision evidently applying to all officers of towns and cities, whether created by the Constitution or the Legislature, and in carrying into effect this provision of the Constitution in regard to removal from office the General Assembly enacted, under the title of Municipal Corporations, the following:

"Section 2781. Executive and ministerial officers, unless otherwise provided in this act, shall be removable by the board of aldermen,

sitting as a court, under oath or affirmation, upon charges preferred by the board of councilmen. No person so charged shall be removed from office without the concurrence of two-thirds of the aldermen, and when a person has been so removed from office he shall be ineligible thereto during the term for which he had been elected."

This provision of the statute is sufficiently comprehensive to embrace every city officer; and, although the charges for which the removal may be made are not specified, they must be such as constitute misfeasance or malfeasance in office, or that character of charge that renders the officer unfit for the position.

The contention of the appellant is that by a subsequent section of the statute on municipal corporations the manner of removing the members of these two boards has been *otherwise provided by law.* That section reads: "He (the mayor) may, by a written order *giving his reasons therefor*, remove from office any head of department, director or other officer appointed by him. A copy of said order shall be sent to the board of aldermen at its next meeting. Unless such order be disapproved by the board of aldermen within thirty days said order shall stand." (Section 2794, General Statutes.)

These officials having been appointed by the mayor, it is urged in his behalf that any reason satisfactory to himself, and approved by the board of aldermen, is a compliance with the statute, and that no limitation on this power of removal exists when applied to those officers holding under his appointment, and however competent and faithful they may be in the discharge of their duties, their positions are held at the mere will of the chief executive.

Counsel for the appellees maintain they are not heads of departments or such appointees of the mayor as are embraced by section 2794.

That they are placed on a level with the mayor in regard to executive duties, and while they are subordinate in some particulars to the mayor, their executive powers are greater than his.

While conceding the force of the arguments, we are disposed to determine this issue on other grounds, and, for the purposes of this case, will assume they come within its provisions.

The case of South v. Sinking Fund Commissioners, 86 Ky., 186, is relied on as sustaining the power of the mayor in the present case. In that case it will be found the statute in express terms placed the power of removal *within the discretion* of the commissioners. It provided: "The said commissioners shall *have power at their discretion* to remove any warden unless the General Assembly should refuse to concur in their action, etc." No reasons for removal were required to be given, nor was there any constitutional prohibition to the removal without cause.

In the absence of a constitutional inhibition an office created by the Legislature in a municipality might, by the terms of the act creating it, vest the power in the mayor to remove without cause, leaving the reasons for the removal within his own breast. This is not denied.

Mechem, in his work on Public Offices, says: "Where, therefore, the term of office *is not fixed by law*, and no other provision is made for removal, either by Constitution or statute, it is said to be a sound and necessary rule to consider the power of removal as incident to the power of appointment, but this power of removal is limited to these circumstances; and if the term is fixed by law, or if the officer is appointed to hold during the pleasure of some other officer or board than that appointing him, the appointing power can not arbitrarily remove him." And it might be said that where the term is

fixed the power to remove at will might be added, for, in the absence of any constitutional prohibition, the power of the Legislature in this regard is not to be restricted.

Our attention has been called to the case of the People v. Stevenson & Higgins, 15 Ills., 110, as sustaining the contention of the appellant. In that case the act created the Illinois Hospital for the Insane, and authorized the trustees to appoint a medical superintendent, subject to removal only *for infidelity to the trust reposed in him.* There was no mode of proceeding in such cases provided by the Illinois statute, and the trustees, being satisfied of the incompetency of the appointee, removed him without notice or trial. It was held that this power was with the trustees, and the opinion based principally on the ground of the necessity for prompt action on the part of the trustees, the court saying: "Circumstances may require, and even the very existence of the institution may demand the most prompt and energetic action on the part of the trustees in the removal of the superintendent, and the law did not design to leave them powerless to act in such an emergency; and the law being silent as to the manner of proceeding, the nature of the case must determine what course of justice the trustees should pursue in exercising the power of removal."

That case can be easily distinguished from the case before us; but even in such case, in a well-considered case of Lease v. Freeborn, 52 Kansas, 750, a different rule prevailed. The plaintiff in that case, Mary Lease, was a member of the State Board of Charities, and was removed without cause, or at least without notice or trial. The Constitution of Kansas provided: "The term of any office not herein provided for may be declared by law; when not so declared such office shall be held during the pleasure of the authority making the appointment."

A statute of that State subsequently passed declared that the terms of office of the trustees should be three years. The statute was silent as to any cause of removal, notice or trial, and the court held: "The mere silence of the statute, with respect to notice and hearing, will not justify the removal of an officer, whose term is declared by law, without knowledge of the charges, and an opportunity to explain his or her conduct, and defend his or her course and character."

It is urged, however, in this case that the cause of removal (the statute being silent on the subject) is with the mayor and the board of aldermen, and no court can supervise their action.

That the Constitution having required the Legislature to prescribe the causes, and that body having failed to comply with its provisions, the power of removal becomes discretionary with the mayor and board, and the cases of the People v. Stout, 19 Howard (N. Y.), 171; the Mayor and Council of Hoboken v. Gear, 27 N. J. Law, 265, and People v. Whitlock, 92 N. Y., 191, as well as other cases, are referred to as sustaining this view.

It was held in the case of the People v. Stout that the exercise of such a power (removal for cause) "is judicial in its nature, and, therefore, not the subject of review by any other tribunal, either in respect to the cause, its sufficiency or existence in any respect whatever."

In the case of the Mayor v. Gear it was held that, although the appointment to the office was a *fixed term* and the removal for cause, it meant only such cause as was satisfactory to the council.

Other cases follow the authorities referred to, some of them holding (and to which we assent) that the Legislature, when not forbidden by the organic law, having been given the authority to create

an office for a term, may, if in express terms, authorize the removal of the incumbent without notice or hearing.

In looking to the doctrine on the question of the *removal* from office found in the elementary books, as well as the weight of authority in the adjudged cases, we are not disposed to recognize the rule contended for by the appellant in the construction of our State Constitution or the statute creating municipal offices. The general power to remove an officer who holds for a definite term carries with it the power to remove for cause upon notice and trial, and it is only in cases where this power to remove without a trial is expressly given that it can be exercised. This doctrine is elementary, and sustained by the decided weight of modern authority.

In the case of the State, *ex rel* v. Dennison, 90 Mo., 19, a police justice had been appointed by the council, and confirmed by the mayor, for the term of four years. The validity of his removal was tested. The charter was silent as to notice and trial where one had been appointed to office, but it did require a notice and hearing to those who had been elected to office.

It was contended that inasmuch as the charter required notice to elective offices before removal, it must negative the idea that any notice was required to be given appointed officers. The court held that no inference dispensing with notice arose from the failure of the charter to require it; and further, that the removal of the justice without an opportunity to be heard was invalid. (State v. Brown, 57 Mo., 179.)

In the case of Halgreen v. Campbell, 82 Mich., 255, the charter of the city of Menominee prohibited, in express terms, the removal of elective officers except for cause, and it was argued in that case the presumption must follow the Legislature intended that appointed officers should be removed without cause, or at the pleasure of the appointing power, but the court held that no such presumption would be indulged to enable those in power to exercise such arbitrary power, and the appointee was entitled to be heard.

In the case of Speed v. Common Council of Detroit the office of city councillor was filled by appointment from the mayor for a fixed term, and the charter of that city provided: "Any officer holding office by appointment, *unless otherwise provided by law or ordinance*, may be removed at any time by the council without charges and a trial thereof, by a vote of a majority of the members-elect, except the comptroller, receiver of taxes, etc." The appointee was not within the exception. The court held that such power was inconsistent with the power of appointment by the mayor for a fixed term, and, therefore, the removal was invalid, the officer being entitled to notice and an opportunity to be heard.

The court in that case referred to the case of *ex parte* Hennen, 13 Pet., 230, in which it is said: "We have not found any case where an officer who was appointed for a fixed term, and where the power of removal was not expressly declared by law to be discretionary, has been held to be removable except for cause;" and when cause is to be assigned the party is entitled to an opportunity to be heard.

But it is further contended that the Legislature, by section 2794 of the Kentucky Statutes, applying to the cities of the first class, has given the express power of removal without cause, and for any reason the mayor might suggest, if approved by the board of aldermen. We can not assume that this is the legislative meaning of that section, or that such a construction should be given it, or that the exercise of such an arbitrary power arises by implication.

The members of these executive boards carry into execution nearly

the entire legislation of the municipal government, and are entrusted with the performance of duties requiring the exercise of the highest judgment and the assumption of grave responsibilities. They are appointed for the fixed term of four years, with a salary commensurate with the duties they are to discharge, and to concede the power of the mayor to expel these boards from office with or without cause, in the absence of a trial or an opportunity to be heard, would be to recognize the existence of an arbitrary power that never entered the mind of the Legislature, and in direct antagonism with the entire policy of the State in reference to such officials.

The Legislature, in failing to comply with the provision of the Constitution, in not assigning causes for removal of city officials, attempted to transfer the exercise of this legislative power to the mayor, and left with that officer and the board of aldermen the right of determining *the reasons* for which the members of these boards should be removed, and if such a power could be delegated (and we think it could not) a removal *for reasons given* must be based on some neglect of duty or the want of capacity to conduct the office, or such other causes as unfit the member for holding the place.

If the legislative purpose had been to give the power to the mayor to remove at pleasure, with no constitutional provision against its exercise, they would have said so, for in sections of the same general act the power to remove at pleasure is given in express terms, and when empowering the mayor to remove for *reasons given* the legislative meaning was a removal *for cause*—for legal reasons, based on a sufficient cause—and when removed for *reasons given* or for cause the party is entitled to a hearing, and to be proceeded against as provided in section 2781 of the chapter on Municipal Corporations.

The act also under which this power is claimed plainly indicates the legislative policy as to the removal of the city officials, and goes so far as to require the board of safety, when investigating charges against the members of the police force, its own appointees, to give *reasonable notice* to the accused, that he may be heard; and yet it is attempted to be maintained that these executive officers, because they were appointed by the mayor, can be removed for any cause, however trivial, or for charges odious and degrading without the opportunity of making defense and of disproving the charges made.

We can not assent to the exercise of such a power, and the necessity for some stability and independence in the discharge of the important trusts confided to these executive boards is of itself a convincing argument against the contention of the appellant, and aids much in the construction of the statute from which it is argued this arbitrary power flows.

In the case of Mindy v. Board of Fire Commissioners of the City of New York, the charter of that city declared that "the power of removal by the commissioners could not be exercised as to any regular clerk until he has been informed of the cause of the proposed removal."

The clerk was removed after notice, and without cause, and then a second notice given, and the cause assigned was that "the duties of the position could be better performed by some one else." It was held the provision of the charter necessarily implies the cause of removal must be for some neglect of duty, or some delinquency affecting the general character of the one sought to be removed, and that some other person *could more* efficiently perform the duties was not sufficient.

It may be contended the Legislature by section 2794 intended the removal from office by the appointing power, for either a fixed or

indefinite term of the appointee, should be for a less cause than that authorizing an impeachment; and while this is no doubt true, still the cause was not prescribed, and when for a fixed term, unless otherwise expressly provided, the party sought to be removed is entitled to be heard, and the attempt to confer the power (if such was the proper construction of the statute) on the mayor to remove, with the consent of the aldermen without trial or an opportunity to be heard is a nullity.

"Where the officer is appointed for a fixed term, and removable only for cause, he can be removed only upon charges, notice and an opportunity to be heard." (Throop on Revenue Officers, page 364.)

This rule is fundamental, and as both the Constitution and the Legislature are silent as to the cause for removal the delinquent officer may be impeached before the aldermen with notice and that as at the common law. That the Legislature intended to place a limitation on the power of the mayor to remove these officials, if embraced by the section referred to in requiring *reasons to be given*, is unquestioned, as well as for the purpose of protecting those who are competent to fill the position, and who faithfully and honestly discharge their duties; and there is but little protection when the opportunity to be heard is denied.

The judgment in each case is affirmed.

Judge Guffy delivered the following separate and dissenting opinion:

I concur in the affirmance of the judgments, but dissent from the reasons given in the opinion.

It seems to me that the Legislature, under section 160 of the Constitution, has plenary power as to the manner of and cause for which city officers may be removed, and it is within the power of the Legislature to authorize the mayor to remove the officers mentioned for any cause or reason to him deemed sufficient, although such cause or reason might not imply either malfeasance, misfeasance or incompetency, and that, too, without notice or hearing; but the power of removal given in section 2794 of the Kentucky Statutes does not clearly include the power to remove the officers in question.

Judge DuRelle delivered the following dissenting opinion in the case of Todd v. Tilford, &c.:

I dissent from the opinion of the majority in these cases. In my opinion the act for the government of cities of the first class was intended to effect a departure from the character of municipal government which had theretofore prevailed.

A consideration of the whole act shows that it was intended to provide a responsible head of the executive department of the city government, accountable to the people at the polls, and that the subordinates of that department should be responsible, directly or indirectly, to the head. While the act is in terms a general act, there was but one city to which it could apply, and a comparison of its provisions with those of the old city charter leads inevitably to the conclusion that a change was intended whereby greater power, and, at the same time, greater responsibility should attach to the office of mayor. Without attempting to state in detail the argument which might be made on this question, I shall give briefly my conclusions.

The mayor, who is the head of the executive department of the city government (section 23), appoints the executive boards, which are subordinate departments or branches of the executive, although not called departments in the statute (section 40). The boards in

turn are empowered to appoint the heads of subordinate executive departments (section 48), and they also employ or appoint subordinate executive employes and officers (sections 41, 47, 100).

It is made the duty of the mayor to be vigilant and active in causing the ordinances of the city and the laws of the State to be enforced (section 29). He is required to "exercise a general supervision over all the executive and ministerial officers of the city, and see that their official duties are honestly performed. He may require from them statements in writing concerning the discharge of their duties" (section 31). He may appoint persons "to examine, without notice, the affairs and accounts of any city department, trustee, officer or employe," * * * and to report to him the results of such investigation.

If these powers were all that were attached to the office of mayor, he would be helpless to perform the duties required of him. In what way could he be vigilant and active in causing the ordinances of the city to be enforced if the boards of his appointment, creatures of his creation, were turned upon confirmation into a set of Frankenstein monsters, who could set him at defiance? How could he exercise a general supervision over all the executive and ministerial officers of the city, and see that their official duties are honestly performed, if those officers are responsible alone to a tribunal over which he has no control, though appointed by him and sharing his executive powers? What sort of statements in writing concerning the discharge of their duties might he expect from members of the boards who share his powers, and, because it was supposed that they were responsible to him, have been given greater powers than those granted to him? What benefit would he derive from statements of subordinate officials, heads of inferior departments, etc., who are responsible alone to independent and perhaps hostile tribunals? With what obstructions, tangible and intangible, would the examiners appointed by him meet in investigating the affairs of a city department over which he could exercise no control, or of an officer who owed allegiance to a different chief?

Again (section 52), authority is given to refer any matter in dispute as to the powers or duties of said boards or the officers thereof to the mayor, who shall examine and determine the questions involved, and whose decision shall be final as between said boards or said officers. There would be little prospect of a reference of any matter in dispute to the mayor, if the boards are entirely independent of his control.

By section 107 it is provided that "in times of peril from riot, extensive conflagration, disorder, or the apprehension thereof, the chief of policemen shall be subordinate to the mayor, and obey his orders and directions." With the chief of police subject to removal at pleasure by the board of safety, and with the board of safety entirely independent of and hostile to the mayor, who is to determine whether peril from riot, disorder, or the apprehension thereof exists, and which of his two masters will the chief of police be likely to serve under such circumstances—the one who has no power over him or the one which can decapitate him at pleasure?

The provision for written charges against and trial of policemen before their removal from the force, upon which some stress has been laid in argument, was not part of the original act, and no argument can justly be drawn from it as to the intent of the original act, or the intent of any part of it not affected by the amendment. This amendment (section 2, act of March 23, 1894) was passed, so far as can be inferred from its provisions, as a civil service reform measure

designed to take the police force out of politics. The suggestion[8] which have been given, and many more which might be drawn from the provisions of the act, indicate clearly that the intent of the Legislature was to adopt the theory which has in modern times become the accepted theory of municipal government, that there should be a responsible head of the municipal executive, and that he should be clothed with authority commensurate with his responsibility.

The modern theory has been well expressed by Judge Cooley: "Experience has also demonstrated the necessity of more power and more responsibility in the executive head of our municipal institutions. Too often the duties of the mayor or executive officer are only nominal, and to these he gives but little attention—a natural result of his want of importance, and of his inability to control the administration of municipal affairs. If the office be clothed with dignity and real authority; if the mayor shall be invested with the veto power; if he shall have the sole right to appoint and the unrestricted power to suspend or remove subordinate officials or heads of departments, then the citizens can justly demand of him that he shall be individually responsible for the proper conduct of the concerns of the municipality, and, if grievances exist, they will know to whom to apply for remedy or upon whom to fix the blame."

It is not necessary to suppose that the Legislature had the present condition of affairs in mind in passing the act, though it is to be presumed that they considered the contingency of the death or resignation of the mayor during his term. What they probably had mainly in view was the contingency which was to be expected, namely, that the mayor and the boards of his appointment might differ in their views of what was necessary for the proper conduct of the city government, or might become engaged in a quarrel over personal matters; and so the purpose of the Legislature being clearly deducible from the act itself, the question remains whether apt language was used to express that intention, and, if so, whether the Constitution gave the right to effect the object.

Section 32 provides: "Removal of officials appointed by the mayor. He may, by a written order giving his reasons therefor, remove from office any head of a department, director or other officer appointed by him. A copy of said order shall be sent to the board of aldermen at its next meeting. Unless such order be disapproved by the board of aldermen within thirty days said order shall stand."

It is contended for the boards that this section does not include them upon the ground of the rule of construction that "a statute which enumerates persons or things of an inferior rank, dignity or importance is not to be extended by the addition of general words to persons or things of a higher rank, dignity or importance than the highest enumerated, if there are any of a lower species to which the words can apply." (Black on Interpretation, 145.)

While this rule of interpretation is most generally invoked to prevent the application of a penal statute, in this case it can have no application, for the members of the boards are themselves, within the meaning of the section, heads of departments. Their duties are prescribed by the charter and their departments are subdivided into other departments—as the police and fire—whose heads are appointed by the boards; yet the two great divisions, though not called "departments," are none the less so, and the members of the boards are none the less heads of them. It might as well be said that the mayor is not the head of the executive department of the city government. Moreover, the boards are the only heads of

departments to which the Legislature can be presumed to have intended the language to apply, for they are the only heads of departments (unless we may call the comptroller's office a department) "appointed by him."

It remains to be considered whether the removal provided for by section 32 was forbidden by section 160 of the Constitution. That section, after providing specifically for certain-named officers of municipalities, and thereby creating what was never known to any former Constitution, namely, constitutional municipal officers, fixing their terms of office and the manner of their selection under various conditions, proceeds: "The General Assembly shall prescribe the qualifications of all officers of towns and cities, the manner and causes for which they may be removed from office, and how vacancies in such offices may be filled."

That section is susceptible of two interpretations: One, that the concluding clause referred only to those municipal offices which were mentioned in the Constitution—that is, to the constitutional municipal offices—and has no application to municipal offices which are the mere creatures of the Legislature. The other construction is that the section was intended to be permissive; to enlarge the power of the Legislature as to offices which had been made constitutional by the new Constitution, and to give to the Legislature a power which it otherwise would not have had, inasmuch as the offices had been made constitutional; and in the construction of the constitutional provision the language should be interpreted in its natural sense as it was understood by the people who voted for it. It is difficult to suppose that the average voter, in considering the section which gave the Legislature power to provide the manner in and causes for which officers might be removed from their offices, understood or intended that those causes were limited to such as were at common law grounds for impeachment.

In theory Constitutions are made by the whole people. In actual practice they are submitted to them for ratification, and the words used are to be given their common meaning, and not to be construed technically. It must be remembered that under the former Constitutions it was well established and undisputed that the Legislature was without power to provide qualifications for constitutional officers in addition to the qualifications provided in the Constitution, or to provide for their removal for any cause other than the causes recognized by the common law at the time of the adoption of the Constitution, or to provide any manner of removing a constitutional officer except upon notice and hearing. (Page v. Hardin, 8 B. Mon., 648.)

On the other hand, prior to the adoption of this Constitution, it was equally well settled that as to officers which were not constitutional but wholly statutory, the Legislature had full power to provide their qualifications and the manner of their removal, whether the removal was to be with or without cause, or with or without notice and hearing. (South v. Commissioners, 86 Ky., 186.)

Before the adoption of the present Constitution the Legislature was omnipotent as to municipal government and municipal officers, and when the new Constitution was adopted, which created certain constitutional municipal offices, a wise provision was inserted to prevent those new constitutional offices becoming subject to the then established rule of law; and the language of this provision must be construed according to its common meaning.

"In interpreting clauses we must presume that the words have been employed in their natural and ordinary meaning. As Marshall, Chief Justice, says: 'The framers of the Constitution and the people

who adopt it must be understood to have employed words in their natural sense, and to have intended what they have said.' This is but saying that no forced or unnatural construction is to be put upon their language; and it seems so obvious a truism that one expects to see it universally accepted without any question; but the attempt is made so often by interested subtlety and ingenious refinement to induce the courts to force from these instruments a meaning which their framers never held, that it frequently becomes necessary to re-declare this fundamental maxim. Narrow and technical reasoning is misplaced when it is brought to bear upon an instrument framed by the people themselves for themselves, and designed as a chart upon which every man, learned and unlearned, may be able to trace the leading principles of government." (Cooley's Constitutional Limitations, sixth edition, page 73.)

In my judgment the constitutional provision is a wise one, and section 32 of the act under consideration was adopted in accordance with the purpose of the constitutional provision, which was intended to be permissive and not restrictive upon the power of the Legislature.

In passing upon its validity this court should be guided by the well-settled rule of statutory construction which is thus stated by Judge Cooley in his work on Constitutional Limitations: "It has been said by eminent jurists that when courts are called upon to pronounce the invalidity of an act of legislation, passed with all the forms and ceremonies requisite to give it the force of law, they will approach the question with great caution, examine it in every possible aspect, and ponder upon it as long as deliberation and patient attention can throw any new light upon the subject, and never declare a statute void unless the nullity and invalidity of the act are placed, in their judgment, beyond reasonable doubt. A reasonable doubt must be solved in favor of the legislative action, and the act be sustained.

"The question whether a law be void for its repugnancy to the Constitution is at all times a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station could it be unmindful of the solemn obligation which that station imposes; but it is not on slight implication and vague conjecture that the Legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the Constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other.

"Mr. Justice Washington gives a reason for this rule which has been repeatedly recognized in other cases which we have cited. After expressing the opinion that the particular question there presented, and which regarded the constitutionality of a State law was involved in difficulty and doubt, he says: 'But if I could rest my opinion in favor of the constitutionality of the law on which the question arises on no other ground than this doubt so felt and acknowledged, that alone would, in my estimation, be a satisfactory vindication of it. It is but a decent respect due to the wisdom, the integrity and the patriotism of the legislative body by which any law is passed, to presume in favor of its validity until its violation of the constitution is proved beyond all reasonable doubt.'" (Cooley's Constitutional Limitation, sixth edition, page 216.)

GIBBS V. BOARD OF ALDERMEN OF THE CITY OF LOUISVILLE.

(*Filed June* 16, 1896.)

1. *Impeachment of city officers—Jurisdiction of board of aldermen*—The board of aldermen of the city of Louisville has jurisdiction of a proceeding to remove a member of the board of park commissioners in the mode pointed out in section 2781 of the Kentucky Statutes.

2. *Power of Legislature to create courts*—The Legislature had power to confer upon the board of aldermen that jurisdiction by virtue of section 160 of the Constitution which requires it to provide the manner in and causes for which city officers may be removed; and, while the Legislature has no power to create courts, the fact that the statute refers to the board of aldermen as a "court" does not render the statute unconstitutional, the powers of the board in impeachment proceedings not being strictly judicial.

3. *Removal of officer for cause*—Where no causes of removal have been designated by the statute the common-law rule supplies the defect, and the officer may be removed for malfeasance or misfeasance, or for any cause that unfits him for the place.

Hargis & Turner and F. Hagan for appellant.

H. S. Barker and Kohn & Baird for appellees.

Appeal from Jefferson Circuit Court, Common Pleas division.

Opinion of the court by Chief Justice Pryor.

This case involves a question of jurisdiction only. The appellant, Gibbs, was a member of the board of park commissioners, and, for cause alleged, was cited to appear before the board of aldermen upon a proceeding to remove him from office. The jurisdiction to remove the appellant is found in section 2781 of the Kentucky Statutes, and is as follows: "Executive and ministerial officers, unless otherwise provided in this act, shall be removable by the board of aldermen sitting as a court, under oath or affirmation, upon charges preferred by the mayor or any two members of the board of councilmen, etc."

It is claimed that the manner of removing such an official has been otherwise provided for under section 2847 of an act for the government of cities of the first class. That section reads: "If any member of said board (park commissioners) cease to be a *bona fide* resident or housekeeper of the city, or incur any of the disqualifications mentioned herein, or become incapacitated to perform any of the duties of commissioner, or be found guilty of any felony or high misdemeanor, he shall immediately cease to be a member of said board." And that, by the provisions of this section, the board of aldermen are in effect prohibited from removing the appellant by impeachment, and that, if such jurisdiction is attempted to be given, no such power exists, as is shown by the change made in the present Constitution on this subject. The Constitution of 1849 provided: "The judicial power of this Commonwealth shall be vested, both as to matters of law and equity, in one supreme court (to be styled Court of Appeals), the courts established by this Constitution, and such courts inferior to the supreme court as the General Assembly may, from time to time, establish." The present Constitution provides: "The judicial power of the Commonwealth, both as to matters of law and equity, shall be vested in the senate, when sitting as a court of impeachment, and one supreme court (to be styled the Court of Appeals), and the courts established by this Constitution."

So it is contended that the new or present Constitution created all the courts necessary for the purposes of State government and withheld from the Legislature the power to create courts, as was authorized by the Constitution of 1849. Section 160 of the present Constitution left with the Legislature the right of determining the manner in and the cause for which city officials may be removed; and, while the board of aldermen may be termed, in one sense, a court, it is an organized municipal body, with the power to remove city officials, and is not a court of impeachment, nor was it ever contemplated by the framers of the Constitution that city officers could be removed by impeachment proceedings before the State senate. Angel & Ames on Corporations, section 110, say: "That the power of *amotion* is incident to every corporation." Mr. Dillon, in his work on Municipal Corporations, says: "The power to remove a corporate officer from his office, for reasonable and just cause, is one of the common-law incidents to every corporation." And the framers of the Constitution, recognizing the common law rule on the subject, by an express constitutional provision, gave the power to the Legislature to provide the manner and the causes for which officials of municipal governments may be removed. This power to remove is not strictly judicial, and was not so regarded at common law; and the fact that the board of aldermen is called a court does not make the entire act unconstitutional.

We have recently held, in the case of Todd, mayor v. The Boards of Public Works and Safety (*ante* 329), that where no causes of removal have been designated, the common-law rule supplies the defect, and if the causes are assigned as to the removal of a park commissioner, there is no other mode of proceeding pointed out than the section of the statute giving to the board of aldermen the power to determine such questions. This is the only tribunal provided by the charter, and that the board has the jurisdiction to remove the official for misfeasance or malfeasance in office as well as for causes that unfit him for the place is, we think, unquestioned. (Hinkle v. City of Louisville.)

This case has been heretofore in this court on questions bearing on the issue now presented. The case will be found reported in 96 Ky., 407. And the court held the party could not be indicted and punished for perjury because the committee, as constituted, making the investigation was not authorized to administer an oath; but this did not affect the jurisdiction of the board to try the appellant for the offenses charged.

We have nothing to do in the case before us as to the guilt or innocence of the appellant. As before stated, the only question is as to the jurisdiction of the board of aldermen to try the appellant.

It is not necessary to determine whether there should be a conviction by a court of competent jurisdiction, under an indictment for bribery or perjury, which of itself would render the office vacant, before the board could act. Other charges are made of an indefinite character that may affect the discharge of his duties as an official, or, if not, render him unfit for the place. But, as before stated, we are not investigating such questions. but only the one of jurisdiction.

The judgment is, therefore, affirmed.

NEALE'S ADM'R V. NEALE, &C.

(*Filed June* 16, 1896—*Not to be reported.*)

1. *Assignment of note—Burden of proof*—In a suit by an administrator upon a note executed to his intestate, in which a third person asserted claim to the note under an assignment from a son of the payee, who claimed the right to assign it by virtue of a written assignment of the note purporting to have been executed to him by his mother, the plaintiff having by his reply denied that the pretended assignment of the note by his intestate was her act or deed, the burden was upon the claimant of the note to establish the validity of that assignment.

2. *Evidence as to transaction with deceased*—The mere fact that one has divested himself of all interest in a claim against the estate of a deceased person does not render him a competent witness against the estate with regard to the transaction had by him with the decedent, out of which the claim arose; and this is true, whether he divested himself of his interest before or after the death of the decedent. Therefore, even though the assignor of the claimant in this case had no interest in the controversy, he was not a competent witness to establish the validity of the assignment to him.

3. *Same*—But the assignor of the claimant was directly interested in the issue for the reason that he is liable to his assignee if he had no title to the note, and, therefore, for that reason he was not a competent witness as to the transaction by which he claimed to be the owner of the note, even though it be necessary that the witness should be interested in the issue in order to render him incompetent to testify against the estate of the decedent.

E. W. Hines and Wilkins & Bradburn for appellant.

Lewis McQuown for appellees.

Appeal from Allen Circuit Court.

Opinion of the court by Judge Landes.

The material questions in this case are, first, were the allegations of the reply, which were designed to put in issue the validity of the assignment of the note sued on by the appellant's intestate to T. S. Neale, sufficient to put on the appellee, Thomas Ralston, the burden of proving it; and, second, was T. S. Neale a competent witness to prove the validity of the assignment of said note to him by the intestate?

The note in question was executed by the appellee, E. P. Neale, to the intestate, Mary W. Neale, on the 11th day of April, 1882, for the sum of $1,050, due one day after date, and in some way passed into the possession of T. S. Neale, the son of the intestate, who, on the 2d day of February, 1884, borrowed from the appellee, Thomas Ralston, $1,150, and executed his note therefor, and delivered the note sued on to Ralston as collateral security for the sum he had borrowed from him.

By an endorsement on the back of the note it appears to have been transferred to him by the intestate on the 31st day of January, 1884. On the 2d day of August, 1893, and previous to the death of the intestate, he assigned the note absolutely to the appellee, Thomas Ralston.

After the death of Mrs. Neale, which occurred in September, 1893, the appellant qualified as her administrator, and brought this suit against E. P. Neale, the maker of the note, and appellee Ralston, claiming that the note belonged to the estate of the intestate, and calling upon appellee Ralston to assert any claim he might have

to the note. Ralston filed his answer, setting up the note and the assignment of it to T. S. Neale by the intestate, and by T. S. Neale to him, as has been stated, and making his answer a cross petition against E. P. Neale, the maker of the note; asked judgment on the note in his favor against him.

The appellant filed a reply, containing the following allegations, for the purpose of putting in issue the validity of the assignment of the note by the intestate to T. S. Neale, viz: "He says that he is informed, believes and so charges that Mary W. Neale did not by herself make or write said pretended writing of transfer and assignment, nor authorized anyone else to make the same, and he, therefore, denies that said alleged pretended assignment or transfer is the act or deed of said Mary W. Neale. He says that he has no knowledge or information sufficient to form a belief as to whether, on the 2d day of February, 1884, or at any other time, the said T. S. Neale borrowed from the defendant $1,150, or any other sum, or executed to the defendant his note for said sum or any other sum, or that, in order to secure the payment of said sum or any other sum, or for any other purpose delivered or assigned to defendant, as collateral security or otherwise, said note which defendant, E. P. Neale, had executed to Mary W. Neale, or which she had assigned to T. S. Neale, as alleged, or at all. He again denies that she ever assigned or transferred said note to T. S. Neale. * * He alleges that said T. S. Neale had no right or authority from the true owner of said note, this plaintiff's intestate, Mary W. Neale, to deposit said note as collateral security, or to transfer or assign it to said Ralston for any purpose; or that said T. S. Neale did not own said note, or any part of it, nor had he any right to collect any part of it, nor to deposit it with defendant Ralston, for any purpose; nor to transfer or assign to said Ralston said note, or any part of it, and the said Ralston, by said alleged transfer or assignment, acquired no title to said note or interest in its proceeds, or any part of it." The reply was sworn to by the appellant, the affidavit stating that "the statements in the foregoing reply are true."

1st. We can not see that the issue as to the validity of the alleged assignment of the note to T. S. Neale could have been presented more definitely or directly than it was presented in the allegations we have quoted from the reply. It is conceded that the transfer was written by T. S. Neale, and it is expressly denied that Mrs. Neale transferred it to him. Certainly, if it was done by him without authority, the transfer was not the act and deed of Mary W. Neale, the payee of the note. The facts with reference to the alleged transfer were not presumably within the knowledge of the appellant, and the form or manner of making the statements to put the matter in issue is all that could have been required of him in his attitude or relation to the parties to the alleged transaction, and was sufficient to throw the burden on appellee Ralston, who claimed under the alleged transfers of the note, to establish its genuineness or validity.

2d. In order to establish the legal validity of the transfer the deposition of T. S. Neale was taken, to which exception was filed by the appellant, which was overruled by the court, and his testimony on that point was permitted to be read to the jury.

Section 606, clause 2 of the Civil Code contains the following provision: * * * "No person shall testify for himself concerning any verbal statement of, or any transaction with, or any act done or omitted to be done by * * * one who is * * * *dead when the testimony is offered* to be given, except, etc."

Clause 9 of the same section is as follows: "The assignment of a claim by a person who is incompetent to testify for himself shall not make him competent to testify for another."

These provisions have repeatedly been construed by this court, and the settled construction is that they were designed and their effect is to render incompetent the testimony of one concerning his transactions with another which become the subject of litigation, after the death of one of the parties to the transaction, between the representatives of the deceased party and another, regardless of whether or not the surviving party to the transaction, whose testimony is offered, is a party to the litigation or is interested therein. (Hardin's adm'r v. Taylor, 78 Ky., 593; Harpending's ex'or v. Daniel, 80 *Ib.*, 449; Hopkins' adm'r v. Faeber, trustee, 86 *Ib.*, 223; Hurry v. Kline, 98 *Ib.*, 358; Hobbs' ex'or v. Russell's ex'or, 79 *Ib.*, 61; Alexander's ex'ors v. Alford, &c., 89 *Ib.*, 105.)

In the case last referred to it was held that the mere fact that one has divested himself of all interest in a claim against the estate of a deceased person does not render him a competent witness against the estate with regard to the transaction had by him with the decedent, out of which the claim arose.

After quoting the two clauses of section 606 of the Civil Code, which we have quoted, the following language was used by the court: "The interest of the witness may be in equipoise, or he may be testifying against his interest, still his testimony affects the rights of those who are not present to speak with reference to the transaction; and in rendering all competent to testify this was made an exception, and for the purpose of denying to one the right to testify for himself when the person with whom he had the transaction can not be heard to speak. Interest does not now exclude one from testifying; but when testifying for himself, *or when he has assigned the claim, and would have been incompetent if he had not assigned it*, he can not testify against one who is dead with reference to the transaction, *although he may have divested himself of all interest.*"

The court proceeded to say that the very object of the exception was to protect the estates and interests of those who can not speak, and that the fact that the party who made the contract which might be the subject of such litigation was no longer interested in the subject-matter furnished no reason for disregarding the exception, and added that "the interest of the witness in such a case is not the subject of the inquiry; but the question is, does the statement made affect the rights of the party who is dead? If so, he is incompetent, the whole object of the statute being to place the dead and the living upon terms of perfect equality in this particular—the one not being able to testify, the other shall not." We approve and adhere to the doctrine announced in these cases on this question.

But counsel for the appellees insists that the note having been assigned by T. S. Neale to Ralston during the life of Mrs. Neale, the payee of the note, and at a time when T. S. Neale would have been a competent witness to testify concerning it, he could not be disqualified by assigning the note, and so render himself incompetent after the death of Mrs. Neale because, as they contend, clause 9 of the section refers only to "a person *who is* incompetent," under clause 2, to testify concerning the transaction at the time it occurs. This position of counsel is not tenable for the obvious reason that the condition of a disqualification of a person to testify *before assigning away his interest in the subject-matter*, imposed by clause 2, is the fact of the party with whom the transaction was made *being "dead at the time the testimony is offered to be given,"* and this condition

necessarily operates after as well as before the assignment of the interest of the witness in the subject-matter of such a transaction, for without it the manifest object of the provision in clause 9 could easily be defeated.

We can not approve a construction of the statute, designed to remove restrictions upon the competency of parties to litigation to testify and at the same time place them upon an exact equality, that would operate to defeat the object and purpose of its enactment.

Thus far we have considered the question from the point of view that T. S. Neale had no interest in the issue as to the validity of the assignment to him of the note sued on; but if the assignment was not valid, and did not give him title to the note, it follows that he had no right to assign it to the appellee, Thomas Ralston, and his assignment of it to Ralston did not give the latter title to it as against Mrs. Neale or her personal representative. Consequently T. S. Neale was directly interested in the issue, and in effect testified "for himself," for it was manifestly to his interest to establish the validity of the assignment to him, and thus avoid liability to Ralston, which would attach to him if he had no title to the note; so that, in either view of the question, T. S. Neale was not a competent witness to the transaction by which it is claimed he became the owner of the note, and the court below erred in permitting his testimony as to that transaction to be read to the jury.

Other exceptions were taken, which are mentioned in the grounds for a new trial, but are not discussed in the briefs of counsel. We shall not pass upon them because it does not seem necessary to do so, and counsel seem to have abandoned them.

But for the reasons given the judgment is reversed and the cause remanded, with directions to set aside the verdict and award the appellant a new trial and for proceedings consistent with this opinion.

BERNARD LEAS MFG. CO. v. WALLER.

(*Filed June* 17, 1896—*Not to be reported.*)

Sales of personal property—Breach of warranty—Offer to return—In this action to recover the purchase price of machinery sold by plaintiff to defendant, in which the defendant by his answer pleaded a breach of warranty and sought to recover by way of counterclaim the damage resulting therefrom, the court erred in permitting the defendant to file an amended answer offering to return the machinery, as this plea came too late. While the defendant might have escaped liability for the price if he had offered to return the machinery within a reasonable time after discovering the breach of warranty or worthlessness of the machine, yet, having failed to do that, he must pay for the machine and be allowed such damages as he has sustained by reason of the breach of warranty.

S. B. & R. D. Vance for appellant.

Allen & Hughes for appellee.

Appeal from Union Circuit Court.

Opinion of the court by Judge Guffy.

This action was instituted by the appellant to recover of appellee an alleged balance of $516.96, due for elevator machinery for his warehouse.

The substance of the defense is that the machinery was worthless, and would not at all answer the purpose, and that appellant had warranted the same and had undertaken to erect same, and have it in full and perfect operation by a certain time; and that appellant had also failed to comply with that part of the contract. Appellee also set out specifically various items of damage, and asked $1,275 damages.

Appellant denied all the material averments of appellee as to damages, warranty, etc., as well as pleading that the failure of the machine to answer the purpose was the fault of appellee.

A trial resulted in a verdict and judgment in favor of appellee for the sums of $262.50 and $625, making a total of $887.50, and to this verdict the jury added the following: "The above verdict is upon the basis that the defendant keeps the scales, and the plaintiff to take the other machinery out of the house."

Judgment was suspended upon the verdict, and on the next day it appears that the defendant appeared and consented upon the payment of the amount of the verdict, that the plaintiff might remove the machinery, except the Fairbanks wagon scales. Thereupon judgment was entered in favor of appellee for $887.50, with interest and cost, and upon payment thereof plaintiff was authorized to remove said machinery.

Appellant moved for a new trial, relying upon several grounds, which motion was overruled by the court, and appellant has appealed.

It seems to us that the court erred in permitting appellee to file the amended answer, averring his willingness for appellants to remove the machinery. That plea came too late. He might have, within a reasonable time after discovering the breach of warranty or worthlessness of the machine, have offered to return the machine, and if his cause of action was well founded he would have been relieved from any liability for the price or value of the same, and might have had such other relief as he showed himself entitled to; but, not having done so, the verdict and judgment ought not to have been rendered or allowed to stand.

The appellee should account for the value, if any, of the machinery left in the warehouse, at the time and place when it was ceased to be used, including the Fairbanks scales, and be allowed the amounts paid by him to appellant, and also be allowed such damages, if any, as he has sustained by reason of the breach of warranty and failure of appellant to comply with the contract, if such breach or failure be shown.

For the reasons indicated the judgment of the court below is reversed and cause remanded for a new trial upon principles consistent with this opinion.

NEWPORT NEWS & MISSISSIPPI VALLEY CO. V. STUART'S ADM'R.

SAME V. STUART.

SAME V. STUART, BY, &C.

SAME V. WYATT, BY, &C.

(*Filed June* 17, 1896.)

1. *Railroads—Duty to have flagman at dangerous crossing*—Where a railroad crossing near a populous town was unusually dangerous by reason of the obstruction of the view by a deep cut, it was not improper to require the

company to have a flagman at the point to warn travelers of the approach of trains or to adopt and use some other reasonably safe mode of warning travelers. And in this action against the railroad company to recover damages for injuries resulting from a collision at the crossing it was not error to instruct the jury that if they believed by reason of the conditions named the crossing was exceptionally or unusually dangerous it was the duty of defendant to keep a flagman there "or to adopt and use some other reasonably safe and effectual mode of warning travelers of the approach of trains." This instruction did not make it incumbent upon the company to adopt some mode that would make it impossible for a person to be injured, but merely required that the means should be reasonably effective.

2. *Same—Instruction*—An instruction as to contributory negligence which submitted to the jury the question as to the intelligence of the plaintiff's intestate, a boy thirteen years old, was not prejudicial to defendant, as there was in fact no question in the evidence on this point, as all the plaintiff's evidence showed that the boy was remarkably bright and intelligent.

Smith, Robbins & Thomas and P. H. Darby for appellant.

R. O. Hester, H. J. Moorman and W. H. Hester for appellees.

Appeal from Graves Circuit Court.

Opinion of the court by Judge Guffy.

The appellees, in separate suits in the Graves Court of Common Pleas, recovered judgments against the appellant, and appellant's motions for new trials having been overruled it prosecuted appeals to the Superior Court of Kentucky, which court affirmed the judgments, and the appellant obtained appeals to this court, which appeals, upon request of parties, are heard together.

It appears that W. H. Stuart, Charles Stuart, Zephyr Wyatt and Robert Stuart attempted to cross the Railroad track in a wagon, and a collision occurred between the wagon and a locomotive, resulting in the instant death of Robert Stuart and the injury of the others. Four actions were brought against the railroad company, in which it was charged that the collision was the result of the appellant's negligence. One of the actions was by the personal representative of Robert Stuart, and one by each of the other persons injured.

The defense in each case was a denial of negligence, and a plea of contributory negligence on the part of the injured parties. The pleadings, the evidence and the rulings of the court in each case were substantially the same, and will be disposed of in one opinion.

The highway crossed the railroad a short distance north of the corporate line of Mayfield, Ky., and about fifteen or twenty feet south of a deep cut. The north end is about two hundred and eighty yards from the crossing. The whistling post is about two hundred and sixty-five yards from the north end of the cut. The railroad track is considerably elevated above the highway, and in crossing the grade is steep.

On account of the conformation of the surrounding country travelers upon the highway approaching this crossing from the city of Mayfield can not see a train coming from the north until they get within twelve or fifteen feet of the track, but the engineer or fireman on the locomotive can see the horses to a wagon from any point in the cut, and a little distance north of it, when the horses get within twelve or fifteen feet of the track. When the wind is from the south, as it seems to have been on the evening of the injury, it sweeps through the cut and obstructs any sound coming from the north. The highway is the only road leading from the north to Mayfield,

and is a thoroughfare continuously used by people going to and returning from Mayfield.

W. H. Stuart, the father of Robert and Charles, was blind; Robert was thirteen years old, Charles was younger, and Zephyr Wyatt was fourteen years old. The train that collided with the wagon was due at Mayfield at seven minutes past 6 P. M.

The evidence tends to show that the parties injured left Mayfield about half-past 6, being past the time the train was due at Mayfield. The testimony conduces to show that the parties in the wagon thought the train had passed, and as they drove along their attention was directed to a freight train near the depot and south of the crossing, which train was moving to and fro. The old man cautioned the children to look and listen; he listened. At a point shortly before reaching the crossing they stopped, thinking that the freight train was about to run up to or beyond the crossing. Seeing that it moved back, they drove on, so as to cross before it returned towards the crossing. They did not see nor did they hear the whistle or other sound of the train which was approaching from the north. Just as they got on the track, and when it was too late to turn back, they saw the train almost upon them; the driver whipped up the team, and as the rear end of the wagon was about to leave the track it was struck by the engine.

Witnesses, who were just north of the cut and saw the train as it passed, testify that no whistle was blown at the whistling post, and that none was blown until it was about to enter the cut, and then only two short blasts were made in quick succession. (This evidence is contradicted by other evidence.) The train was one of the fastest on the road, its schedule time being about twenty-eight miles per hour; it was behind time, and there is evidence tending to show that it was running very fast.

Plaintiffs' evidence also tends to show that if the engineer and fireman had been on the lookout they could have seen the team in time to have stopped the train or so checked its speed as to have avoided the collision.

The evidence for the defendant showed that the usual sound of the whistle was made at the whistling post, and that the whistle was sounded about the time the engine entered the cut, and there is also evidence of several persons hearing the train coming, and, seeing the danger the parties were in, shouted to them, endeavoring to warn them.

The engineer and fireman swear that they did not see the team until the engine was within forty or fifty feet of the wagon, and that it was impossible to stop the train in time to avoid the collision.

Several grounds for a new trial are relied on, some of which need not be noticed.

The evidence entitled the plaintiff to go to the jury, hence the peremptory instruction was properly refused. The second instruction is upon the question of contributory negligence, and is in the usual form, with the exception that it submitted to the jury the question as to the intelligence of Robert Stuart, the boy who was killed. There was in fact no question in the evidence on this point, as all the plaintiffs' evidence showed that he was a remarkably bright and intelligent boy, and had driven on the road, hauling wood, etc., often, and, therefore, the jury could not have been misled or the defendant prejudiced by this portion of the instruction.

The third instruction is very seriously and earnestly objected to, which is in the following language: "The court instructs the jury that if they believe from the evidence that, by reason of the prox-

imity of the crossing to the city of Mayfield and the number of the traveling public crossing there, or by reason of any obstruction of view of the railroad or of the hearing of the approach of trains, said crossing was exceptionally or unusually dangerous, then it was the duty of the defendant to use ordinary care to discover such danger, and, if necessary to avoid injury to travelers, to keep a flagman there to warn travelers of approaching trains, or to adopt and use some other reasonably safe and effectual mode of warning travelers of the approach of its trains; and if the jury believe from the evidence that defendant negligently failed to discover such danger, if any, or negligently failed to provide or use such means of warning as were reasonably safe and effectual to avoid injury to such travelers, and by reason thereof the injury to deceased occurred, then the defendant is liable unless deceased negligently contributed to such injury and death, as defined in instruction No. 2."

The crossing in question was near a populous town; was the only way to the town for the people in the country north of it, and was continuously used by persons on horseback and in vehicles. On account of the elevation of the track above the highway, and the steep approaches to it, it could not be crossed at an ordinary traveling gait; the deep cut and the conformation of the surrounding country were such that a person could not see the approaching trains from the north until within fifteen or twenty feet of the track, and, if driving a horse, could not see the train until his horse's head had almost reached the track and further under certain conditions, which were not infrequent, many persons, especially when riding in a wagon, could not hear the approach of a train or its whistle.

Under the circumstances it was the duty of the company to use more precaution to avoid injury to persons using the highway than at ordinary crossings; and, those conditions existing, it was not improper to require the company to have a flagman at the point to warn travelers of approaching trains, or to adopt and use some other reasonably safe mode of warning travelers. (L. C. & L. R. Co. v. Goetz's adm'r, 79 Ky., 449, 80 Ky., 103.)

But it is still further urged that the instruction is erroneous because it required the company to use an effectual mode of warning travelers. In other words, that it made it incumbent upon the company to adopt some mode that would make it impossible for a person to be injured.

We do not think that the instruction could have been so understood by the jury. The evident meaning was that the means should be reasonably effective.

The other instructions given give to the plaintiffs no right to recover unless the defendant was guilty of negligence, and manifestly the jury believed the defendant guilty of negligence in each case.

The other instructions given were not prejudicial to the substantial rights of appellant in either of the cases, and those asked by appellant were properly refused.

Judgment in each of the cases is affirmed.

TOBIN V. SOUTH'S ADM'X, &C.

(*Filed June* 18, 1896—*Not to be reported.*)

1. *Evidence*—Upon an issue as to the value of appellant's services as warehouseman the court properly refused to permit him to introduce testimony

as to the character of other business in which he was interested and that needed his attention.

2. *Same*—The claim of appellant being against the estate of a deceased person, the court properly refused to permit him to testify for himself as to an agreement between him and the decedent as to the amount he was to receive for his services, neither the personal representative nor any person interested in the estate having testified.

3. *Interest*—As the matters between the parties had remained unsettled for a number of years, during which they might have been settled, and in the meantime the balance due either party on their mutual claims was uncertain and indefinite, interest should have been allowed on the balance found to be due by appellant only from the date of the commencement of the action.

W. H. Julian and Ira Julian for appellant.

Frank Chinn and John W. Rodman for appellees.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Landes.

The issue as to the amount due the appellant for services as warehouseman was submitted to a jury by the court as an issue out of chancery. The appellant claimed the sum of $2,750 for his services, being at the rate of $500 per year for five and one-half years, while the appellee asserted that his services for the whole time was worth not exceeding $500.

Upon the trial of that issue the court refused to permit the appellant to introduce testimony as to the character of other business in which appellant was engaged or interested, and that needed his attention, and also that he was responsible to the banks for the safety of the goods stored in the warehouse. The object of offering this testimony was that it might be considered as the basis in part of estimating the value of his services.

We think the testimony was properly excluded, for although it might have been considered by the appellant in a proper case in making his own estimate of the value or worth of his services, it does not follow that it was proper to be considered as affecting the question as between himself and those for whom he was employed, or that it would have thrown light upon that question.

The appellant also offered to testify as to his having made an agreement with Samuel South with reference to what he was to receive for his services as warehouseman, and the court refused to permit him to testify on that matter.

In our opinion the action of the court in this regard was proper. Samuel South was dead, and it does not appear that any one interested in the estate of the decedent or his representative had testified with reference to the making of the agreement, and the appellant was on that account not a competent witness. (Civil Code, section 606, clause 2.)

The objection that the verdict was not responsive to the question submitted can not be sustained. The questions to be tried under the submission were as to whether the appellant and South had agreed as to what he was to receive, and as to the value of his services as warehouseman. His claim being for $500 per year for the whole time, and the appellees asserting that he was entitled to no more than $500 for the whole time, the jury fixed the amount at $850 for the whole time, thus showing that the jury found gainst his claim that his compensation had been agreed on, and at the same time fixed the amount he was entitled to for his services.

These questions being disposed of, the next question is whether the judgment allowing interest on the balance found due from appellant to appellees was proper. In our opinion the court erred in allowing interest on the balance of $796.50 from January 1, 1881. The whole case shows that the matters between the parties had remained unsettled for a number of years, during which they might have been settled, and in the meantime the amount of balance due either party on their mutual claims was uncertain and indefinite.

We do not think it was the character of case, upon the facts shown in this record, in which the court was authorized to allow interest for this long period of time. Interest should have been allowed, and ought to be allowed, however, from the date of the commencement of the action, November 7, 1890, on the sum of $796.50.

Therefore the judgment, in so far as it allows interest on said sum from January 1, 1881, is reversed and the cause remanded for further proceedings consistent with this opinion.

MANION, BY, &C. V. OHIO VALLEY RY. CO.

(*Filed June* 18, 1896.)

1. *Compromise by guardian*—Without statutory restraint a guardian may compromise, settle and release claims and demands due to or made by or on behalf of his ward, and the ward will be bound thereby unless it is done in bad faith.

2. *Same*—Section 2030 of the Kentucky Statutes does not require leave of court in order to authorize a guardian to compromise a claim of the ward for unliquidated damages on account of a tort, as the expression "debt or demand," as used in the statute, does not embrace such claims. How far the statute was intended to restrict the right of the guardian to compromise liquidated demands is not determined.

S. B. & R. D. Vance for appellant.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge Landes.

The question raised in this case is whether the guardian of the infant appellant had the lawful power to bind him by compromising a claim for damages against the appellee, alleged to have been caused by reason of the negligence of the appellee.

It seems that the infant appellant was in the service of the appellee company on the 27th day of July, 1892, in the capacity of watchman and fireman on one of its engines, and that on that day, at McClain Station, on Green river island, between Henderson and Evansville, he stumbled over a pile of rocks and fell upon the railroad track in front of the engine, and his leg was run over and broken and "so badly mutilated that it had to be amputated just below the knee."

Afterwards James F. Manion, his father, was appointed and qualified as his guardian, and compromised with the company for the sum of $400, which was paid by the company and the receipt of the guardian taken for the amount, which reads as follows: "Received, March 31st, 1893, of the Ohio Valley Railway Company, the sum of four hundred dollars, in full compromise, satisfaction and discharge of all claims or causes of action against it, or any of its lessees, and particularly of all claims or causes of action arising out of injuries

received by Mathew Manion, by loss of leg, by being run over by engine No. 6, on O. V. Railway, near mile 494, on or about July 27, 1892."

Action was commenced against the company by the infant, suing by his said guardian, on the 30th day of June, 1893, seeking to recover $5,000 in damages for the alleged injury. Defense was made, in which the alleged negligence was denied, and the said compromise and payment of $400, and receipt therefor, were set up as a full discharge of the company from all further liability to the infant appellant.

In the reply it was admitted in substance that the compromise was made, and the $400 were paid as alleged in the answer; but it was averred that "in consideration of the payment of said sum, and the agreement of defendant to furnish a place and employment to plaintiff, his guardian did agree that same should be a settlement of all claims and causes of action against the defendant arising out of said injury."

It was then averred that the company, having paid the $400, "refused to give employment to plaintiff, as it had agreed," and that "*said agreement was made by his said guardian without leave of court, and was not binding on him.*" A demurrer to the reply was filed and sustained by the court and the petition dismissed, and that judgment is before us on this appeal.

Without statutory restraint a guardian may compromise, settle and release claims and demands due to or made by or on behalf of his ward, and the ward will be bound thereby unless it is done in bad faith or in fraud of his rights. Authorities on this question are collated in a valuable note to the case of Hayes v. Massachusetts Mutual Life Ins. Co., 1 L. R. A., 304, decided by the Supreme Court of Illinois.

It is insisted by counsel for the appellant that the powers of guardians in this State are restricted by statute, and that the compromise made by the guardian in this case was unauthorized, and was not binding on the infant appellant.

The statute relied on is section 5 of article 2 of chapter 48 of the General Statutes (Kentucky Statutes, section 2030), which contains the following provision with reference to the duties and powers of guardians, viz: "He shall receive and sue for the *debts and demands owing to the ward*, defend actions against him and, with leave of court, may compound *a debt or demand*."

The contention is that the compromise, having been made by the guardian without leave of court, was without authority, or beyond the authority conferred upon him by law, and was, therefore, not binding on the infant appellant.

It does not appear that this question has heretofore been passed on by this court, nor do we deem it necessary in this case to determine how far the powers of guardians are restricted by the statute with reference to the compounding of *debts and demands owing to their wards*, for it is manifest that the claim for damages here is not the kind of claim which is embraced in the meaning of the words "debt or demand" used in the statute, and which a guardian may not "compound" without leave of court, the words used, in our opinion, being intended to designate or describe such claims as may be *due or owing* to the ward, and, consequently, not such as are of the nature of unliquidated damages for tort to the person or property of the ward. (Anderson's Dictionary of Law, *in loco* "Claim," "Demand.")

We hold, therefore, that the guardian had the power and authority in law to compromise the claim, and that the court did not err in

sustaining the demurrer to the reply. If the terms upon which the claim for damages was compromised have not been complied with, that is not a matter that was cognizable in this case; and if there was bad faith or fraud in the transaction on the part of the company it does not appear from the averments in the reply.

Finding no error, the judgment is affirmed.

TODD, MAYOR, &C. v. JOHNSON, COUNTY CLERK, &C.

(*Filed June* 23, 1896.)

1. *Cities of first class—Vacancy in office of mayor—How filled*—Under section 160 of the Constitution the General Assembly has no power to provide how vacancies in elective offices for towns and cities shall be filled except temporarily and until an election can be had by the people to fill the unexpired term as provided by section 152 of the Constitution. And in so far as section 2788 of the Kentucky Statutes provides for the temporary filling by the general council of a vacancy in the office of mayor of a city of the first class it conforms to the requirements of section 160 of the Constitution. But as to the time at which an election is to be held by the people to fill the unexpired term section 152 of the Constitution must control, and it is therefore not necessary to construe the statute as to that matter.

2. *Same*—Section 152 of the Constitution, which provides that vacancies in all elective offices shall be filled at the next succeeding annual election at which "either city, town, county, district or State officers are to be elected," provided three months intervene between the happening of the vacancy and such election, was intended to provide for the filling of vacancies at regular elections for officers of any of the divisions or subdivisions named, whether such officers be named in the Constitution or not.

3. *Same—State officers*—Presidential electors are "State officers" within the meaning of that provision of the Constitution, and, therefore, a vacancy in the office of mayor of the city of Louisville having occurred in January, 1896, the appellant, who was chosen mayor *pro tempore* by the general council, is entitled to hold the office only until an election can be had by the people in November, 1896, to fill out the unexpired term, there being an election at that time for presidential electors.

4. *Same—District officers*—It would seem that common school trustees are "district officers" within the meaning of section 152 of the Constitution, and that the fact that such officers are to be elected in the city of Louisville in November, 1896, would alone be sufficient to authorize an election at that time to fill a vacancy in the office of mayor, but it is not necessary to determine that question.

John Marshall, Henry S. Barker and Fairleigh & Straus for appellants.

Humphrey & Davie, T. L. Burnett, Lytle Buchanan, Robert E. Woods, Phelps & Thum and Alfred Selligman for appellees.

Appeal from Jefferson Circuit Court, Common Pleas division.

Opinion of the court by Judge Hazelrigg.

The death of Henry S. Tyler in January, 1896, caused a vacancy in the office of mayor of the city of Louisville, and the appellant, George D. Todd, was in due time, and as provided by statute, chosen mayor *pro tempore* by the general council.

Whether this temporary election by the council was to fill out the entire unexpired term of Tyler, who had been elected in November,

1893, for four years, or was to provide an incumbent only until an election by the people in November, 1896, is the sole question presented on this appeal.

The sections of the Constitution supposed to affect the question are as follows:

"Section 152. Except as otherwise provided in this Constitution, vacancies in all elective offices shall be filled by election or appointment, as follows: If the unexpired term will end at the next succeeding annual election at which either city, town, county, district or State officers are to be elected, the office shall be filled by appointment for the remainder of the term. If the unexpired term will not end at the next succeeding annual election at which either city, town, county, district or State officers are to be elected, and if three months intervene before said succeeding election at which either city, town, county, district or State officers are to be elected, the office shall be filled by appointment until said election, and then said vacancy shall be filled by election for the remainder of the term." * * * The balance of the section is not involved here.

Section 160, after making certain provisions as to mayors or chief executives, police judges and members of legislative boards or councils of towns and cities, and providing for the election or appointment of other officers of towns and cities, concludes as follows: "The General Assembly shall prescribe the qualifications of all officers of towns and cities, the manner in and causes for which they may be removed from office, and how vacancies in such offices may be filled."

In obedience to the one or the other of these sections, or of both, the General Assembly, in the enactment of a charter for cities of the first class (section 2788, Kentucky Statutes), provided as follows: "When a vacancy shall take place in the office of mayor, a mayor *pro tempore* shall be chosen by the general council, in joint session, by the votes of a majority of the members elected. If the vacancy occur three months or more prior to a regular municipal election, a mayor shall be chosen for the unexpired term at the said election. If the vacancy occur within three months, the mayor *pro tempore* chosen by the general council shall serve until the regular election for mayor. It shall be the duty of the president of the board of aldermen to issue his proclamation for such joint session, to be held not less than ten nor more than twenty days after such vacancy shall take place. Until the vacancy is filled the president of the board of aldermen shall act as mayor."

As there is to be no "regular municipal election" in Louisville in November, 1896, the appellant contends that the vacancy can not be filled then, if the plain letter of the statute be observed; but with regard to the meaning to be given the words "regular municipal election," it seems clear to us that in so far as the statute provides "*how*" or by what process the vacancy is to be filled, namely, by the action of the general council in joint session and by the votes of a majority of the members elected, etc., it conforms to and meets the requirements of the provisions of section 160, giving the General Assembly the power to provide *how* such vacancy may be filled. But we think when it comes to providing the time at which an election is to be held by the people to fill the vacancy for the unexpired term of this officer, confessedly "elective" under the Constitution, we must look to section 152 of that instrument; and if the statute changes the time there fixed, so much the worse for the statute, the Constitution must control.

In considering this precise question in Shelly v. McCulloch, 17 KY.

LAW REP., 53, we reached the conclusion that the power of the General Assembly was limited to providing how vacancies in elective offices of towns and cities might be filled temporarily, and until an election could be had by the people to fill the unexpired term as provided by section 152. We need not repeat here the reasons there given fully for our conclusions.

However, granting this, the appellant says there is to be, at the November election, 1896, no election "at which either city, town, county, district or State officers" are to be elected, and, therefore, the vacancy can not then be filled; and this brings us to consider the only serious question in this case. There will be elected at that time the electors of president and vice-president, and these, say counsel for the appellees, are "State officers;" and such they undoubtedly are.

The Kentucky Statutes, section 1514, provide for their election—which means an election by the people on a general ticket—on the Tuesday next after the first Monday in November, 1892, and on the same day in every fourth year thereafter. By section 1543 they are required to convene at the capitol of the State on the morning of the second Monday in January after their election, cast their votes and make due return thereof according to law; and for each day an elector so attends (section 1545) he is entitled to receive the same *per diem* and mileage as may at the time be allowed to a member of the General Assembly, to be paid out of the State treasury. He would seem, therefore, to be no more converted into a Federal officer, because he is elected by the people to cast his vote for a presidential candidate, than a member of the General Assembly would be considered a Federal officer because, when elected, he casts his vote for a Senator of the United States; for while the latter is supposed to do more than that, he does that much, and his status as a State officer is not affected.

In *In re* Green, 134 U. S., 379, Mr. Justice Gray said: "By the Constitution of the United States the electors for president and vice-president in each State are appointed by the State, in such manner as its Legislature may direct. * * * (Constitution, article 2, section 2.) The sole function of the presidential electors is to cast, certify and transmit the vote of the State for president and vice-president of the Nation. Although the electors are appointed and act under and pursuant to the Constitution of the United States, they are no more officers or agents of the United States than are members of the State Legislatures when acting as electors of Federal Senators, or the people of the States when acting as electors of representatives in Congress." And a conviction in the State court for illegal voting for electors at a regular State election was upheld.

So in McPherson v. Blacker, 146 U. S., 35, where the validity of a State law was attacked as repugnant to the Constitution of the United States because the law provided for the appointment of electors by district elections, the court upheld the State law on the ground that "the Legislatures of the several States have *exclusive* power to direct the manner in which the electors of president and vice-president shall be appointed," and held that they might be appointed by the Legislatures directly or by popular vote in districts or by general ticket. "In short," said the court, "the appointment and mode of appointment of electors belong exclusively to the States under the Constitution of the United States."

When framing the present Constitution, therefore, its makers had before them the plain provisions of the statutes making these officers "State officers," not in some peculiar or qualified sense, but in every conceivable sense, Congress having no control over their election or

appointment, but being empowered merely to determine the time when they should be chosen; and they had before them, if that were needed, the decisions of the Supreme Court to this effect.

Why they should be held, therefore, to have intended that the words "State officers," in section 152, should not include these electors—these particular State officers—we can not conceive.

It is said, however, that these officers are not named in the Constitution. This is true, and for the best of reasons. It would have been a wholly useless thing, unless indeed it had been thought desirable to fix permanently the mode of electing such officers. The technical rule of construction which would confine the words "city, town, county, district or State officers" to those officers which had been mentioned in the Constitution, if adopted, would not only override the literal construction of the section, which undeniably includes these electors, but would also set at defiance the well-settled constitutional policy of our State since the abrogation in 1850 of the old Constitution of 1799. And that policy is to refer to the people—the source of all governmental power—the right of filling the offices of their creation with incumbents of their own selection.

The only excuse for the appointment of any officer made elective under the law is founded on the emergency of the public business, and when by death, removal, resignation or otherwise an elective office is made vacant, the policy of the law is to give to the people a chance to fill it as soon as practicable.

"The great object in the change in the system," said this court in Speed, &c. v. Crawford, 3 Met., 207, and which is emphasized in the well-considered case of Toney v. Harris, 85 Ky., 473, was to refer to the people the choice of their officers of all grades and classes, whether State, district, county, city or town offices. That choice was to be made through the instrumentality of an election.

In Berry v. McCollough, 94 Ky., 247, we had under consideration section 148 of the Constitution in so far as it prohibited the election of city, town or county officers in the same year in which members of Congress are elected. And it was contended that a vacancy in the office of coroner of Jefferson county could be filled at the election of county officers in 1892. We held that the adoption of such a construction "would stretch the appointive term very far beyond what was even intended or provided for under either the old or the new Constitution," and "construed the prohibition to apply to regular elections only."

The framers of the Constitution were not ignorant of this policy, and they must be supposed to have intended to embrace in the comprehensive language used in the section, viz., city, town, county, district or State officers, all the officers of these divisions and subdivisions, from the highest to the lowest, which were then electible by the people, or which, under any future law, might become so; and to have intended that the occasion of any such election must furnish also the occasion for filling vacancies in any elective office.

It will be observed that the vacancy is to be filled at the "next succeeding *annual* election at which, etc."

The use of the word "annual" is not without significance. It carries with it the idea of an annually recurring election, and one which must, under the scheme devised in the Constitution, recur in every November for all time.

The construction we have adopted gives at least some force to this word, for, including presidential election, the occasions afforded for filling vacancies are largely increased, and elections for that purpose become at least more nearly "annual." Indeed the use of this

word gives strong color to the argument of one of our associates that upon the first Tuesday after the first Monday in November of every year the occasion arises for filling any vacancy in an elective office, if it occurs, of course, more than three months before, because no such November can occur when there will not be an election in some of the classes named.

As to odd years there would seem to be no question of the right to hold the elections to fill any vacancy, and in even years there will always either be an election for presidential electors, or a district election for a judge or judges of the Court of Appeals.

Waiving for the present the question of the electors, an illustration of this argument may be drawn from the present situation.

The regular election for a judge of this court from the Fifth district is to be held at the approaching November election. There was a vacancy on the bench, caused in —— of this year, by the death of our late associate, the lamented John R. Grace, and the argument is that it is most inconceivable to suppose the law makers intended that an election might be held for the purpose of electing a regular judge of this court, and yet not one held at the same regular election to fill a vacancy on the same bench. This view of the matter, however, is not suggested or argued by counsel, and need not, therefore, be considered further than to say that the use of these words, "at which either city, etc.," would seem to indicate that it was not at every succeeding November election that vacancies might be filled, but only when those were to be elected of the classes named, and hence unless an officer of that class is to be elected the vacancy can not be filled, even if there be an election for members of the lower house of Congress.

Be this as it may, we are convinced that within the meaning and intent of the Constitution vacancies in elective offices may be filled at the succeeding annual election at which electors for president and vice-president are to be elected.

It appears from the agreed facts and from the statute on the subject that a trustee for the Louisville common schools is to be elected in each legislative district of the city, and it is argued that this is an election at which "district officers" are to be elected within the meaning of section 152, and an election, too, in the same territory as that covered in the election for mayor.

This would *seem* to be true, but a determination of that question is not necessary in this case.

The judgment must be affirmed.

Judges Guffy and DuRelle dissenting.

Judge Landes not sitting.

Judge DuRelle delivered the following dissenting opinion in the case of Todd, Mayor, &c. v. Johnson, County Clerk, &c.:

Henry S. Tyler, mayor of Louisville, died on January 14, 1896, and the appellant, Geo. D. Todd, was thereupon elected mayor by the general council. The election was had under the provisions of the act for the government of cities of the first class, Kentucky Statutes, section 2788, as follows: "When a vacancy shall take place in the office of mayor a mayor *pro tempore* shall be chosen by the general council in joint session by the vote of a majority of the members elected. If the vacancy occur three months or more prior to a regular municipal election a mayor shall be chosen for the unexpired term at the said election. If the vacancy occur within three months the mayor *pro tempore* chosen by the general council shall serve until the regular election for mayor. It shall be the duty of the

president of the board of aldermen to issue the proclamation for such joint session, to be held not less than ten nor more than twenty days after such vacancy shall take place. Until the vacancy is filled the president of the board of aldermen shall act as mayor."

The term for which Mayor Tyler was elected will expire in November, 1897, and the vacancy occurred more than three months before the November election, 1896. As there is to be no "regular municipal election" in November, 1896, as conceded by the opinion of the majority, the plain letter of the statute requires the election to be in November, 1897, unless the Constitution renders the statute inoperative as to the time of holding the election.

It is contended by appellees that the time of holding the election for mayor is controlled by section 152 of the Constitution, because of the fact that in November, 1896, there are to be elected school trustees in the city of Louisville and presidential electors throughout the State.

Section 152 of the Constitution provides: "Except as otherwise provided in this Constitution, vacancies in all elective offices shall be filled by election or appointment, as follows: "If the unexpired term will end at the next succeeding annual election, at which either city, town, county, district or State officers are to be elected, the office shall be filled by appointment for the remainder of the term. If the unexpired term will not end at the next succeeding annual election, at which either city, town, county, district or State officers are to be elected, and if three months intervene before said succeeding election, on which either city, town, county, district or State officers are to be elected, the office shall be filled by appointment until said election, and then said vacancy shall be filled by election for the remainder of the term."

The remainder of the section need not be considered here except to note the somewhat striking fact that the "succeeding annual election" is referred to five times in this section, and each time is followed by the qualifying phrase "at which either city, town, county, district or State officers are to be elected."

The questions involved in the case are reduced to these: First, is it "otherwise provided in this Constitution" that the office of mayor may be filled at a different time and in a different manner to be prescribed by the General Assembly from the time and manner prescribed by section 152? second, if the Constitution has not so otherwise provided—

a. Are school trustees either such city or such district officers within the meaning of section 152 as to control the time of the election of the mayor; and

b. Are presidential electors State officers within the meaning of section 152 of the Constitution?

First, is there a provision otherwise in the Constitution?

Section 160, after making certain provisions as to the mayor and other named officers of municipalities, provides: "The General Assembly shall prescribe the qualification of all officers of towns and cities, the manner in and causes for which they may be removed from office, and how vacancies in such offices may be filled."

This provision is not ambiguous. It delegates to the Legislature the control of the manner in which vacancies in such offices may be filled. But it is insisted that this section does not mean what it says, and that its specific provisions are controlled by the general expression contained in section 152, in spite of the saving clause at the beginning of that section, "except as otherwise provided in this Constitution."

It is further contended that in Shelly v. McCulloch, 17 KY. LAW REP., 53, this court so decided. There was no statutory provision for filling a vacancy in the office of tax receiver involved in that case, and this court held that the provision of section 152 controlled in the absence of statutory provision. It is freely admitted, however, that the logic of that opinion goes further than the point expressly decided, and while in that case there has been no legislative construction of the meaning of the Constitution, and the court was not there confronted with the question whether an act of the General Assembly was unconstitutional, we do not think we should be justified in dissenting from the opinion of the majority upon this ground alone.

But the remaining questions are a different matter. Leaving the statute out of the question, and assuming that it is unconstitutional and void, we have first the question whether school trustees are officers of cities or districts within the meaning of section 152; and in this connection it may be doubted whether they are officers at all in the strict meaning of the term, and whether they are not, in the view of the Constitution, what their name implies—trustees of their districts for the management of the educational interests thereof, having no other power or duty, and exercising no official functions. The act for the government of cities of the first class, after fully providing for all city officers and for a complete system of city government, enters upon a distinct field, namely, that of education. All the statutory provisions on the subject are under the distinct title of "Education," beginning with section 2949, Kentucky Statutes. At the very beginning the school board is created an independent corporation, with a distinct government of its own, responsible for its own acts, making its own contracts, suing and sued in its own name, and from time to time in litigation with the city. Its autonomy is perfect, and the only connection it has with the city government lies in the fact that the city is required to levy, collect and pay over to the school board an annual tax.

A consideration of that portion of the act for the government of cities of the first class relating to the school board leads us to the conclusion that they are not city officers within the meaning of the section of the Constitution under consideration. Their election, moreover, is put by the Constitution upon an entirely different footing from that of city, town, county, district or State officers. By section 155 of the Constitution it is provided that their election shall not be governed by the rule laid down in the Constitution for other elections; it is not required to be, and is not, in fact, held by secret ballot, but under the old *viva voce* method, and the votes are registered by the clerks of the election in separate books provided for that purpose. The very qualifications of the voters may, under the section referred to, be different from the constitutional qualifications for electors of State and other officers, and it is probably competent for the Legislature to provide that women shall be entitled to vote at such an election. Their election need not be in November. Generally throughout the State it is held on the first Saturday in June. Both in the cities of the first class and in the county districts it is an annual election (Kentucky Statutes, section 4434), and if the construction contended for by appellees on this point, and intimated at the close of the opinion of the majority, be correct, there is no year in which there is not an annual election at which district officers are to be elected. And this would lead logically to the conclusion that vacancies in county offices throughout the State would be required by section 152 to be filled at the annual June election, if that happened

to be the next succeeding election before which three months intervened after the vacancy occurred, although this is forbidden by section 148, which requires all such officers to be elected in November. Moreover, the Constitution itself, in section 155, provides that section 152 "shall not apply to the election of school trustees and other common school district elections," thereby excluding those elections from consideration in determining the meaning of section 152. Nor does this case come within the rule laid down in Shelly v. McCulloch, before referred to, for in order to cover the territory embraced in the city of Louisville, throughout which the mayor's election is held, it is necessary to combine seven separate school trustee districts, in each of which there is to be held a distinct and independent election for school trustees. There is no officer to be elected whose electoral district covers the territorial limits of the city. In Shelly v. McCulloch this court said: "Unless the territorial limits of the particular office to be filled were embraced by that of the nearest succeeding election, the rule might be different. For example, a vacancy in a State office would not be filled at a succeeding election in which only city officers were to be elected."

We think the true construction of section 152 probably is that a vacancy in an office can be filled only at an election at which officers of the like class are to be elected; but, be that as it may, the case of Shelly v. McCulloch does not decide the point contended for by appellees that a number of independent elections can be united to authorize the filling of a vacancy in an office, the election district of which embraces them all. We do not believe that an election in every constable's district in the State would of itself authorize the filling of a vacancy in a state office under section 152. In our opinion the school trustee elections to be held in Louisville in November 1896, do not make that election one at which either city, district or State officers are to be elected.

And this brings us to consider what is aptly termed in the opinion of the majority "the only serious question in the case." There will be elected in November, 1896, electors for president and vice-president, and these, say the counsel for appellees, are "State officers." In a limited sense they may be so termed, and they have sometimes been described as agents of the State to cast its vote for president and vice-president. But are they officers of the State within the meaning of section 152 of the Kentucky Constitution? They are nowhere mentioned in that instrument. The act which authorizes their election was not authorized thereby. The Kentucky Legislature derives its whole power in that regard from the Constitution of the United States. "Each State shall appoint, *in such manner as the Legislature thereof may direct*, a number of electors, equal to the whole number of senators and representatives to which the State may be entitled in the Congress, but no senator or representative or person holding an office of trust or profit under the United States shall be appointed an elector."

The sole power of the State as to the electors is the power of naming them in such a manner as the Legislature may direct. The act which provides the mode of selecting electors derives its authority not from the Kentucky Constitution but from the Constitution of the United States. When the Constitution of this State provided for the government of the Commonwealth, and the officers who were to administer that government, no officers were in contemplation except those who derived their official capacity from the State Constitution, or the laws passed in pursuance thereto. The framers of the instrument and the people who voted to adopt it certainly

tion of 1850 should have nothing to do with the construction of the present Constitution.

It must be assumed that the new Constitution was intended to effect a change of policy in every respect in which the language used indicates a different purpose from that used in the former instrument. Constitutional conventions are not held nor are Constitutions adopted for the purpose of perpetuating governmental policies, but for the purpose of changing them. A new Constitution is a new departure; and so the policy of the Constitution of 1850, to refer all matters to the vote of the people as quickly as possible, can have no place in the construction of the language of section 152 of the present Constitution, which indicates in five separate places an intention to alter or qualify that policy.

In our opinion it was a matter of little importance whether the Constitution should fix the time of filling the vacancy in one year or another, but we deem it of great importance that the correct rule of constitutional construction be adopted by this court.

McNEW, &C. v. WILLIAMS, &C.

(*Filed June* 20, 1896—*Not to be reported.*)

1. *Formation of new county—Transfer of suits*—The fact that a new county is formed and courts established in it does not authorize the court of a county in which actions are pending to transfer them to the new county because the subject of litigation is situated in or the parties to the action reside within the territorial limits of such new county. The court can only be divested of jurisdiction by appropriate legislation.

2. *Partial transcript—Presumption*—In this action to recover land claimed by defendants under a purchase at judicial sale in an action which was transferred from one court to another, as it does not clearly appear at what stage of the proceedings the transfer was made, this court, in the absence from the transcript of an amended answer which might have pleaded that fact, will presume that the sale was made and confirmed in the court in which the action was originally pending, as the defendants, if that was the fact, acquired such a title as constitutes an available defense, even though the action was transferred without authority and the orders of the court to which the action was transferred, and under which deeds were made, were void.

3. *Same*—When the transcript shows that the record contained a paper which may have contained matter that would sustain the decision, the appellant must include such paper in the transaction or this court will presume the decision appealed from to be correct.

4. *Same*—In the absence of an order of the court or a bill of exceptions showing the contrary, the presumption must be indulged that a certified copy of the record of another suit which was made a part of the answer was a part of this record and considered on the trial of the case. And this is true, although it appears that after the exhibit had been before the court and had been considered by it, there was a rule against defendant's attorneys to produce it, and they filed a response denying that it was in their possession.

W. W. McGuire, James Goble and W. S. Harkins for appellants.

John L. Scott & Son and D. D. Sublett for appellees.

Appeal from Magoffin Circuit Court.

Opinion of the court by Judge Paynter.

The appellants brought four suits to recover certain boundaries of land particularly described in the petition. The appellees were not all made defendants in either of the suits. By consent of the parties the suits were transferred from ordinary to equity and consolidated. The plaintiffs claimed to be the heirs at law of Wm. H. McNew, who died in Floyd county in 1857. The land described in the petition was situated in Floyd county, and continued to be within the boundary of that county until 1860, when Magoffin was formed, whose boundary embraced the land in controversy.

While separate answers were filed by some of the defendants, a joint answer was filed for most of them. The answers denied that the plaintiffs were the owners of the several tracts of land which were sought to be recovered. A number of defenses were interposed.

In the fifth paragraph of the answer the death of Wm. McNew in Floyd county, the appointment and qualification of his personal representatives, etc., is alleged, and in addition thereto in substance that the personal estate being insufficient to pay the debts owing by the estate the personal representative brought suit in the Floyd Circuit Court, to which the plaintiffs in this action were made defendants, suggesting the insufficiency of the personal estate to pay its debts; that a settlement of the estate was asked and a sale of enough of the real estate owned by the decedent at his death to pay the balance of the indebtedness of the estate, etc.

It is further alleged "that the Floyd Circuit Court, by appropriate and proper orders, changed the venue of said case to the county of Magoffin, and transferred the suit aforesaid to the Magoffin Circuit Court, *and such proceedings were had in the Floyd Circuit Court and the Magoffin Circuit Court* as resulted in a judgment of sale and a sale of all the lands claimed in these actions by the plaintiffs for the payment of the debts of their ancestor, W. H. McNew, which said sales were confirmed by the appropriate and proper orders of the *courts*, and deeds made by the *courts'* commissioners, which were examined and approved, etc."

The answer states that a certified copy of the pleadings, exhibits, reports, orders and judgments in the case is filed as part thereof. To the answers demurrers were sustained. An amended answer was filed by the defendants, as appears by an order, as follows, to wit: "This day came *defendants* and tendered and offered to file an amended answer, and plaintiffs objected and cause submitted on said motion, and court, advised, sustains said motion and permits said amended answer to be filed, to which plaintiff excepts."

The clerk certifies that this amended answer is not in the files of his office. A copy of it does not appear in the transcript of the record.

The original answer is indefinite, uncertain and unsatisfactory as to when the case was transferred to the Magoffin Circuit Court, and as to the court in which the orders, etc., were made. The fact that a new county is formed and courts established in it does not authorize the court of a county in which actions are pending to transfer them to the new county because the subject of the litigation is situated in or the parties to the action reside within the territorial limits of such new county. (Drake v. Bedenger, Sneed, 188; Lindsay v. McCormick, 2 Mar., 230.)

The court can only be divested of jurisdiction by appropriate legislation.

If the judgments of sale were entered in Floyd Circuit Court, sale made and confirmed by that court, although the deeds were made

in the Magoffin Circuit Court after the transfer of the case, then the purchaser would have acquired such title to the land as would be an available defense to this action, even if the orders in the Magoffin Circuit Court were void for want of jurisdiction in the court. The amended answer, which is not a part of the transcript, may have pleaded the state of facts we have indicated. Where the transcript shows that the record contained a paper which may have contained matter that would sustain the decision the appellant must include such paper in the transcript or this court will presume the decision appealed from to be correct. (Huffaker v. Bank, 13 Bush, 644; Bowman v. Hollaway, 14 Bush, 426.)

The answer may have alleged facts with reference to the action in question, which showed that the sales to the defendants were valid. It is contended that the burden was on the defendants to show that the judgment was rendered ordering sale; that sales were made and approved by the court, and that this must be shown by an exhibition of the record; that the burden is on the defendants to show the judgments, sales and confirmations is conceded, and that if the record is in existence it must be shown by it.

We have presumed from the facts heretofore stated that the amended answer alleged facts which, if true, rendered the sales valid. It was incumbent on them to exhibit the record or a certified copy of it to sustain its allegations. The answer makes a certified copy of the record part of the answer. Unless the contrary is made to appear by an order of court or by a bill of exceptions the presumption must be indulged that it was a part of the record and considered by the court on the trial of the case.

A copy of this record is not made part of the transcript, and for the reasons given with reference to the absence from the transcript of the amended answer, we must presume the certified copy of the record sustained the allegations of the amended answer. It is insisted that the defendants failed to exhibit the record from the following state of facts: "On October 4, 1894, W. W. McGuire, one of the attorneys for plaintiffs, filed his affidavit, in which he says that this case was submitted for trial and argued by counsel for two terms preceding this, and that the copy of the record in the case of W. H. McNew's adm'r v. W. H. McNew's heirs, &c., referred to in defendants' answer, was before the court on each occasion and *considered* by the court, and that defendants' attorneys have possession of and refuse to produce same. Upon this a rule was awarded against the attorneys of defendants to produce the record in question. On the 5th day of October, 1894, the attorneys for the defendant filed responses to the rule, in which they denied having the record." Nothing further appears in this record in relation to the copy of the record. On the 6th of October, 1894, the court rendered a judgment dismissing the petition.

There was no order made to supply the copy which did not appear to be in the record on the 5th of October, 1894, nor does the court state in its judgment the copy was not used and considered on the trial of the case, and there is no bill of exceptions to show that fact. In view of these facts we must presume the court had before it and considered the copy of the record. We must also presume that the amended answer coupled with section 125 of the Civil Code of Practice, which prescribes the requirements of an answer in an action to recover land.

The judgment is affirmed.

MASSIE V. COMMONWEALTH.

(Filed June 16, 1896—Not to be reported.)

1. *Second appeal—Former opinion*—When this court decides that instructions should or should not be given, as the case may be, it does so upon the facts then under consideration, and, as the facts presented by this record differ materially from those appearing in the records on former appeals in the same case, much that was said in former opinions in the case as to instructions proper to be given does not now apply.

2. *Self defence—Instructions*—The failure to give an instruction as to self-defense upon a trial for murder is not error where there is not the slightest evidence to show that the homicide was excusable upon that ground. But in this case the court gave an instruction as to self-defense, although the accused was not entitled to it.

3. *Prejudicial error*—Whether or not it was improper for the Commonwealth's attorney in his argument to the jury to use language intimating a motive of the killing, his action in doing so was not prejudicial to the substantial rights of the accused, and therefore there can be no reversal on that account.

4. *Summoning jury from adjoining county*—The court in ordering the sheriff to summon a jury from an adjoining county did not err in selecting a county from which former juries in the case had been taken, as that fact afforded no ground for the belief that impartial jurors could not be obtained from that county.

Lindsay & Botts, E. E. Settle and James Andrew Scott for appellant.

W. S. Taylor for appellee.

Appeal from Owen Circuit Court.

Opinion of the court by Judge Paynter.

This is the fourth appeal from judgments sentencing the accused to confinement in the penitentiary for life. His case is entitled to the same patient, earnest and conscientious consideration on this appeal as he received on the former appeals. Juries are triers of the facts, but until they have been permitted to hear such competent testimony which the Commonwealth offers to establish his guilt, and such as he may offer for his own exculpation, and has been properly instructed by the court as to the law applicable to the state of facts presented, it can not be said that the accused has had a fair trial—such a trial as is guaranteed to him by the Constitution and laws of the land.

The facts presented by this record (and by which on this appeal he must be judged) differ very materially from those appearing in the records on former appeals.

When this court decides that instructions should or should not be given, as the case may be, it does so upon the facts then under consideration.

The accused failed to testify on this trial. He did not, therefore, prove on this as on former trials the purpose for which he sought the accused with his gun, nor did he make it appear that he was in real or apparent danger of the loss of his life or suffering bodily harm at the hands of the deceased when the fatal shot was fired, neither was he heard to say that Honaker did not deny the slanderous words imputed to him, nor did he say that "It was not my intention to shoot him when I met him until the shot was fired."

Neither does the record show that Richardson, as on former ap-

peals, testified that "just before the shot Honaker turned in his saddle and placed his left hand behind him and said you ——— something," etc. He testifies that he did not give such evidence on former trials, and he is not contradicted.

The facts preceding and attending the killing, as disclosed by the record, are about as follows: Massie was a reputable physician in Owen county, and his reputation as a peaceable and well-behaved citizen was established by all the witnesses who were interrogated as to it. Massie had a wife and several children. He and the deceased lived in the same neighborhood. James Hanna was his tenant, and on the 10th of October, 1891, between 3 and 4 o'clock P. M. Hanna informed Massie in substance that Honaker had on the previous day told him that he (Massie) had the previous year sustained improper relations with two of his cousins (who were young ladies and had been teachers in the neighborhood the year before and had stayed at Massie's house); that he had kept a regular house, and that Massie was bringing one of them back for the purpose of again having illicit relation with her. On receipt of this news the accused became very much excited, told Hanna to go to his house and stay there until he came. The accused armed himself with a gun, mounted his horse, started rapidly down the road in the direction of Honaker's. He arrived there about 4 o'clock P. M. on the day named, asked Mrs. Honaker where her husband was and she informed him that her husband had gone to Monterey. On receiving this information the accused replied: "You will never see the damned son-of-a-bitch alive again; I am going to kill him; * * I intend to kill him if I have to waylay the road to do it." He then rode rapidly, with his gun in his right hand, towards Monterey. After riding three of four miles he met Honaker and his brother-in-law, John Richardson, in the road, who were returning from Monterey. What occurred may be best told in the language of Richardson, who said: "I saw a man coming down the road riding pretty fast. When he got in a short distance of us he drew his gun on Honaker and said: 'God dam you; I've got you now; I intend to kill you.' Jess (Honaker's given name) said: 'Hold on, Doctor; what's the matter?' Massie said: 'You have been talking about me and mine.' Jess said: 'No I haven't, Doctor,' and Massie said: 'You won't face Jim Hanna and say it,' and Jess said: 'Hanna is a liar, and I will face him or anybody else. I can prove by Alex. Williams that I did not say a word disrespectful of you and your family.'

"When Massie first came up he rode around Honaker and got on the left side of him and a little behind him. I jumped off my horse and tried to get hold of Massie's bridle and told him to hold on. He said: 'Hold on hell and damnation.' They rode up the road, Massie cursing all the time, and holding his gun in a position to shoot him all the way. He held the breech of the gun in his left hand and the muzzle of the gun across the pummel of the saddle or across his right hand, the hand he held the bridle with. My horse got away and I followed them on until I got within twenty yards of Charley Stivers' house. I saw three men in the yard, and I then turned back to get my horse. I caught my horse and started to overtake them. At Stivers' fence I saw Massie raise his gun as though he was going to shoot. He said: 'Go on, God dam you; I will have your heart's blood before you go a mile.' I followed on and overtook them at Stivers' barn. Massie was cursing all the time like a wild man. Jess asked him what it was he said and Massie said: 'You told Jim Hanna yesterday I had been having intercourse with my cousin.'"

Honaker said: 'Hanna is a liar.' Massie told him he would have to face Jim Hanna, and Jess said he would face him or anybody else; that he didn't say it. Massie said: 'You have got to go and do it. Honaker said: 'I will go, but I don't have to go.' Jess said: 'I am not armed,' and said that he was not afraid of him if he had forty guns and pistols.' Massie said: 'If you repeat that I will kill you.' Honaker said: 'I do say it.' Then Massie shot him and rode off.

* * * * * * * * * *

"It was 500 yards from where they met to the place where he was shot. Massie had the gun drawn on Honaker all the time."

Richardson is corroborated by several witnesses and contradicted by none.

George Lewis testified that he was riding up the pike on the evening of the killing and heard Massie tell Honaker that the Honaker family had been trying to get him down ever since he had been in the county, and he would stand it no longer.

James Hanna was introduced as a witness for the accused, who proved that he told Massie of the conversation which he claimed he had with Honaker the day before the killing, etc., as heretofore related, and the consequent effect on the accused—his excitement, etc.

Some witnesses were introduced to prove Massie's good character, and one to prove that he was in a good humor, cheerful and affable a short time before Hanna had the interview with him. Jack Massie, as a witness for accused, testified that shortly after midnight, following the evening of the shooting, he found the accused at the home of Jim Barbers, and that "he did not appear to know anything; he was out of his head."

This is the substance of the evidence offered by the accused. There was not a scintilla of evidence even tending to prove that the killing was done in necessary or apparently necessary self-defense. On the other hand the evidence must have removed any suspicion in the minds of the jury, if any they had, that such necessity existed. He declared his purpose to the wife of deceased to kill her husband, started to find him; met deceased on the road; drew his gun and threatened to shoot him; was dissuaded from then doing it by the deceased, protesting his innocence of the accusation made against him, declaring his willingness to face his accuser. He then followed, abusing the deceased until they reached a point some forty yards beyond the place where they met, when he commanded the deceased to ride on, as he would have his heart's blood before he had ridden a mile. When the deceased had gone about five hundred yards from where they met the deceased again declared he had not had the conversation which Hanna related to the accused, and again expressed his willingness to face Hanna. He then gave the accused to understand he was not afraid of his gun. The accused then threatened to shoot Honaker if he repeated that he was not afraid of his gun. He repeated he was not afraid of it. Then the accused executed his threat by shooting him, from the effects of which he soon died.

It is insisted that the court erred in giving an instruction on murder. If there could be a case other than where the assassin lays in wait for his victim and shoots him, wherein an instruction on murder should be given, this would seem to be the case.

While the court gave an instruction on self-defense, the evidence showed that the accused was not entitled to it. It is not a failure to give the whole law of the case when the court refuses an instruction

on self-defense in a case where there is not the slightest evidence tending to prove the act was excusable on the ground of self-defense or circumstances which indicated that it might have been so committed; and especially in a case like this, where the proof shows that the killing was not done in self-defense. It may be doubted from the facts which appear in this record whether the accused was even entitled to an instruction on manslaughter.

It is insisted that the case should be reversed because of language used by the Commonwealth's attorney in the closing argument of the case. We will not discuss the question as to whether the language used intimating a motive for the killing was improper. It is sufficient to say it did not nor could it have prejudiced the substantial rights of the accused. It seems to us from the evidence in this case the jury could not have done otherwise than find the accused guilty of murder.

The question which it is claimed the Commonwealth's attorney propounded to Hanna, and which it is insisted was prejudicial to the rights of the accused, does not appear in the bill of exceptions, and, therefore, the court has no question to consider. The bill of exceptions fails to show that the defendant offered to read the testimony of Green Barr, given on a former trial, or that he was dead when this trial took place. Of course it does not appear that the court had an opportunity to pass upon the question raised in argument.

Section 194, Criminal Code, provides that "if the judge of the court be satisfied, after having made a fair effort in good faith for that purpose, that from any cause it will be impossible to obtain a jury free from bias in the county wherein the prosecution is pending, he shall be authorized to order the sheriff to summons a sufficient number of qualified jurors from some adjoining county in which the judge shall believe there is the greatest possibility of obtaining impartial jurors, and from those so summoned the jury may be formed."

The court ordered the jury summoned from Carroll county. The fact that other juries had been taken from that county did not establish the fact that an impartial jury could not be gotten from that county, or that the judge did not believe that there was the greatest probability of obtaining impartial jurors from that county. We can not hold that the judge abused his discretion. The accused received all the instructions to which he was entitled, and at least one favorable to him to which he was not entitled.

No error having occurred at the trial which, in our opinion, prejudiced the substantial rights of the actused, the judgment is affirmed.

Per Curiam—Response overruling the petition for rehearing:

The court does not mean, and it can not be fairly deduced from the opinion of the court, that the court was commenting on the defendant's failure to testify as being a circumstance against him.

The court referred to his (the defendant's) testimony on former trials to show that facts of the case differed from what they appeared to be on former trials, as the defendant did not testify on this trial. It was done for the purpose of showing there was an absence of proof to warrant the giving of a certain instruction to the jury which the court held to be proper on former trials, basing it on testimony which was not offered on this trial.

The petition for a rehearing overruled.

MASON & FOARD CO. v. COMMONWEALTH.

(Filed June 18, 1896—Not to be reported.)

1. *Settlement of accounts of prison lessees—Former settlement—Interest*—In these consolidated suits, involving the adjustment of accounts of the appellant company as lessee of the Frankfort and Eddyville prisons, it appearing that in August, 1891, there was a final settlement of the accounts between the company and the commissioners of the sinking fund growing out of the contract for the Frankfort prison, and that after a few months the State accepted the amount found due on the settlement, in full of its demands against appellant, both parties are bound by that settlement, and as no interest was embraced on either side of the account no interest can now be claimed upon any of the items embraced in the account, save the State is entitled to interest on the sum found due on the settlement until it was paid.

2. *Pay of extra guards*—The lessee having undertaken to pay for such extra guards as might be necessary it can not escape liability therefor upon the ground that the State failed to find adequate cell-room for confining the prisoners at night and thus necessitated the extra guards, as the lessee presumably knew the condition of the prison when it entered into the contract.

3. *Work and material furnished at Eddyville*—The claim of the State for work and materials furnished at the Eddyville prison, which the lessee ought to have furnished, is not supported by the evidence, as the articles were such as the State and not the lessee undertook to furnish under the contract in order that the prison might be equipped for the purpose for which it was built. Besides, the board of sinking fund commissioners fully considered its duty to provide the items and ordered them at the cost of the State, which would seem conclusive on the State, even if the board had erred in its construction of the contract.

4. *Construction of buildings for use of convicts*—The court properly rejected the claim of the lessee based upon the failure of the governor and prison officials, though authorized by law to do so, to construct buildings sufficient for the use of the convicts, the labor of which the lessee contracted for, and by which failure it alleges it was compelled to maintain in idleness a large number of convicts. The law, while it authorized, did not require such buildings to be erected, and the lessee took its chances on the character of buildings to be put up.

5. *Broken stone placed on prison yard*—The lessee having macadamized the prison yard at Eddyville with the full knowledge of the board of sinking fund commissioners that the work was being done and would be a permanent and much-needed improvement of the State's property, and the work being also of great benefit to the lessee in operating the prison under its ten-year lease, it is proper that the State and the lessee should each bear one-half the expense of the improvement, the question as to whether the board of sinking fund commissioners ordered the work to be done being involved in doubt.

6. *Return of escaped convicts*—Although there is no covenant in the contract between the State and the lessee respecting the forfeiture provided by the statute of May, 1880, for failure to return escaped convicts, yet so long as the statute was in force the lessee, as a matter of law, was liable to the penalty prescribed. But the forfeitures can not be enforced after the repeal of the law authorizing them, and as to those occurring prior to the repeal, more than eight years before suit was brought, the claim of the State is barred by limitation, even allowing a reasonable time for the capture and return of the convicts after escape.

7. *Water supply at Eddyville prison*—The State being bound by its contract to furnish the water supply, and the board, in recognition of that obligation, having agreed to buy an engine to be placed on the bank of the river to force the water up, the lessee agreeing to charge only the actual cost of pumping the water, the claim of the lessee for pumping the water was properly allowed, only the actual cost being charged.

Wm. Lindsay, John W. Rodman and Knott & Edelen for appellant.

W. J. Hendrick and John D. Carroll for appellee.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Hazelrigg.

This appeal involves the correctness of a judgment in four consolidated suits rendered by the chancellor in adjusting the accounts of the appellant company as lessee of the Frankfort and Eddyville prisons.

The first disputed item is one of interest, growing out of an alleged failure of the appellants to pay the sums agreed to be paid by it when due under the contract for the Frankfort prison of April 1, 1885.

It appears that a final settlement of the accounts between the company and the commissioners of the sinking fund, growing out of this contract, was made in August, 1891, the claims of the State then amounting to the sum of fifty odd thousand dollars and those of the company to thirty odd thousand. No interest was embraced on either side of the account, but the State, after a delay of a few months, for the purpose of investigating an item of some $2,000 claimed by the company and not understood at the time of the settlement, accepted the principal sum of $19,605.59 claimed by it under the contract in full of its demands against the company.

It is insisted for the company that if interest be given it on its undisputed claims allowed in this settlement the amount would approximately reach that claimed for interest by the State. But aside from this, we are of opinion that when the State, acting through its board of sinking fund commissioners—a tribunal admittedly auauthorized to make this settlement—adjusted the accounts and accepted the principal sum due, the parties are bound by it, unless, indeed, a court of equity be appealed to on the ground of mistake or fraud, and of this we hear nothing in any of the plaintiff's pleadings.

In this view of the question it is not necessary to consider the further plea of the company that it was then asserting a claim for damages growing out of the State's failure to erect buildings in lieu of those burned during the lease, and by reason of which a loss of many thousand dollars was sustained by the lessee in maintaining in idleness a large number of convicts. The company avers its willingness to open up this settlement, if it shall be permitted to assert this claim for damages, based, as they contend, on the principles decided in Commonwealth v. Todd, 9 Bush, 708.

For the reasons given both parties are bound by this settlement, and no claim for interest on the one hand or damages on the other is allowable, save the State is entitled to interest on the sum found due on the settlement until it was paid.

In suit No. 2 the State claims the sum of $1,153.33 for salary for four extra guards at the Frankfort prison, and for which, if such guards were necessary, the lessee was to pay according to the contract of April, 1889.

The only defense urged against this claim is that the State failed to provide adequate cell room for confining the prisoners at night, and this necessitated the extra guards. Presumably the lessee knew the condition of the prison when it entered into the contract, and we think this claim, as well as that of $232.85 for rewards for return of

escaped convicts, and disputed for the same reason, should be allowed with interest, as adjudged in the court below.

In case No. 8 the State asserts claim to a balance for salary of guards, but substantially admits a claim of the company for the sum of $21,500, balance due on contract for completing the Eddyville prison, of date October 21, 1888. The State also claims the sum of $15,459 for work and materials furnished at the Eddyville prison, which the lessee ought to have furnished.

The proof of the State itself disposes of this claim. The articles were such as the State and not the lessee undertook to furnish under the contract in order that the prison might be equipped for the purpose for which it was built.

The chief witness for the State, and himself a member of the board of commissioners, testifies in reference to this claim that "the items contained in this account were taken from the records of my office (auditor's office), and cover sums paid by the State under direction of the board of sinking fund commissioners as directors of the prison at Eddyville for work done and articles furnished there to the State;" that "as a member of the board of sinking fund commissioners, and as one of the directors of the penitentiary, it was my duty to examine fully every item of this account, and to direct its payment out of the proper fund, and to pass legally or officially upon the question as to what fund or by whom it should be paid. I approved every item as a member of the board, acting with the board's other members as far as I could, as being proper, lawful, correct and reasonable, and directed their payment out of the general expenditure fund;" and further that the items were necessary for the protection of the State's property, and as proper equipments of the prison; that the board never demanded any of them from the lessee, and the expense was incurred wholly voluntarily on the part of the State and not at the instance of the lessee; that the board fully considered the question as to its duty to provide the items at its own expense and ordered them at the cost of the State.

While this would seem conclusive on the State, it is proper to say that we concur with the board in its construction of the contract on the question involved. The contractor (who was also the lessee) was to complete the prison, ready for occupancy, but not equip it, except with the permanent machinery, etc., and when equipped the lessee was to maintain and operate it free of cost to the State. No part of this claim is chargeable to the company.

The company presents a claim of $2,516.64 in this suit for labor and expenditures furnished upon the order of the warden of the prison, acting under the authority of the board, and the State's witnesses establish its correctness, save to the extent of $200. The company's account of $1,124.07 is rejected by the commissioner and the court because, while the items were ordered by the warden, they seem to be such as the company, rather than the State, should pay for, and we will not disturb this finding.

The item of $214.50 was for material for repairs on the State's property, and such as would not be affected in its use by the lessees, and was ordered by the warden under authority from the board. As to the water account of the company little need be said.

Under the original plans and specifications the State provided for the erection of "waterworks," and the arrangement seems to have been to sink a well, to be operated in connection with the engine in the power house. An immense tank was built on the apex of the adjoining hill, and it was supposed that while the engine was running, to furnish the power for the shop rooms, the pump would be

running to supply the tank, from which all the water would be obtained for the prison. The well, however, proved a failure, and the State abandoned the project.

The board then, clearly in recognition of its contract to furnish the water supply, agreed with the company that the State would buy an engine, to be placed on the bank of the river, to force the water up, the company agreeing to charge only the actual cost of pumping the water.

This agreement appears to have been in force during the creation of the account in question, and as the charges are shown to be at actual cost and are reasonable the commissioner properly allowed them.

A demurrer was properly sustained to the claim of the lessee to the effect that the governor and prison officials, though authorized by law to do so, failed to construct buildings sufficient for the use of the 400 convicts, the labor of which the company contracted for, and by which failure the company, it is alleged, was compelled to maintain in idleness some 150 convicts.

The law, while it authorized, did not require such buildings to be erected, and the lessee took its chances on the character of the buildings to be put up.

The last item presented in this suit by the company is one for macadamizing the prison yard at Eddyville. It appears that in rainy weather the mud became very deep, and it was manifest to the board that something was necessary to be done for the comfort of the inmates of the prison as well as for the officers and guards. It would also be greatly to the convenience of the employes of the lessee.

Just what was done by the board, however, is involved in much doubt, owing to the conflicting proof. One thing, however, is certain. The lessee in the spring of 1892, shortly after the visit of four of the commissioners and after notice that an order had been made by the board to do the work, proceeded, during the succeeding year in the vicinity of the prison, to have quarried, broken and spread over the yard, containing about thirteen acres, some 10,500 cubic yards of stone, a reasonable price for which is shown to be $1.25 per yard, making the cost some $13,000.

No minute of such an order, however, appears to have been entered on the records of the board, and there is a serious conflict of proof as to whether it was in fact ordered. We need not determine the question. It is certain that when the warden applied for advice as to permitting the lessee to take the convicts outside of the walls for the purpose of quarrying the stone, the legal adviser of the board, and a member of it, in February, 1892, advised in writing that if "the men asked for to work in the rock quarry were to be used in doing work ordered by the board of commissioners of the sinking fund for improvement of the grounds inside the prison," then the opinion already delivered to the auditor of public accounts on that behalf covered the inquiry. Other circumstances brought fully to the knowledge of the board the fact that this work was being done, and would be a permanent improvement of the State's property, and a much needed one.

We must not overlook the fact, however, that the work was also of great benefit to the lessee in operating the prison under its ten-year lease, and, without reviewing the contradictory features of the testimony adduced by the State, we are of opinion that an equitable adjustment of the dispute is to require the State to pay only one-half of this claim, the lessee being benefitted to the extent of the balance

by the improved condition of the premises, where its men were engaged at work. Moreover, the actual cost of the work, ascertained by an estimate of time and men employed, will exceed this allowance very little, if at all.

In suit No. 4, and the last one to be considered, the State presents a claim against the lessee for its failure to capture and return a number of escaped convicts to the Frankfort prison under the statute of May, 1880, providing for a forfeiture of $50 in case of such failure. There is no covenant in the contract between the State and the lessee respecting this forfeiture; nevertheless, so long as the statute was in force, the lessee, as a matter of law, was liable to the penalty prescribed.

The lessee took charge of the convicts on April 1, 1885, and in May, 1886, this statute was repealed. It can not be seriously contended that these forfeitures can be enforced after the repeal of the law authorizing them; and we can hardly see how, in the face of the plea of limitation, those can be enforced, which occurred some eight years before suit was brought to enforce them, even allowing a reasonable time for such capture and return after the escape. We think nothing is due the State on these forfeitures.

Summarizing, we think the State should be allowed as follows:

For interest in case No. 1, on balance due on settlement,	$771 15
Interest thereon to September 20, 1893, date of commissioner's report	65 54
For extra guards at Frankfort prison, case No. 2	1,153 33
Interest, September 20, 1893	38 45
For escapes at Frankfort prison, and interest	241 58
For guards at Eddyville	22,653 24
Interest, September 20, 1893	771 10
Total	$25,694 39
Due the company:	
For work and Materials at Eddyville	$2,316 64
Interest, September 20, 1893	52 00
For Southern manufacturing account and interest	219 86
For balance due on prison contract	21,500 00
Interest, per commissinner's report, September 20, 1893,	3,211 66
For water account	3,285 45
Interest, commissioner's report	82 13
Broken stone contract	6,500 00
Eight months' interest to September, 20, 1893	260 00
Total	$37,427 74
Balance due appellant	$11,733 35

To avoid a restatement of interest we have adjusted the accounts as of September 20, 1893, the date of the master's report and judgment for the above balance will be entered for the appellant as of that date.

For the reasons indicated the judgment below is reversed on the original and affirmed on the cross appeal, with directions to enter judgment in accordance with this opinion.

McCain, &c. v. Putnam, &c.

(*Filed June* 20, 1896—*Not to be reported.*)

1. *Proceeding to open road—Appeals*—The circuit court upon appeal from an order of the county court refusing to open a road having "dismissed the appeal and proceedings," this court must affirm that judgment, as the circuit court, if it had undertaken to pass upon the sufficiency of the viewers' report and of the regularity of the proceedings, must have quashed the proceedings even if the county court had established the road instead of refusing to establish it.

2. *Bar*—Neither the judgment of the county court nor that of the circuit court will be a bar to other or new proceedings by appellants to establish the road under the statute now in force, if the facts authorize it.

H. P. Cooper for appellants.

S. A. Russell for appellees.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Landes.

There is not enough in the record before us in this case to enable us to pass upon the merits of this controversy with reference to the establishment of the proposed new road in Marion county from the old Jarboe road to the New Market and Lebanon turnpike, nor does the record show upon what the county court based its judgment refusing to open the road, nor what the circuit court based its judgment on dismissing the appeal and proceedings, except that the latter judgment is stated to have been "on the face of the papers."

The statement in the brief of counsel of the appellants that "it would be difficult to picture greater necessity for a road than such as appeared in this case" does not aid the court in the absence from the record of evidence to show the propriety of establishing the road based on the necessity of the case.

The county court did not act on the motion of appellees to quash the report of the viewers. If the circuit court, on appeal, had undertaken to pass on the questions of the sufficiency of the viewers' report and the amendment to it, and of the regularity of the proceedings, it must have quashed the proceedings, even if the county court had established the road, instead of refusing to establish it, without regard to the real merits of the application.

If the appeal were from such a judgment we would be constrained to affirm it upon the record before us. The same result precisely must follow now, although the judgment appealed from dismissed "the appeal and proceedings" without showing the questions which were passed upon by the court.

But it is proper to say that neither the judgment of the county court nor that of the circuit court will be a bar to other or new proceedings by appellants to establish the road under the statute now in force if the facts authorize it.

The judgment is affirmed.

The Kentucky Law Reporter.

EDITOR:
WALTER G. CHAPMAN, ... Frankfort, Ky.

VOL. 18. DECEMBER 1, 1896. No. 11

KENTUCKY COURT OF APPEALS.

WADE, &C. v. CITY OF MT. STERLING.

(*Filed January* 30, 1896—*Not to be reported.*)

1. *Sureties on official bond of city officers—Ineligibility of officer*—The sureties on the official bond of a city marshal are bound as such, although the said marshal may have been ineligible to the office by reason of his failure to make a settlement with the city for a preceding term of office, and to obtain proper vouchers or a quietus, as was required by the city ordinance before he should be eligible to the office. And the fact that the common council allowed him to qualify was not such a declaration of his faithfulness as an officer as would mislead the sureties and thereby excuse them.

2. *A municipal government is one of the auxiliaries of the State government*, and its creation is for the purpose of aiding the inhabitants of a given locality in the conduct of their business and political affairs; but the primary object is to aid the State in its governmental functions. Therefore, in the determination of the question as to the effect of the negligence of the common council of a city in failing to ascertain and disclose to the sureties of a city officer a previous defalcation of that officer the same rules should govern as in cases where negligence is imputed to the officers of the State whereby the liability of obligors of the State is affected.

The principles of law recognized in the Tate case (89 Ky., 587) are equally applicable to this case.

C. P. Chenault and J. H. Hazelrigg for appellants.

A. A. Hazelrigg and Tyler & Apperson for appellee.

Appeal from Montgomery Circuit Court.

Opinion of the court by Judge Paynter.

This action was brought on bonds executed by John W. Taul on the 3d day of July, 1888, to the city of Mt. Sterling, with appellee Wade and Mason as sureties. Taul had been elected marshal of the city, and to protect it against loss, in the event he should collect fines, taxes, etc., due the city and fail to account therefor, the bonds

were executed and accepted by the city through its common council.

It was conceded on the trial that Taul's defalcation, for the period covered by the bonds, amounted to $3,662.79, for which the court gave judgment against the sureties. Taul was marshal of the city for the two years preceding his election for the term covered by the bonds in suit.

It is insisted that the sureties were not liable on the bonds because, at the time the council permitted Taul to quality as marshal and accepted the bonds on the 3d of July, 1888, he was ineligible to hold the office because he had not then settled in full with the city for the collections which he had made in his preceding term, and obtained a quietus.

That part of the city charter relating to this subject reads as follows: "No person shall be eligible to the office of clerk, marshal, collector, treasurer or assessor who is not, at the time of his election or appointment, a qualified voter of the city, and has not had a settlement with the city, and obtained proper vouchers or a quietus."

It is admitted that at the time Taul qualified as marshal in 1888 he had not made a full settlement with the city for the preceding term, nor had he obtained a quietus.

It was not known by the common council at this date what, if anything, Taul owed the city, but subsequently it was ascertained by a settlement with him that he owed it $1,700 or $1,800. This court has in some cases held that sureties in a bond can not escape liability thereon because the principal was, at the time he qualified as an officer and gave the bond required by law, ineligible to the office. (Jones v. Gallatin county, 78 Ky., 491; Commonwealth, for Harris v. Teel, 14 B. M., 29.)

In fact counsel concede this to be the law. However, it is insisted with much earnestness that the common council is the legal representative of the city, and by the law the duty is imposed on that body of accepting and approving the bond of the marshal, of issuing to or withholding from the officer of the city who, by law, receives its moneys a quietus; that the fact the council permitted Taul to qualify as marshal was a declaration, imputable to the city, that he was honest, had paid over all its money in his hands due it, and held the quietus required by the charter; that such action was misleading to the sureties, increased the hazard of their undertaking, and that the city is now estopped to assert a claim on the bond against the sureties. In other words, the contention is not that the mere fact of the ineligibility of Taul, but the import of the act of the common council in permitting him to qualify renders the bond invalid in so far as the sureties are concerned—that is to say, that the mere act of permitting him to qualify was equivalent to a representation to the sureties, on the part of the city, that he was not a defaulter, and that he had his quietus.

A municipal government is one of the auxiliaries of the State government. Its creation is for the purpose of aiding the inhabitants of a given locality in the conduct of their business and political affairs, but the primary object is to aid the State in its governmental functions; therefore, in the determination of the question as to the effect of the negligence of the common council of Mt. Sterling in failing to ascertain and disclose to the sureties on the bond under discussion the previous defalcation of the marshal, they occupy the same relation to the city that officers or agents of the State do in matters of their negligence or fraud in an effort to impute such negligence or fraud to the State, so as to affect the liability of obligors to the State.

The charter and by-laws of the city of Mt. Sterling, requiring that frequent settlements should be made with its officers who handle its moneys, were not intended for the benefit of the sureties on their bonds, but for the protection of the inhabitants of the city. For the same reason the law required the marshal to give bond, with appellants as sureties, covenanting to pay over such fines and taxes as he should collect by virtue of his office.

The sureties guaranteed that the marshal would be honest and faithful in the discharge of his duties. The city did not guarantee to the sureties on the bond which the marshal gave that the other officers of the city were honest and faithful. Neither is there any implied obligation on the city to that effect.

While the facts of this are not precisely the same as those of the Tate case (89 Ky., 587), yet the principles of law recognized in that case are equally applicable to this case.

In the Tate case it was contended that because the law required certain officers to make certain settlements with Tate as State treasurer, and they, by their laches or negligence, having failed to make discoveries of his defalcations, his sureties were released on his bond as treasurer.

In this case there appears to have been a failure to make such settlements as the law required, and the marshal, having failed to pay the entire amount which he owed the city and obtain his quietus, was thereby rendered ineligible to the office.

It is insisted that this case is distinguishable from the Tate case because the governing body—the common council—of the city, by allowing the marshal to qualify, was a declaration that he had been a faithful officer for the past term, and had received his quietus, hence they were misled.

In the Tate case the law required settlements to be made with the treasurer; they were made, and no defalcation discovered, and Tate proceeded to discharge his duties. The settlements which were made with Tate were equally as strong a declaration that he was an honest and faithful officer as was the act of the common council in allowing Taul to qualify as marshal, and execute the bond under consideration. The court decided that Tate's sureties were liable on the bond for his defalcation occurring during the period covered by it.

Thinking, as we do, that the reasoning of the court in the Tate case, and the principles therein enunciated are applicable to this case, we deem it unnecessary and unprofitable to enter a discussion of the general principles which control in determining the liability of sureties in obligations.

Wherefore, the judgment is affirmed.

Judge Hazelrigg not sitting.

LOUISVILLE & NASHVILLE R. R. CO. v. MCELWAIN.

(*Filed February* 19, 1896.)

Death by wrongful act—Action under statute a bar to action for loss of wife's society—A recovery by the husband as personal representative of his wife for her death by the wrongful act of another is a bar to an action by the husband for damages for the "loss of her society" from the time the injury was inflicted until her death.

Ben. T. Perkins, jr., for appellant.

Forgy & Petrie for appellee.

Appeal from Todd Circuit Court.

Opinion of the court by Judge Paynter.

On the 8th day of October, 1892, a freight train on appellant's road struck Josephine E. McElwain while she was crossing the track at a public road crossing, inflicting injuries from which she died on the 23d day of December, 1892.

T. W. McElwain, the plaintiff in this case, qualified as executor of her will, instituted an action as such personal representative and recovered a judgment against the defendant for the sum of $5,000. This action was instituted at the same time by the plaintiff as the husband of the deceased, seeking to recover in his individual capacity damages for the "loss of her society" from the date the injury was inflicted until her death.

In the action as personal representative he recovered compensatory damages under the instructions of the court for physical and mental suffering, for expenses of treatment and for the permanent impairment of her ability to earn money, etc.

The sole question in this case is as to whether the recovery in the action as personal representative of the estate of the deceased is a bar to the husband's right to recover for a loss for which it is claimed the common law afforded him redress.

To determine this question the common law must be considered in connection with the statutory remedy afforded for negligent acts resulting in death.

By the principle of the common law the right of action for an injury to the person abated upon the death of the party injured, the case falling within the familiar rule *actio personalis moritur cum persona*. Therefore, if death resulted, whether instantaneously or not, from such injury, no action could be maintained by the personal representative of the injured party to recover damages suffered by the decedent.

As early as 1606 in the Kings Bench the case of Higgins v. Butcher (2 Yelverton, 89), arose, wherein the plaintiff sought to recover damages of the defendant for assaulting and beating his wife, of which she died. The action seemed to have been for damages to the wife and not for loss of service. It was held there could be no recovery, as the injury having resulted in death the cause of action therefor was merged in the felony. It might be added at this point that reasons other than merger have been suggested for the rule, to wit: The law of forfeiture, the maxim *actio personalis moritur cum persona* and public policy.

From the case of Higgins v. Butcher the question does not appear to have been raised in England until 1808, in Baker v. Bolton, 1 Campbell, 493. It was an action against the proprietors of a stagecoach, on which the plaintiff and his wife were traveling, when it was overturned, inflicting injuries on himself and also upon his wife, from which she died within a month. It was declared that "the plaintiff had wholly lost and been deprived of the comforts, fellowship and assistance of his said wife, and had from thence hitherto suffered and undergone great grief, vexation and anguish of mind."

Lord Ellenborough said: "The jury could only take into consideration the bruises which plaintiff had himself sustained, and the loss of his wife's society and the distress of mind he had suffered on her account from the time of the accident till the moment of her dissolution."

The above is the opinion in full. Although the case was at *nisi*

prius it is the leading case on the subject. It was recognized as the law in England until the enactment of the statute familiarly known as "Lord Campbell's Act" in 1846.

Until the passage of that act the law was recognized to be that "in a civil court the death of a human being could not be complained of as an injury."

Formed after "Lord Campbell's Act" nearly if not all the States of the Union have enacted statutes making an action at law maintainable against a person who, by wrongful act, neglect or default, may have caused the death of another.

The courts of this country, with one or two exceptions, accepted Baker v. Bolton as authority until the enactment of the statutes to which we have just referred.

Lockwood, Carey and wife v. The Berkshire Railroad Co., &c., 1 Cushing, 475, follows Baker v. Bolton, and is a leading case upon the subject.

The question arose in this court in 1853 in Eden v. Lexington & Frankfort Railroad Co., 14 B. M., 204, before the enactment of the statute. That was an action by the husband against the railroad company for the alleged negligent killing of his wife. She was killed instantly. The court followed the principle enunciated in Baker v. Bolton, but erroneously assumed that it was decided in that case that when death resulted the civil remedy was merged in the public offense. The court said in the Eden case: "The cause of action for injuries to the person dies with the person injured, and follows, as a necessary consequence, that the cause of action, having itself abated, no separate action can be maintained for such damages as are exclusively consequential. But for aggravated injuries to the person of the wife or child the husband or parent has an independent and separate cause of action for the loss of society of the wife or the service of the child, as the case may be. This cause of action does not abate by the subsequent death of the wife or child, but the death of either affects the extent of the recovery, as by that event all further claim to the society of the one or the services of the other ceases and determines. And the rule still prevails, although the death that produces this effect results from the same injury, which gives rise to the action."

* * * * * * * * * * * * * *

"According to the existing law there can be no recovery for this injury, inasmuch as the death of the wife was instantaneous, and it is only for the loss that is sustained by the husband in this respect from the moment of the injury up to the time of the death of the wife, for which any recovery can be had."

The death resulting immediately on the infliction of the injuries, no appreciable time elapsed in which the husband could enjoyed his wife's society, hence no damage could result.

It is perfectly manifest that at the common law a husband could recover damages for the loss of her society from the date of the injury until her death for a negligent act, resulting in the injury of his wife, although she died therefrom. The question here arises as to what effect the statute, providing a remedy for injuries to the person by negligence, have upon the right of the husband to maintain an action for such injuries, for which the common law afforded him redress.

At the common law, although the person injured may have suffered great physical and mental pain, the cause of action was abated by his death. The General Assembly, in order to preserve and keep alive such cause of action, provided that except actions for assault

and battery, slander, criminal conversation, and so much of the action for malicious prosecution as is intended to recover for personal injury, survive to the personal representative. (Chapter 10, General Statutes.)

To provide a cause of action where none existed the statute of 1854 was enacted, which gave a cause of action to the personal representative of one not in the employment of the railroad, where life was lost by reason of the negligence or carelessness of the servants or agents, etc., of such railroad.

A recovery under section 1, chapter 57, General Statutes, goes to the estate of the decedent. This was the section under which the plaintiff, as personal representative of the estate of his deceased wife, recovered in the other action mentioned.

Counsel for appellees cite Hansford's adm'r v. Payne & Co., 11 Bush, 381, to sustain the contention that this action can be maintained, while counsel for appellants cite the case of Conner's adm'r v. Paul, 12 Bush, 144, in support of the opposing view.

Hansford's case was not under either section 1 or 3 of chapter 57, General Statutes. The petition did not charge the life was lost by the willful neglect of the defendant, hence was not under section 3, and as it was not lost by reason of the negligence or carelessness of the proprietor of a railroad or its agents or servants, the action could not be, and was not intended to be, under section 1.

It was an action against apothecaries because their prescription clerk, in attempting to fill a physician's prescription, put up croton oil instead of linseed oil. The croton oil was administered to plaintiff's intestate. It was charged, among other things, in the petition that it caused him great suffering and agony, and did him serious and irreparable injury, and was the immediate cause of his death. The action was brought by decedent's personal representative.

At common law, had the deceased lived, he could have maintained the action for the agony and suffering resulting from the clerk's mistake, and at his death the cause of action would have ceased exept for chapter 10, General Statutes, *supra*, which caused it to survive in the name of his personal representative. For this reason the court in that case held the petition was good. Under the statements of the petition no recovery could be had for the death of the injured party.

It was not in issue in the case as to what the rights of a husband were when his wife lost her life by the wrongful act of another, but the judge delivering the opinion in the discussion of the case restated the doctrine of Baker v. Bolton, as sanctioned in Eden's case (14 B. M., 204).

Had the injured party been the wife instead of the husband, then certainly he would have had the right at the common law to have maintained an action for the loss of the society of his wife, although her personal representatives might have instituted an action to recover damages for mental and physical suffering.

Had the wife survived her injuries she could have maintained her action for her mental and physical suffering. Had the husband sustained damages in consequence of his wife's injuries, by the "loss of her society," then he could have also maintained his action to recover such damages.

Had she lived he could not recover for her mental and physical suffering because that was a damage to her; neither could she recover for his "loss of her society" because that was his damage. Both causes of action existed at common law.

The action instituted by McElwain as personal representative was

not based on a common-law right, but to enforce a right secured by statute. This statute very much enlarged the rights which had existed at common law. It gave the personal representative the right to recover for the loss of the life, and thus increased many fold the amount which formerly could be recovered.

The husband under the statute (General Statutes) would take the entire amount received, subject to the debts of decedent. It was greatly to the advantage of the husband to enjoy the statutory rights instead of those which formerly existed; therefore, it can not be said that the statute diminished the rights of the husband.

We can not believe that the General Assembly intended that the personal representative should maintain an action for the death of the wife, practically for the husband's benefit, and allow at the same time the husband to maintain one on his own account for the same acts or negligence.

In the Hansford case, in discussing the effect of a recovery of punitive damages under section 3, chapter 57, *supra*, the court said: "A recovery of punitive damages for the destruction of the life will certainly bar any other action for the injury, or any of its consequences."

It is the degree of negligence which determines whether the recovery should be compensatory or punitive, but when the action by the personal representive is based on section 1 of the statute in question the recovery should be as effectual a bar to any other action for the injury or any of its consequences as if the jury should have added punitive to the compensatory damages.

In Conner's adm'x v. Paul, 12 Bush, 145, it appeared two actions were instituted by the personal representative of the deceased. The mother qualified as administratrix in Indiana, where the injury was inflicted, and also in Kentucky, where the deceased lived.

As administratrix under her Kentucky appointment she instituted an action to recover for the mental and physical suffering of deceased. As administratrix under the Indiana appointment she instituted an action to recover for the loss of life of her intestate. The acts of negligence were the foundation of each action, and the court held a recovery in one action would bar a recovery in another action.

We conclude that as the statute gives the personal representative the right to maintain the action for the loss of life of the wife, and the consequences of the negligent act producing the injury, the husband can not maintain the action for the loss of her society. The legislative intent was to increase the elements of damage flowing from the acts or negligence producing death. It was not the intention of the Legislature to multiply actions. The husband must accept the benefits which the statute secures him in lieu of those he possessed at common law.

Wherefore, the judgment is reversed, with directions that further proceedings be had consistent with this opinion.

GRUBBS V. MCILVAIN.

(*Filed May* 28, 1896—*Not to be reported.*)

1. *Settlement of partnership*—In this action involving the settlement of partnership accounts between appellant and appellee it was error to credit the appellee with what he had paid another partner for his position in the firm, as it is doubtful whether the amount of assets would justify the con-

clusion that the parties regarded that sum as so much capital invested in the concern by the appellee as between himself and the appellant.

2. *Same*—The chancellor properly refused to charge the firm with the amount of notes discounted in bank, the proceeds of which were appropriated by appellant to his individual use.

C. H. Fisk for appellant.

Tarvin & Hall for appellee.

Appeal from Kenton Chancery Court.

Opinion of the court by Chief Justice Pryor.

While the commissioner's report in this case shows the stock on hand, when appellee became a partner, was worth $3,500 and the Grant county land $1,500, also outstanding notes and accounts, making $5,000 exclusive of the notes and accounts, still we are not disposed to credit the appellee with the $1,275 paid by him to Bramlage for his position in the firm, as it is doubtful whether the amount of assets would justify the conclusion that the parties regarded that sum as so much capital invested in the concern by the appellee as between himself and the appellant.

We will assume, as the proof warrants, that the firm was out of debt when the appellee became a partner. He paid into the firm $2,067.84 when he entered, and subsequently paid in the additional sum of $1,000.

The firm did a profitable business, but in about two years and eight months made an assignment of the firm property. The appellant seems to have managed and controlled the moneys of the firm, and in fact obtained the entire benefits resulting from the partnership. It is manifest the firm should not be charged with the notes, amounting to $10,550, discounted at the German National Bank, as the money was applied to the individual use of the appellant, and this finding of the chancellor will not be interfered with, and accounts for the firm's financial wreck, the one partner appropriating the entire profits to his own use.

The chancellor finds upon a settlement between these partners that the appellant is indebted to the appellee in the sum of $5,278.55, but this sum should be credited by the amount paid Bramlage by the appellee for his interest, as it should not have entered into the settlement, and would leave the appellant indebted to the appellee in the sum of $4,003.55, with interest from the 22d of December, 1890, instead of the sum adjudged.

In all other respects the judgment below is affirmed, and is reversed that this credit may be entered.

TRUSTEES OF THE CHURCH HOME FOR FEMALES AND INFIRMARY FOR THE SICK V. MORRIS, &C.

(*Filed May* 29, 1896.)

Renunciation of will by widow—Time of distribution of estate—Compensation of residuary legatee—When a widow has renounced the provisions of her deceased husband's will, giving her his entire estate for life, the reason for postponing the distribution of the estate ceases, and the legacies made payable upon the widow's death become payable at once, unless there is something in the will indicating a contrary intention. The specific legatees,

being the chief objects of the testator's bounty, should not be delayed in the enjoyment of their legacies in order that the residuary legatees, who have been disappointed by the action of the widow in renouncing the will, may be compensated out of the benefits intended to be conferred upon the widow. It might be different if an intention was apparent to benefit certainly the residuary legatees and to make them the chief objects of the testator's bounty, but no such intention appears in this case.

Helm & Bruce for appellant.

Barnett, Miller & Barnett and Samuel B. Kirby for appellees.

Appeal from Jefferson Circuit Court, Chancery division.

Opinion of the court by Judge Hazelrigg.

By the will of John P. Morton the net income of his entire estate was to go to his wife so long as she lived. Upon her death the estate was to be distributed as follows: (Item 4) To J. H. Morton Morris, $5,000; Ellen M. Goodloe, $3,000; Mary Belle Griswold, $1,000; Morton Morris, jr., $1,000; Morton Griswold, $1,000, and Margaret M. Becker, $500.

Then follows a clause giving to the appellant, a charitable institution in Louisville, the sum of $40,000. In a succeeding clause the sum of $10,000 is set apart for the construction of buildings on the lot of the Orphanage of the Good Shepherd, where mechanical education might be furnished the inmates of the orphanage. This, however, was on condition that a like sum should be furnished by others, which was not done.

By another clause the testator provided that if there still remained a surplus, and enough for that purpose, the sum of $20,000 was to go to the appellant for investment for the use of the boys cared for at the Orphanage of the Good Shepherd, and the income was to be paid them when they reached maturity, etc.

Then, after disposing of a fruit grove in Florida to a number of persons, the last item of the will provided as follows: "After all the foregoing devises are provided for in full, in the order named, and there yet remains a surplus from any and all sources, the same shall be divided into four equal parts, and one part each shall pass to the first five of the several beneficiaries named in item (4) four."

The will was probated in the county court of Jefferson county in July, 1889, but was contested, and the mandate of this court affirming the judgment below establishing the will was entered in October, 1892. Pending this contest, however, the widow renounced the provisions of the will. This was done on March 12, 1891.

By appropriate proceedings the interest of the widow has been allotted to her, the effect of which allotment, growing out of her renunciation of the will, has been to withdraw from the estate some fifty-odd thousand dollars. If the distribution of the remainder of the estate is now made the residuary legatees will get much less than if it is postponed until the widow's death, the income of it in the meantime being set apart for their benefit.

The judgment below postponed the distribution until the death of Mrs. Morton unless in the meantime the accretions of the estate shall equal the amount withdrawn by her, in which event the distribution was to be made, giving the appellant the $60,000 without interest, and giving the residuary legatees—the appellees here—the entire balance. The correctness of this judgment is the sole question on this appeal.

The only reason we conceive for the testator's postponement of

the distribution until the death of his widow was that she might be provided for, and when the reason for postponement ceased, as it did upon her renunciation, we can not see why those who were the chief objects of the testator's bounty should be delayed in the enjoyment of their legacy.

While the amount of the residuary estate is lessened to the extent of the widow's allotment, they can not complain because they were only to get what was left after payment in full of the specific legacies. They are benefited to some extent because they get their specific legacies at once, instead of waiting until the widow's death; and it is not for the court to attempt an adjustment of their profit and loss account by withholding from the principal object of the testator's solicitude the estate intended for them.

To the extent that the testator intended to *prefer* the appellees or make it *certain* that they should get a part of his estate, he provided for them in item 4 of his will as to whether they would get any further estate, he left in uncertainty, and indeed expressed a doubt as to whether there would be enough to pay the $20,000 mentioned in the will, and still further indicated a doubt in the last clause by basing the residuary devise on the questionable condition of there still remaining a surplus of the estate.

The general rule is well settled that a renunciation of the will by the widow under circumstances like the present has the effect of precipitating the maturity of the legacies.

The rule is thus stated in *In re* Ferguson's Estate (1890), 20 Atlantic Rep., 945 (Pa.): "It was held in Coover's Appeal, 74 Pa. St., 143, that devises or bequests, subordinate to a life estate in the widow and contingent upon her death or payment of which is postponed until then, become presently payable upon her election to take under the intestate laws. As to its effect upon all claims under the will her election is equivalent to her death. This is the general rule; and if there are any exceptions they must depend on the expression or unavoidable implication of a contrary intent of the testator." And the opinion of the lower court in that case that, "as the residuary legatees would be disappointed in the amount coming to them, which would be diminished by the half of the personalty taken absolutely by the widow, they should be compensated out of the benefits intended to be conferred on the widow," was reversed under the rule announced.

We are aware that there are exceptions to the rule, but the intention of the testator must prevail so far as it can be ascertained. That is higher than any equitable rule adopted to carry out what may seem to a court a more equal or just distribution of the estate.

There is no reason whatever in this case to depart from the direct command of the testator to distribute this estate in the manner in which he directs it to be done. It might be different if an intention was apparent to benefit certainly the residuary legatees, and the bulk of the estate was expected to be left for them. In such event they, and not others, could be said to be the chief objects of the testator's bounty, and they would be protected, not because it would be equitable or just, but because such was the intention of the testator.

The question remains, when shall the legacies begin to bear interest? We have seen that they became due upon the renunciation of the will by the widow, which was in March, 1891, but there was a contest over the will, and the executors could not pay until that was settled. This was done in October, 1892, and then for the first time the payment could safely be made. It seems to us interest should be computed from the last-named date.

Judgment reversed for proceedings consistent with this opinion.

TREASY V. TREASY, &C.

(*Filed May* 29, 1896—*Not to be reported.*)

Renunciation of will by widow—Compensation of specific devisees—Where a widow elected to renounce her deceased husband's will and dower was allotted to her in property specifically devised to others, the specific devisees were entitled to compensation out of the residuary estate for their loss occasioned by the widow's occupancy of their specific property.

W. B. Dixon and Humphrey & Davie for appellant.

H. S. Barker for appellees.

Appeal from Jefferson Circuit Court, Chancery division.

Opinion of the court by Judge Hazelrigg.

James Treasy died childless and testate in 1890, leaving a widow, to whom he gave for life, in lieu of dower, the family residence, with its furniture and fixtures, and charged upon his estate the payment of all taxes, gas bills and water rents of this property, together with the payment of $100 per month for the additional support of the widow.

By item 2d he gave his brother Martin, the appellant, certain specific lots of land, and also his interest in the firm of Treasy & Bro. In items 3, 4, 5, 6, 8 and 10 he gave to the various appellees certain specific lots of land, and to certain charities he made various bequests. By the 11th item he provided that all property owned by him, not devised by the will, should go to his brother Martin.

The widow elected to renounce the will, and dower was allotted to her in property devised in the main to Martin, but part of which had been specifically devised to the appellees, Thomas F. Treasy and Mary Tierney.

After some two years she died, and the sole question presented on this appeal is, are the legatees, Thomas Treasy and Mary Tierney, entitled to contribution out of the residuary estate for their losses occasioned by the widow's occupancy of their specific property?

The chancellor properly answered the question in the affirmative. The residuary legatee can get only what is left after the specific legatee has been satisfied. That is the clear intent of the testator, and it must prevail.

The general rule is that a specific devisee takes the particular thing given him, while the residuary legatee takes only such part as remains. The rule is founded on the supposed intention of the testator, and will not be deviated from unless an intent to the contrary appears in the will.

These principles were considered in the case of Trustees of Church Home, &c. v. Morris, &c., *supra*, 384.

Judgment affirmed.

LOUISVILLE & NASHVILLE R. R. CO. V. GAINES.

(*Filed June* 9, 1896.)

1. *Railroads—Mistake in issuing limited ticket—Ejection of passenger from train*—Where a limited railroad ticket was by mistake of the agent issued to a passenger who had contracted and paid for an unlimited ticket, and the

passenger, when he presented the ticket on the next day, was ejected from the train because the ticket had expired, although the fault was that of the agent who issued the ticket and not of the conductor, the passenger had the right to maintain an action of tort against the company to recover damages for the injury. And, although the facts with reference to the purchase by plaintiff of the ticket and as to his entering the train are stated in the petition, they are mere matters of inducement, and the action is to be regarded as *ex delicto* and not *ex contractu*.

3. *Verdict not disturbed*—A verdict in favor of plaintiff for two hundred dollars, not palpably against the weight of the evidence, will not be disturbed.

Winslow & Winslow for appellant.

Gaunt & Downs and J. A. Donaldson for appellee.

Appeal from Carroll Circuit Court.

Opinion of the court by Chief Justice Pryor.

The appellee purchased of the ticket agent of the appellant a first-class ticket to Crab Orchard from the city of Cincinnati. The office was at Fourth and Vine streets. He paid for his ticket and proceeded at once to the depot, where he discovered the train was then moving off and out of his reach. He returned to his hotel, and left on the next train the following morning.

After starting on his journey the conductor on the train of appellant applied for his ticket, and, upon examining it, found it was a first-class limited ticket, and out of date the day previous. He refused to receive the ticket, and under instructions from those in authority, having consulted them by telegram, took the appellee by the lappel of his coat and against his will led him off the train. Some loud talking between them preceded his removal, the appellee refusing to leave the train, but claiming the right to be carried to his place of destination.

When the ticket agent made out his ticket he placed it in an envelope and handed it to the appellee, the latter making no examination of it.

The appellee was taken from Covington to Milldale, and there transferred to another train of appellant, and from the last train was ejected.

The appellant's agent contradicts the statement made by the appellee, and says he sold him the ticket, as a limited ticket, for $4.39, while the regular first-class ticket was $6, and this would seem to sustain the agent in his version of the matter.

We think, however, there was evidently a mistake made by the ticket agent, as it does not appear the appellee knew they were selling such tickets, and he swears he applied for a first-class passenger ticket to Crab Orchard, and there is no doubt but what he supposed he had paid for such a ticket. So positive was he of his right to go upon the ticket that he reqested the conductor to inform himself by telegram, and the answer he received was to "*put* him off the train." He was made to leave the train about thirty miles from his home, and it seems to us without much reason on the part of the company, but, in so far as the conductor was concerned, it was his duty to obey the orders of his superiors, and he is in nowise to blame. He of course looked to the ticket presented to him, and by that he was to be controlled in his action, and but for the mistake made by the ticket agent the company could not be held responsible.

It is claimed, however, there was no mistake made, and there was

none if the ticket agent is right in his recollection of what transpired when he sold it, but the jury heard the testimony, and seem to have been satisfied the history of the purchase of the ticket was as stated by the appellee.

It is argued that no recovery can be had except on the breach of the contract to carry, and not then if the ticket presented does not evidence the obligation to transport the passenger. This would evidently be the correct rule if the mistake had not been with the company, as it can scarcely be held that a ticket worthless for travel when sold by the agent of the company can justify the ejection of the passenger from a train when the fault is that of the company, and not that of the passenger.

It is claimed that this is an action *ex contractu*, and not *ex delicto*. We can not take this view of the petition. While many unnecessary facts are stated in the petition, they are mere matters of inducement, and what transpired when the ticket was purchased, and his going to the depot and entering the train, were facts stated, showing the rights of the plaintiff as a passenger, or, in other words, his right to be on the train.

When the appellee was taken off the train against his will, by the conductor laying hands upon him for that purpose, it was an assault and battery; and while no wounding or bruising of the person appears, the doctrine of *mutitter manus imposet* does not apply because the conductor had no right to remove him from the train.

The entire case rests on the testimony of the appellee and that of the ticket agent, and the verdict not being palpably against the weight of the evidence the verdict for $200 will not be disturbed.

The right to bring such an action is evident. If the fault of the agent of the company, the remedy by an action for tort, where the passenger is forcibly ejected, ought not to be questioned. (Hufford v. Grand Rapids & I. R. R. Co., 7 Vest, 850; Lake Erie R. R. Co. v. Fixe, 11 American & English Railroad Cases, 109; Pittsburgh R. R. Co. v. Hennyh, 39 Ind., 509; Head v. Georgia Ry. Co., 11 American State, 434.)

There was no question made as to the jurisdiction for want of service, but, on the contrary, the party appeared and made defense.

Judgment affirmed.

BRIGGS, TRUSTEE V. TOWN OF RUSSELLVILLE.

TOWN OF RUSSELLVILLE V. BEALL.

(*Filed June* 20, 1896.)

1. *Municipal corporations—Extension of territorial limits*—The constitutional power of the General Assembly to fix the territorial limits of municipal corporations, either by acts of original incorporation or by subsequent acts extending their boundary lines is not restricted, the only restriction being in respect of the power to tax the added territory.

2. *Same—Taxation of lands embraced within corporate limits by extension*—The courts will not relieve against the burden of municipal taxation following the extension of the boundary lines of a town or city except in cases where the legitimate object of improving the town has been "palpably" perverted to the unauthorized purpose of lessening the burden of taxation on the inhabitants, who will not be otherwise benefited by the extension.

3. *Same*—A tract of twelve acres embracing the residence and lawn of the owner within the limits of a town is subject to taxation for municipal pur-

poses, although there is no public street or sidewalk contiguous to the property, the owner and his family having convenient access to the public streets of the town, and having the privilege of enjoying all of the advantages and conveniences afforded by the municipal government.

4. *Farming lands included in town boundary*—Seventy seven acres of a tract of 180 acres of land being included within the boundary of a town, about one-half the seventy-seven acres thus included in the town boundary is subject to taxation for municipal purposes although used as farming land, and although the residence of the owner, who is engaged in mercantile business in the town, is outside the town limits, the land being so situated with reference to the streets of the town and to other property subject to municipal burdens as to make it proper and right that it should be subject to its fair proportion of those burdens.

5. *Same*—As the property in question was brought within the limits of the town by legislative act in the year 1869, and no effort was made by the town to assess it for taxation until 1893, it is manifest the municipal authorities were not seeking to foster private interests or to lighten the burden of other taxpayers by extending the boundaries of the town.

J. H. Bowden and S. R. Crewdson for Town of Russellville.

W. F. Browder and W. P. Sloss, jr., for Briggs and Beall.

Appeal from Logan Circuit Court.

Opinion of the court by Judge Landes.

These two cases originated in the Logan Circuit Court, involve the same questions and stand upon substantially the same state of facts, except as to the condition, use and situation of the parcels of land which it is claimed on the one hand and denied on the other are subject to municipal taxation. On that account they were heard together, both in the court below and in this court. The litigation is friendly, the object being to ascertain whether or not the town of Russellville has the right to impose taxes for municipal purposes on certain land belonging to the appellant, J. B. Briggs, trustee, in one case, and to the appellee, J. H. Beall, in the other case, which was originally brought within the limits of the town by an act of the General Assembly, entitled "An act to extend and define the corporate limits of the town of Russellville, authorize the election of a police judge and provide a sinking fund for said town," approved March 12, 1869. (Session Acts 1869, volume 2, page 236.)

Previous to the passage of said act the boundary of the town was in a very irregular and unsatisfactory shape, and while in 1869 it was a thrifty, though quiet town, having a population of near 2,000 souls, with a reasonable prospect of growth and of steady improvement, having the advantage of one railroad, with the prospect of the early construction of another. The main object of the extension of the limits seems to have been to correct the irregular shape of the lines defining the limits of the town and at the same time to extend the jurisdiction of the municipal government over a considerable territory claimed to be actually suburban, although not within the lawful limits of the town. This the act accomplished by describing a perfect square of territory, each of the four sides extending four hundred and ten poles, with the county courthouse and public square in the center.

By a previous act, entitled "An act to amend the charter of the town of Russellville," approved March 5, 1868 (Session Acts 1867–8, volume 2, page 219), the chairman and board of trustees of the town were authorized and empowered to assess and collect annually an

ad valorem tax "of not exceeding fifty cents on the $100 worth of real and personal estate within the corporate limits of said town, and a poll-tax of not exceeding $2," on each titheable inhabitant of the town, for municipal purposes. Subsequently another act was passed, entitled "An act to amend and reduce into one the acts relating to the town of Russellville," approved May 1, 1880 (Session Acts 1879, volume 2, page 874), which was substantially a new charter, and under which the municipal affairs of the town were conducted until the passage of the act for the government of towns of the fifth class, approved July 3, 1893, to which class the town of Russellville now belongs.

By the act of 1880 the boundary of the town was continued as fixed by the act of 1869, and the municipal authorities were empowered to assess and collect taxes for municipal purposes annually upon all of the real and other property in the town, as of the 10th day of January, upon a list of the "taxable inhabitants and owners of property in said town," and the marshal of the town was invested with "all the powers and authority within the town of Russellville to collect the town tax as sheriffs have in collecting the State tax and county revenue."

Notwithstanding the ample power of taxation thus conferred on the municipal authorities to assess and collect taxes on their property within the corporate limits of the town, no effort was made by the said authorities to assess or levy or collect from the appellant, Briggs, and the appellee, Beall, taxes upon their land which was brought into the limits of the town by the act of 1869, and afterwards, by the act of 1880, until the efforts made for that purpose, which furnished the occasion for the present litigation.

As we take it, the taxes now involved were assessed in 1893, under the authority of acts in force previous to the passage of the said act of July 3, 1893. Action was instituted by each of the parties seeking to enjoin the town and the collector of the town tax from proceeding to collect these taxes, which had been assessed by the municipal authorities on their said respective parcels of land within the limits of the town.

The issues having been made up in each case, in the case of the appellant, Briggs, the court adjudged, in substance, that his land was lawfully assessed and that he was liable for the tax, and his petition was dismissed. But in the case of the appellee, Beall, the court adjudged, in brief, that his land was not lawfully assessed or subject to the tax and that he was not liable therefor, and the municipal authorities were perpetually enjoined from proceeding to collect the tax that they were then seeking to collect from him on his said land. These appeals are prosecuted to reverse the judgment in each case.

In the case of Briggs, trustee, it appears that he was living with his family upon twelve acres of land that were included within the limits of the town by the acts of 1869 and 1880, which have been referred to, and that the dwelling house and all other improvements were erected thereon in 1872. The track of the Louisville & Nashville railroad lies in front of this ground and is the south boundary of it. We do not deem it necessary to go into lengthy detail of the facts material, especially in the Briggs case. It is sufficient to say that the facts show that, although there was no public street or alley or sidewalk contiguous to his ground, he and his family had convenient access to the public streets of the town by a driveway out of his lawn across the said railroad track, and thence across a meadow, in which Mrs. Briggs had an interest, to the "Hopkinsville pike,"

laid down on the map of the town as "Hopkinsville street," which leads to the public square and the principal business part of the town, and which is a prolongation of the main center street in the original boundary. His ground is thirty-two poles from the passenger depot of the said railroad, at which is the nearest sidewalk. The same may be said concerning the land of appellee, Beall. Briggs' residence is also something more than one thousand feet from the electric light plant which supplied the town, and from which his residence was supplied, over a line erected at his own expense, with light, which was the nearest point in the business part of town to his house. He had a number of tenement houses situated south of the said railroad track, and somewhat nearer to his ground than the electric light plant. The facts show, further, that his ground was not divided up into lots, but that it constituted one lot upon which, with ample means, he had erected a splendid urban residence, where he and his family were in a position to enjoy and had the privilege of enjoying, if they chose to avail themselves of it, all of the advantages and conveniences which were to be afforded by or derived from the presence and energy of the municipal government, not only for comfort but for protection as well.

Appellee Beall was the owner of 180 acres of land, situated on the western and northwestern boundary of the town as established by the act of 1869, but all of his land, up to the commencement of his action, had always been used as farming lands, and only 77½ acres of it were included in the said town boundary, through which, as shown on the map of the town, the Owensboro & Nashville railroad track runs from north to south. No part of this land had ever been divided into lots since the act of 1869. His residence was on that part of his farm that lay outside of the limits of the town and the approach to it was from the "Hopkinsville pike," and from a point thereon beyond the west line of the town boundary. That part of his land within the town boundary, as it appears from the map of the town, is about equally divided by the track or line of the Owensboro & Nashville railroad, but no streets or alleys had been laid out through any part of it, but that part of it east of said railroad is situated on the "Greenville pike," which is a prolongation northward of Main street, and is laid down on the map as "Greenville street," which the municipal authorities in 1882 and since improved at considerable expense for some distance out and in front of Beall's land, but just how far or to what point the record does not show with certainty, but probably to a point nearly half way the length of his line fronting on said street or pike. Along this street and on both sides of it and adjoining Beall's land on the west side, there are several houses, which were occupied mostly by colored persons, erected on lots which were originally a part of the tract in question, but they were laid off and sold prior to 1869. The occupants of said houses used the said street as their only way of ingress and egress to the premises, and appellee Beall used it also when going to and from that part of his land which he entered through a gate opening on the said street or pike. That part of this parcel of land lying between the line of the O. & N. railroad and "Greenville street" is wet but good meadow land, and water rises on and flows from it under a culvert constructed across the said street at the expense of the town. There is an area of 34 acres of land between appellee Beall's land and the business part of the town, upon which there were not any improved lots except that of appellant Briggs. Appellee Beall had never voted for town officers or held any office in said town, but was engaged in mercantile and other business in the town,

and owned other property in the town. The lands of both Briggs and Beall, the taxes on which are involved in this litigation, are in the vicinity of the passenger and freight depots of the L. & N. railroad and the shops of the O. & N. railroad, as shown by the map of the town, but they are situated on the side of the line or track of the former road opposite to them which has to be crossed in passing from their lands to the business part of the town, the courthouse and the public square.

The foregoing statement contains the principal facts that are material to the questions raised in the two cases. It is contended by counsel for the appellant, Briggs, and the appellee, Beall, that neither parcel of ground was subject to municipal taxation, briefly because it is not urban property, and had never been used as such, or divided into lots; that the owners had never consented to the extension of the boundary of the town so as to include their land within the town limits; that they had never received any benefits from the municipal government, or consented to be taxed by it; and that to compel them to pay taxes on their said lands to the town for municipal purposes would be the taking of private property without any compensation. On the other hand it is contended by counsel for the town that the situation of the two properties is such, with reference to the streets of the town, and with reference to other houses and lots within the limits that are subject to municipal burdens, as to make it proper and right that they should be subject to their fair proportion of these burdens, which are necessary to the maintenance of municipal government for the benefit and convenience of the inhabitants of the town, and for the preservation of public order.

Numerous cases of a character similar to these cases, and in which the same questions were raised, have been decided by this court, and in no such case has it been held that the General Assembly did not have the constitutional power to fix the territorial limits of municipal corporations, either by acts of original incorporation or by subsequent acts extending their boundary lines. We do not understand counsel here to deny that the General Assembly had the constitutional authority to pass the acts of 1869 and 1880, by which the limits of the town of Russellville were extended. Nor do we understand counsel to hold that the municipal power or authority within the limits of the town as defined by those acts is restricted, except in respect of the power to tax the added territory. There were other purposes for which the General Assembly had the constitutional power to extend the jurisdiction of municipal government over territory contiguous to a town or city by extending its limits besides that of taxation. This might be done in any case in anticipation of the future growth of the town or city for the purposes of police protection and the like.

Such an exercise of legislative power was not violative of the constitutional guaranty of private property to the owners, because the land was still their own and could not be taken or appropriated for any public use, such as for streets or alleys, without their consent or without just compensation therefor. (Cheaney v. Hooser, 9 B. Mon., 330; Swift v. City of Newport, 7 Bush, 37.)

It will be found on investigation, we think, that in most of the States the court will not interfere in such cases to relieve property owners from taxation by the municipal authorities, because municipal government being an important part of the governmental machinery of the State, it is the peculiar province of the legislative department—the law-making power—to define or provide a method of defining the limits of municipal corporations, and to clothe them

with the powers of local government, and that the propriety of legislative action in this regard may not be questioned. In this State, however, as well as in several other States, it has long been the established doctrine that the courts will relieve against the burden of municipal taxation, following the extension of the boundary lines of a town or city, in cases where "the legitimate object of improving the town" has been "*palpably* perverted to the unauthorized purpose *only* of lessening the burden of taxation on the inhabitants, who will not be *otherwise benefited by the extension.*" (Swift v. Newport, *supra.*)

In the case of Board of Trustees of Elkton v. Gill, 94 Ky., 138, following Cheaney v. Hooser, *supra*, and Maltus v. Shields, 2 Met., 553, the doctrine is stated in the following language: "The protection afforded to, and advantages received by, the citizen from a municipal government are, in the meaning of the Constitution, just compensation for taxation imposed in order to maintain it; and local taxation authorized by law can not be deemed taking private property without just compensation unless it is palpable that persons or their property are subjected to such burthen for the benefit of others for purposes in which they have no interest, and to which they are, therefore, not bound to contribute."

In that case a parcel of 6 acres of land, embracing the residence and lawn of the owner, which was within the limits of the town, the land being a part of a tract containing 46 acres, which was used for agricultural purposes, the part including the residence being adjacent to two streets of the town was held to be subject to taxation by the town.

In Maltus v. Shields it was held that a lot of about 9 acres in the town of West Covington, upon which the owner resided and part of which was in cultivation and part containing evergreens and shrubs and a large number of fruit trees, was constitutionally subject to taxation for municipal purposes.

In the case of Sharp's ex'or v. Dunnavan, 17 B. Mon., 223, it was held that where a town is extended by improvement, so as to give those living adjacent to the town boundary all the advantages which the citizens enjoy from the local government of the town, the Legislature had the constitutional power to extend the limits of the town and subject the owners of the property within the extension to taxation for town purposes, and that the legislative discretion in the location of the lines of the extension could not be questioned or controlled by the court.

In that case 34 acres of land, including the residence of the owner, being a part of a tract of 140 acres which were used for agricultural purposes only, were brought within the limits of the town by the legislative act. The owner's residence was situated 25 poles from the original boundary of the town, and 155 poles from the center of the business part of the town, and near enough to enjoy the advantages of schools, churches and the business of the town. This case and that of Cheaney v. Hooser arose under the act of 1846, extending the boundaries of the town of Hopkinsville.

Another case, that of Stites v. Dunnavan (MS. opinion), originated under the same act, in which it was decided that the land of the owner that was brought within the limits of the town by the said act, containing 22 acres and used as a residence and for pasturing and other agricultural purposes, was liable to municipal taxation.

The foregoing references are sufficient to show the doctrine that has prevailed in this State upon this question, and the manner in which it has been applied. Applying it to these two cases we find

that the facts exhibited by the records before us, fairly viewed, do not make out a case that would authorize the interference of the court in behalf of either appellant Briggs or appellee Beall.

Considering the character and location of their property, its proximity to the two railroads, their depots and shops, running through and located in the town, and to the business portion of the town, the actual and prospective growth of the town, and the propriety under existing conditions of extending the police jurisdiction of the town over the locality, and the benefits and advantages necessarily afforded to and enjoyed by them by reason of the very existence and presence of the municipal government, in common with other citizens and property owners on whom the burden of maintaining it had been cast, it was, in our opinion, reasonable and just to require them and their property to bear a due proportion of the burden.

By forbearing for so many years to assess their property, it is manifest that the municipal authorities were not seeking to foster private interests or to lighten the burden of other taxpayers by extending the boundaries of the town, and when at last they did attempt to subject this property to taxation it was under circumstances and conditions that showed that these parties were to be equal sharers with every other property owner in the town of the benefits of the municipal government.

The taxes involved in these cases having been levied and assessed under laws existing before the passage of the act of July 3, 1893, providing for the government of towns of the fifth class, it is not necessary to pass upon any question that might be raised under any of the provisions of that act bearing upon the question of municipal taxation; nor is it necessary for us to determine the effect of the provisions of our present Constitution, requiring that taxes shall be uniform upon all property subject to taxation "within the territorial limits of the authority levying the tax" and prohibiting the exemption from taxation of any property except such as is exempted by the Constitution. (Copeland v. City of St. Joseph [Mo.], 29 S. W. Rep., 281.)

It is only necessary to say that under the provisions of the Constitution all property not exempted by that instrument is required to be "assessed for taxation at its fair cash value, estimated at the price it would bring at a fair voluntary sale." This plain requirement will prevent exorbitant and arbitrary valuations, and placing more than an equal and just proportion of the public burdens on any taxpayer.

Finding no error in the judgment in the case of Briggs, trustee, the judgment is affirmed; but for the reasons given the judgment in the case of appellee Beall is reversed. It is conceded by counsel for the town that only so much of his property as lies between the O. & N. railroad and Greenville "street" or "pike" ought to be subjected to taxation in this proceeding, and the cause is accordingly remanded, with directions to so adjudge.

LEONARD, &C. V. BRASWELL, &C.

(*Filed June* 20, 1896.)

1. *Legitimacy—Issue of void marriage—Descent and distribution*—The Kentucky statute which declares the issue of void marriages to be legitimate is a statute of descent and distribution, and, therefore, so far as concerns the

right to inherit property in this State, it applies as well to the issue of a void marriage solemnized in another State as it does to the issue of such a marriage solemnized in this State, although such issue could not inherit under the law of the State where the marriage was solemnized.

4. *Same*—Where a marriage is void because a former husband or wife was living when the marriage was contracted, the issue of the marriage is legitimate whether or not the marriage was conducted in good faith under the belief that the former husband or wife was dead.

3. *Construction of statutes*—A statute should be construed according to its spirit and reason.

J. G. Husbands, Husbands & Husbands, W. H. Holt and F. A. Wilson for appellants.

L. H. James, Ollie M. James, C. K. Wheeler and T. J. Watkins for appellees.

Appeal from Lyon Circuit Court.

Opinion of the court by Chief Justice Pryor.

N. T. Braswell lived in the county of Lyon for many years. He died intestate, leaving no children surviving him, but several grandchildren, as well as a large estate. He had but two children, and both of them died before he did. One of his children, Ida, married Leonard, and her children, five in number, are the appellants in this case.

His son, Charles Braswell, at his death left children, and this controversy is between the children of Mrs. Leonard and the children of her brother Charles over the estate left by their grandfather, N. T. Braswell.

The appellants, who are the children of Mrs. Leonard, claim that the children of Charles Braswell (the brother of their mother) are the offspring of a void marriage, and, therefore, not entitled to inherit from him or take by descent any part of their grandfather's estate.

The court below adjudged that the children of Ida and Charles Braswell stood in the shoes of their respective parents, and were entitled to inherit what their parents would have taken if living.

The origin of this litigation is based on the following state of facts: Charles Braswell (the father of the appellees) prior to the year 1863 incurred the displeasure of his father, or, for some other reason, left his home, which was in Lyon county, Ky., and took up his residence in Memphis, Tenn., under the assumed name of Charles Dobbins. About the year 1863, and when in Memphis, he married one Susan Beloate, and at the time of the marriage was going under the assumed name of Dobbins. In a short time he deserted his wife, and, after wandering from place to place, in the year 1866, he returned to Lyon county, to his father's home, *and there* succeeded in winning the affections of a young lady by the name of Josephine Dooms, and, under a promise of marriage, the two left their homes in Lyon county, and, going to Cairo, Ill., were married at that place in accordance with the law of the latter State. They immediately returned to their homes in Lyon county, and there lived for many years, having had the two children who are the appellees in this case, and who, after their father's death, lived with their grandfather (the intestate) for some time, the latter dying, as the testimony conduces to show, without ever having known of his son's escapade in Memphis or that he ever had but the one wife, the mother of the children who are the appellees in the present case.

It was argued upon the hearing in this court that Charles Braswell (alias Dobbins) never married Susan Beloate, but the testimony in the case upon this point is convincing, and we have no doubt but that a marriage with the Memphis woman took place in the year 1863, and while his sending his second wife back to Memphis shortly after their marriage, and his having been arrested at the instance of her uncle for bigamy and discharged, are facts tending to show that no lawful marriage had taken place, yet there were those who knew Charles Braswell well and attended the wedding, and, connected with other facts and circumstances not necessary to detail, concludes this question.

It seems to have been studiously concealed—this Memphis marriage—as the most intimate friends in Lyon county and the grandfather of these children were all kept in utter ignorance of the events that transpired at Memphis in 1863, or that the father of these appellees ever had but the one wife. They lived in Lyon county, raised these children, and for twenty-five years, and until this suit was instituted, the Memphis marriage was kept concealed, and we are satisfied the mother of the present appellees was not imbued with the belief that her husband had ever married the Memphis woman.

It is claimed by the appellants that the appellees are the offspring of a bigamous marriage, and have no right to inherit one-half or any part of their grandfather's estate, their father having died long before their grandfather.

The law of the State of Illinois, where the last marriage took place, is pleaded, to the effect *that the issue* of such a marriage were and are illegitimate and without inheritable blood, and the contention is that the *lex loci contractus* governs, not only as to the validity of the marriage but determines, once for all, the legitimacy or illegitimacy of the children.

It is conclusively shown that no statute was ever enacted in Illinois providing that *the issue of marriages null or void in law shall nevertheless be legitimate*, and it will be assumed that the issue of such marriages celebrated in that State are bastards as at the common law, and, the better to understand the argument of able counsel, it is further insisted the law of the State where the marriage takes place must make the offspring legitimate, and if the marriage was null and void by the law of Illinois the children must be held to be illegitimate wherever they go.

We shall not attempt to combat the proposition made by learned counsel that the *lex loci contractus* governs and determines the validity of the marriage, and, if valid when consummated, it must be held valid everywhere; and, if invalid, a like result follows. This doctrine can not be controverted, and the rule must be conceded to be that the law of the place of the marriage will generally govern as to the legitimacy or illegitimacy of the offspring.

There is then no difference between the court and counsel as to this well-settled doctrine, but the appellees maintain they are made legitimate by the Kentucky statute, which reads: "The issue of an illegal or void marriage shall nevertheless be legitimate, except the issue of an incestuous marriage, the marriage between a white person and a negro or mulatto, shall not be legitimate."

That every State has the power and the right to pass its own laws of descent counsel admit, but insists that this applies only where the marriages take place within the borders of the State passing such laws; and, if within its borders, can determine the status of the children or their right to inherit.

It seems to us the confusion in this case arises from the failure to

distinguish between the validity of a marriage and the right of the offspring of that marriage to inherit from their parents or collateral kindred. The law of the State where the realty is located determines the mode of alienation or descent, and, as to personalty, it passes under the law of the domicil of the owner. The State of Kentucky in the exercise of its sovereign power has not attempted by the statute making certain children legitimate to validate marriages that were void when celebrated.

There can be no doubt of the power of the State to enact laws by which bastards may inherit from either father or mother or from both, and this in nowise affects the validity of the marriage contract when entered into either in the State or out of it.

Counsel have cited the case of Smith v. Kelly's heirs, 22 Miss., 167, and the case of McDeed v. McDeed, 67 Ill., 545, tending to establish the principle contended for, and in fact the case of Smith v. Kelly's heirs is exactly in accord with his views, but when we look to the history of the statute under which these appellees claim to be legitimate, with the right to inherit from their grandfather and the decisions of this court upon the question, there is left but little room for controversy.

The statute on which this claim rests is based on the Virginia statute of 1785, and was embodied in the statute of this State in the year 1796, and made a part of the statute regulating the mode of descent and distribution. It then became a part of the Revised Statutes, and subsequently of the General Statutes, under the title of Husband and Wife, and there can be no doubt of its being a statute of descent and distribution, or creating such a status as to children within its provisions by which they may inherit not only from their parents but from collateral kindred.

The law of descent and distribution differs materially in many of the States of the Union, but this does not militate against the doctrine that a marriage, valid when celebrated, is valid anywhere, or, if void, must be so held; but such is not the question involved here. On the contrary, the only question is: Has Kentucky the right to regulate the law of descent or inheritance as to the property of its own citizens where the property is within its own territory?

In the case of Sneed v. Moore, 5 J. J. Mar., 159, it appears that Robert R. Moore lived in the State of Indiana at his death. Dying in that State he left a will that was admitted to probate. He devised a slave and a tract of land in Kentucky to Sneed. When the will was executed Moore was childless, but shortly before his death his wife gave birth to a child, a daughter, and in 1823 this daughter married a man by the name of Ewing. Ewing and his wife claimed the land and slave as the heir at law of her father. Sneed's defense was that she was not legitimate. Mrs. Moore, it seems, when she married Moore had a living husband. Moore's marriage to his wife took place in Kentucky. This court held that under the Kentucky statute, providing "the issue in marriage, deemed null in law, shall, nevertheless, be legitimate," Mrs. Ewing was entitled to the land, its descent being controlled by the law of this State; but as the slave was moveable the law of Indiana must control as to his value, that being the domicil of Moore at his death.

The court in that case said, in discussing the effect of the statute: "It is a law of inheritance. It does not operate extra territorially so as to legitimate in another State a child who, by the law of that State, would be illegitimate there. This statute would have applied to the land even if the marriage had taken place in Indiana," and further "the law of Kentucky, which declared that issue in marriage,

deemed null in law, *should be legitimate* can be applied only so far as the estate in Kentucky, which descends according to her law, may be concerned."

In the case of Jackson v. Moore and wife, 8 Dana, 170, a provision of this same statute (1796), by which antenuptial children were made legitimate by the sub-equent marriage of the parents, this court held the statute to be one of inheritance, and a child made legitimate by its provisions was adjudged to inherit from the brother of her father, his brother dying without children.

The word legitimate, as defined by Webster, means "born in lawful wedlock; to put in position or state of a legitimate person before the law by legal means; as to legitimate a bastard child."

In Harris v. Harris, 85 Ky., 49, a Miss Deacon married one Smith Ash in the State of Ohio (Cincinnati), in August, 1860. In a short time after the marriage she brought an action for a divorce that for some reason was dismissed. While she was the wife of Ash she intermarried with one Harris, the marriage to Harris taking place in Ohio also, but after this last marriage she obtained a divorce from her first husband. We have then both marriages taking place in the State of Ohio, and the testimony showing proceedings for a divorce from the first husband and the birth of several children, the offspring of the second marriage.

It was insisted in that case, the marriage being void, the children could not inherit from the father. This court held the last marriage void from its inception, but the children were legitimate and entitled to the father's estate by reason of the statute of 1796, that had been embodied in both the Revised and General Statutes, and said: "Where a marriage actually takes place—that is, where it is solemnized according to the forms of law—though void as between the parties, the offspring are made legitimate by the statute."

It is, however, contended that section 4 of the Kentucky statute relative to void marriages, was intended to qualify something in the third section, and not to supply what they supposed had been omitted in the third section.

The third section makes in general terms the issue of an illegal or void marriage *legitimate*, and section 4 provides: "Where the marriage is contracted in good faith and with the belief of the parties that a former husband or wife then living was dead, the issue of the marriage, born or begotten before notice of the mistake, shall be the legitimate issue of both parties."

It is difficult to construe the fourth section as qualifying the third, unless it be said that in all void marriages, after notice of the mistake or the invalidity of the marriage, children begotten after this notice are illegitimate. Such could not have been the legislative meaning, and it is apparent the framers of the statute were fearful that something had been omitted in the third clause that required to be supplied by the fourth, and it is certainly more in accordance with the legislative intent to place this construction on the statute than to make the notice of the mistake on the part of the parents determine the legitimacy or illegitimacy of the children, as said in the case of Sams' administrator v. Sams, 85 Ky., 396, the statute should be construed according to its spirit and reason, and viewed in this light forbids the conclusion reached by counsel. The fear of an indictment for bigamy would deter the parties from violating the law, and no harm can result from a construction not only consistent with the object of the statute but in furtherance of a sound public policy.

Judgment affirmed.

GILMOUR'S ADM'X V. KERR'S EX'OR.

SAME V. SAME.

(Filed February 15, 1894—*Not to be reported.)*

1. *Settlement of partnership accounts*—Where a member of a firm withdrew from the partnership without a settlement of accounts, and his interest in the partnership passed into other firms subsequently formed and was held and appropriated by those firms for firm purposes, a partnership liability was created in favor of the withdrawing member on the part of the succeeding partnerships, and the court properly held one of the firm responsible upon the idea of a partnership liability.

2. *Same*—A settlement of partnership accounts which was signed by the parties as a firm and in their individual names must be assumed to be correct where, after the lapse of thirty years, a subsequent settlement of the partnership affairs is sought by the personal representatives of the parties and the original settlement is attacked; and the conclusion must be reached that the partners knew more of their rights and liabilities at that date than those who, after the lapse of such a time, are called on to make a settlement for them.

3. *Same—Preference of creditors*—Where a member of a partnership had placed in his hands assets of an insolvent firm which was indebted to his partnership and to him individually as well as to other creditors it could not be charged against him in a settlement of the affairs of his partnership the failure to appropriate the assets to the partnership debt, since he as an individual and the other creditors were entitled to have a distribution of the fund in proportion to their respective claims.

4. *Same—Interest*—Where a partner withdrew from the firm and those succeeding him retained his assets and used them, in the absence of a contract or agreement in regard to interest compound interest can not be charged.

5. *While this court has no power to appoint a commissioner*, or, if so, has never exercised that right, there is no reason why the commissioner in a complicated case should not be brought from the court below to enlighten the court with reference to the accounts in controversy.

Sweeney, Ellis & Sweeney for appellant.

James F. Clay and S. B. & R. D. Vance for appellee.

Appeal from Henderson Circuit Court.

Opinion of the court by Chief Justice Pryor.

This appeal is from a judgment in the consolidated cases of Hugh Kerr, Allan Gilmour and David Clark against Garvin Beatty, and of Hugh Kerr and Allan Gilmour against David Clark and wife.

The litigation originated from partnership transactions, beginning as far back as the year 1862, and involves the settlement of these partnerships in order that the rights of the parties to the present appeal may be determined.

The business in which the several firms were engaged was that of purchasing, stemming and prizing tobacco, for sale in this country and in England.

The first partnership began in the year 1862, and was composed of Hugh Kerr, Allan Gilmour and David Clark, and continued until 1867. E. G. Hall was a partner for a short time, when his interest was purchased by Hugh Kerr. In 1867 Garvin Beatty became a partner, and the firm composed of Kerr, Gilmour, Clark & Beatty carried on the business until the year 1881. Hugh Kerr then left the firm, leaving Gilmour, Clark & Beatty as partners, and this partnership ended in the year 1885, Beatty, however, withdrawing sometime in the year 1883.

A great portion of their tobacco was sold at Liverpool and London, and some of it in the cities of Louisville and New York.

From the year 1862 up to the last partnership, that ended in the year 1885, there had been no settlement of the partnership accounts, and when Hugh Kerr withdrew as a partner in the season of 1880–1, his interest in the partnership passed into the other firms, and was held and appropriated by those firms for firm purposes, and their liability to Hugh Kerr is the principal subject of inquiry in this case.

Hugh Kerr resided in Liverpool, was a man, as this record indicates, of large means, and, after leaving the partnership, seems never to have urged a settlement or required such a settlement of his accounts as a partner until one of the actions below was instituted, in the year 1884, by Hugh Kerr, Allan Gilmour and Clark against Garvin Beatty, seeking to recover of him what he (Beatty) was owing them by reason of these partnerships, after deducting his profits.

In this action the extent of the interest of the several partners is set forth, and no dispute arises as to the interest of each, or of the interest of Hugh Kerr, up to the time he ceased to be a partner in the year 1881.

It is not pretended in this action that Kerr had ever been paid or his accounts adjusted, but it is conceded that his interest in the first firm went into the second and third firms, and was evidently, as the books show and as his partners admit, who unite with him in this action, used by the firm in which Beatty was a member for firm purposes and so continued to be used until the dissolution of the last firm, which was in 1885.

When this action was pending, or after it became evident that Beatty had used more of the firm assets than he was entitled to, a statement of the accounts were made out that all the parties to this action against Beatty *were satisfied with*, and so alleged in their petition.

The accounts were made out, as the plaintiffs allege and that Allan Gilmour endorsed as correct, by one John Anderson, a competent *bookkeeper* and conversant with the business, to use Allan Gilmour's language, "*after an exhaustive examination and thorough understanding thereof.*"

After this, in an amended petition, it is stated that the business of the partnerships *had been carefully and finally audited and settled.*

It is manifest, therefore, that Allan Gilmour knew the state of accounts between the partners, involving all these partnerships, prior to the year 1886, and we allude to his familiarity up to that time with the condition of the accounts, as this sole controversy is now between Hugh Kerr on the one side and Allan Gilmour's administratrix on the other.

In the month of December of the year 1885, after the accounts had been stated by Anderson in the action against Beatty, Kerr & Gilmour, being an action against Clark and wife (Clark being a plaintiff with them in the action against Beatty) to foreclose a mortgage given them by Clark and wife to secure Kerr & Gilmour *in any indebtedness that might be found due them upon a settlement of the accounts of the partnership.*

After this action was instituted David Clark had his name stricken as one of the plaintiffs from the petition against Beatty, and denied that the settlement made by Anderson was right or proper, or made by his authority.

In this action against Clark and wife it is again stated by Gilmour that John Anderson, by consent of the plaintiffs, had stated *the in-*

dividual accounts of the partners, and he believed the statement to be correct.

We infer from the record that Hugh Kerr was not in this State or country when this litigation was pending, and that *Allan Gilmour*, with the *books* of all the firms in his possession and his general knowledge of the partnership transactions, must have known at least whether or not the accounts against each partner were approximately correct. They were partnerships involving large interests, and the parties connected with the business were doubtless men of intelligence, and must be presumed to have known what constituted partnership assets, and what partnership liabilities.

Allan Gilmour having died before these actions were finally disposed of, it is claimed by the administratrix (his wife) that the settlements made by Anderson were all wrong, and not understood by her intestate, and this widens the litigation and increases the trouble in the way of a fair and final adjustment of the accounts.

It is evident that Beatty and Clark were in no condition to meet their liabilities to their partners, and Gilmour may have been looking more to their ability to pay, and his efforts to coerce payment, than to bringing about a fair adjustment of the accounts between himself and Hugh Kerr; still the adjustment of Clark's and Beatty's accounts necessarily determine the state of the accounts between himself and Kerr.

It is insisted by counsel for the appellant that, although the *firms* or partnerships continuing after Hugh Kerr ceased to be a partner used the assets of the first firm or the assets of Hugh Kerr, still it created a several liability on the part of each partner to Hugh Kerr for the assets received into each firm, and not a partnership liability, or such a liability as would make Gilmour's administratrix responsible to the extent that the interest of Clark and Beatty in the firm assets failed to pay Kerr.

There is no evidence of any agreement to loan these assets to any one of the partners, and the record is entirely silent on the subject, except to show that the assets of the first firm in which Hugh Kerr was interested went into the succeeding firms, and were used by those firms for firm purposes.

The actions against Beatty & Clark by Gilmour proceeded on the idea that these assets have been used, and of a joint as well as separate liability. Gilmour knew that the assets of the first firm went into the succeeding firms. He was in fact the manager of the business in this country, and if the firms of which he was a member used Kerr's means, his liability to Kerr is undoubted, and the chancellor very properly held him responsible upon the idea that it was a partnership liability.

The position of counsel, as we understand it, that the surrender by Kerr to his copartners of his interest in the assets, is a separate loan to each and not a consent by the retiring partner that his assets may be used and the firm liable as such. We can not take that view of the question. The very acts of the partners in their subsequent partnership business, the entries on the firm books, the mode of settlement adopted by Gilmour in his suits for settlement against Beatty & Clark show the manner in which they regarded this liability to Kerr, the retiring partner, and, besides, it is consistent with any rational view of such a business transaction.

In the brief of counsel for the appellant, known as the supplemental brief, the court's attention is called to the old firm of Hugh Kerr & Co. that had been settled by the parties themselves in the year 1859, and as we ascertain from counsel there is a suit now pending in

the court below to correct that settlement, and what effect to give it here is a question necessary to be considered.

Kerr & Gilmour were the partners in the firm of Hugh Kerr & Co., and in October of the year 1859 a settlement was had between them, by which Gilmour's share was ascertained to be $46,759. This settlement, of what is known as the *previous* business, continued undisturbed uutil the death of Gilmour. That took place a quarter of a century after it had been made, and it is scarcely to be supposed that during this entire period, with suits pending involving a settlement of all three partnerships, that Gilmour should have overlooked such a large indebtedness to himself as is now claimed existed, nor is there any evidence before us that he did not fully understand his rights when that settlement was entered into. The settlement is signed by the parties as a firm, and in their individual names. We must assume, therefore, that this settlement is correct.

It is attempted to be shown, or rather insisted by counsel, that there were many hundred hogsheads of tobacco left unsold at the date of that settlement which belonged to the firm, and remain unaccounted for, when it is made to appear that the tobacco had been sold long before the settlement by the commission merchants in Liverpool, and stated in the account of Robert Kerr & Son, the commission merchants, with the firm of Hugh Kerr & Co. This appears from the deposition of Jenkins, and we must also conclude that these partners knew more of their rights and liabilities at that date than those who, after the lapse of more than thirty years, are called on to make the settlement for them.

Another objection made to the settlement below is that the appellant or her intestate has been made to pay double interest on the amount due his partner, Hugh Kerr, in the settlement between them, and at first impression it would seem to be so, but when looking to the manner in which the partners themselves settled and the character of the transaction interest has not been improperly charged. When the firm of Hugh Kerr & Co. drew on their commission merchants for money they were charged with interest, and to pay this interest the firm was credited by interest due Kerr on his individual accounts, and in paying this interest the firm was only paying to Kerr back the interest he had paid for the firm out of his individual account.

It is complained that Hugh Kerr, after the failure of Robert Kerr & Son, had placed in his hands assets belonging to that firm amounting to £181,121, and as the insolvent firm owed Hugh Kerr & Co. £141,715, Hugh Kerr and Allan Gilmour being members of that firm, Hugh Kerr should have appropriated the money to the payment of the debt due Kerr & Gilmour, constituting the firm of Hugh Kerr & Co.

This the chancellor did not do because the insolvent firm was also indebted to Hugh Kerr individually in a greater sum than was due to the firm of Hugh Kerr & Co., and was also indebted to James Clark and others, and these creditors were entitled to have distribution of the fund in Hugh Kerr's hands in proportion to their respective claims. Gilmour had no equitable preference over Kerr or the other creditors, and there is nothing in this action of the court that works any injustice to Gilmour or the other parties in interest. There are other questions raised by counsel that are fully met by the settlement of the commissioner, and, in fact, when looking to this controversy as presented by the brief of counsel for the appellant, the theory is that Gilmour did not comprehend or understand the nature of the accounts between himself and his partners, and the chancellor

is asked to adopt such a view of these complicated accounts that had their inception more than a quarter of a century before this litigation began.

It is apparent that both Kerr and Gilmour were business men, and settlements made by them years ago ought not to be disturbed on the idea of their ignorance with reference to these various partnerships. The statement of accounts made in the settlement with the other partners of Beatty & Clark at the instance and under the direction of Gilmour by Anderson, a trusted friend of both parties, is entitled to great weight. Gilmour & Anderson then had the custody of the books. There was no controversy between Hugh Kerr and Gilmour at the time these accounts were stated, and what was then regarded as right and proper between the partners should be adhered to, in the absence of fraud or mistake, and neither appears in the record before us.

It is not to be expected that this court will itemize the accounts of these several partnerships. The record consists of nearly four thousand pages, and the learned chancellor below having before him the various reports made, with the exceptions of both parties, has, we are satisfied, rendered a judgment that is just and equitable between the parties.

Besides, it seems to us, as already intimated, the parties themselves, by the settlement of 1859, and by the settlements made by Anderson & Gilmour, or with Gilmour's approval in the actions against Clark & Beatty, have left but little for the chancellor to do. We have had with us the commissioner that we might the better understand the basis of the chancellor's judgment, and with his aid have prepared a statement of accounts as between these partners. While this court has no power to appoint a commissioner, or, if so, has never exercised that right, there is no reason why the commissioner, in a case with such complication as this, should not be brought from the court below to enlighten us with reference to these accounts. He has lessened our labors by his intelligent understanding of the record, and the court below will allow him the additional sum of $200, one-half to be paid by each party, and the clerk of this court will so certify. The statement of accounts is here inserted as a part of this opinion, marked B:

B.

The shares of Hugh Kerr in first firm, after deducting interest not allowed by court, is £24,371.4.8, which at $4.866 gives $118,590.41 due Hugh Kerr from first firm. On same page, 649, and on page 650, volume B, the share of Allan Gilmour in first firm of Kerr, Clark & Co. is stated at £17,845.2.5 (after deducting interest not allowed by the court), which at $4.866 equals $86,834.35, Gilmour's share in first firm of Kerr, Clark & Co. No interest was allowed to either Kerr or Gilmour on their respective shares in the said first firm.

Interest of Hugh Kerr in first firm	$118,590 41
Interest of Allan Gilmour in first firm	86,834 85
Sum of shares of Kerr & Gilmour in first firm	$205,424 76

And the assets, $183,038.85, divided by $205,424.76 gives the percentage that said assets will pay on the sum of the shares or claims of Kerr & Gilmour against said first firm as .8910261 per cent., which per cent. of $118,590 41 is $105,667.15, the amount the said assets will pay Hugh Kerr on his interest in or claim against said first firm, and the same percentage of $86,834.35 is $77,371.70, amount the assets of said first firm will pay to Allan Gilmour on his share in or claim against said first firm.

The $31,528.94 balance of assets of first firm in hands of Hugh Kerr is £6,479.8.5, converted into Federal money at $4.866, as shown in commissioner's report at page 424, volume B. Hugh Kerr is not charged with interest on this sum, no interest having been allowed to him on his share, $118,590.41, in the said first firm.

As to how the $105 667.15 due Hugh Kerr from first firm of Kerr, Clark & Co. was adjudged to be paid, I refer, first, to commissioner's report, volume B, page 683, where the total amount due Hugh Kerr from all three firms of Kerr, Clark & Co. is stated. The item $104,481.70, appearing first in the statement, is obtained by deducting from the $105,667.15, above named, the sum of $1,?35.40, Hugh Kerr's one-half of the costs of suit. I here copy the table from volume B, page 683:

Due Hugh Kerr from first firm, as above (no interest allowed) .	$106,431 75
Due Hugh Kerr from second firm	1,611 74
Interest 6 per cent. from av. date to July 31, 1890	446 96
Due Hugh Kerr from third firm	1,353 60
Interest 6 per cent. from av. date to July 31, 1890	321 75
Total due Hugh Kerr (all firms)	$108,165 80

Which by same commissioner's report, volume B, page 684, was to be paid as follows (*i. e.*, recommended to be paid):

To £6,479.8.5 at $4.866 (in his hands)		$31,528 94
To Lannie, Son & Co. for £80.6.9 at $4.866, and interest . . .		463 15
To James Clark		4,224 17
Commissioner's report, volume B, page 648—		
To Allan Gilmour, balance due English account . .	$2,350 28	
Interest to July 31, 1890	371 11	
		2,721 39
To deeds to realty, half David Clark's, Henderson & Uniontown	$18,459 00	
To one-half deeds to realty, G. J. Beatty's	4,200 00	
To deed one-half Eddyville factory	2,550 00	
To deed one sixth S. P. Smith's residence	384 00	
		25,593 00
To three bonds, for money loaned	$1,025 30	
To interest on same to July 31, 1890	36 61	
		1,061 91
James F. Clay, bond for rent of Third street house .	$115 00	
James F. Clay, interest on same to July 31, 1890 . .	4 01	
James F. Clay, account for two months rent Third street house	30 00	
		149 01
Five realty bonds	$1,998 33	
Interest on same to July 31, 1890	146 51	
		2,144 84
D. Banks, administrator P. H. Banks, deceased, balance due	$61 62	
R. S. Eastin, commissioner	17 06	
		78 68
		$67,965 09
Balance due Hugh Kerr from cash under control of court . .		40,200 71
		$108,165 80

From the table copied on preceding page (from commissioner's report, volume B, page 684) are omitted by oversight two items which should have

been charged to Hugh Kerr, and which are charged to him in the final judgment of the court (see volume B, page 709). Said two items are as follows, viz: $247.60 in hands of James F. Clay, attorney, and one-half of fee of $5,000 paid Clay and Banks by the commissioner, $2,500. For the item of $247.60 I refer to commissioner's report, volume B, page 651.

Balance due Hugh Kerr from cash under control of the court, brought over		$40,200 71
To amount in hands of J. F. Clay, attorney	$247 60	
To one half of fee paid Clay & Banks by commissioner	2,500 00	
Total items omitted to be charged to Hugh Kerr in table, volume B, page 684		2,747 60
Deduct this sum from the $40,200.71 above and we have the true amount due Hugh Kerr from the cash under the control of the court		$37,453 11

Which tallies with the judgment, volume B, page 709, and with the amount set forth in brief for appellee, page 40.

As to how Gilmour's administratrix is paid the amount due her from the assets of Kerr, Clark & Co., first firm, see table 3, commissioner's report, volume B, page 683, where Gilmour's share of assets is stated at	$89,312 47	
She is charged on same page one-half costs of suit		$1,285 39
At table 5, commissioner's report, volume B, page 685, she is charged with deeds to realty, Clark & Beatty, one-half bought by her and Beatty jointly,		25,593 00
Balance of cash on hand		904 31
Judgment making him liable for proceeds in full of tobacco belonging to first firm		47,698 85
His debt to Hugh Kerr, second and third firms		3,734 05
His debt to Grave & Co., reclamation items		1,876 87
	$89,312 47	$89,312 47

The $89,312.47 shown on this table (3), commissioner's report, volume B, page 683, to be due to Allan Gilmour's administratrix includes $11,940.77, allotted to her from the proceeds of mortgaged property of Clark on account of his debt to Gilmour as a member of second and third firms of Kerr, Clark & Co.:

Gilmour's whole share in assets	$89,312 47
Deduct	11,940 77
And we have	$77,371 70

The part of the assets due her from first firm, as shown by the judgment, page 708, paragraph 4, volume B, and brief for appellee, page 39, paragraph 4.

Again, the $9,674.31, balance of cash on hand charged to Gilmour's administratrix in said table (5), commissioner's report, volume B, page 685, includes $2,500, one-half the fee of Clay & Banks, paid by the commissioner:

Balance of cash on hand by table	$9,674 31
Deduct one-half of Clay & Banks' fee	2,500 00
And we have	$7,174 31

The amount adjudged to be paid her from cash under control of court. See judgment, volume B, page 710, paragraph 6, and quoted in brief for appellee, page 40, paragraph 6.

Verification of judgment, volume B, pages 708 and 709, paragraphs 4 and 5, and as recited in paragraphs 4 and 5, pages 39 and 40 of brief for appellee:

Due Hugh Kerr from the assets of first firm	$105,667 15	
He is charged with one-half costs of suit		$1,235 40
To balance in his hands		31,528 94
To debt due by Lannie, Son & Co. to third firm, Kerr, Clark & Co.		463 15
To debt due by James Clark to third firm		4,224 17
To balance due Hugh Kerr to Gilmour, account Hugh Kerr & Co.		2,721 39
To one half the price of realty bought by him and Gilmour's administratrix jointly at commissioner's sale in these cases		25,593 00
Bonds for money loaned by commissioner under order of court, viz:—		
Bond of J. F. Clay, agent	$627 71	
Bond of Posey Marshall	329 57	
Bond of J. T. Farley	104 63	
		1,061 91
Bond of B. M. Clay and J. F. Clay		149 01
Sum in hands of J. F. Clay, attorney		247 60
Five bonds for realty, viz:—		
Three bonds of Jordan Giles		1,053 75
One bond of A. S. Winstead		619 64
One bond of Edwin Hodge		471 45
Balance due by administrator of P. H. Banks, deceased		61 62
Balance in hands of R. S. Eastin, commissioner . .		17 06
To one-half of fee of Clay & Banks, paid by commissioner		2,500 00
Sum of payments adjudged		$71,948 09
Which, deducted from $105,667.15, leaves due Hugh Kerr on his interest in first firm, payable from money under control of the court		$33,719 06
Debt of Hugh Kerr against second firm, Kerr, Clark & Co. . .		1,611 74
Interest on same		446 96
Debt of Hugh Kerr against third firm, Kerr, Clark & Co. . . .		1,353 60
Interest on same		321 75
Total due Hugh Kerr from money under control of court . .		$37,453 11

Verification of judgment, volume B, page 710, paragraph 6, and as recited in brief for appellee, page 40, paragraph 6: Page 708, paragraph 4, volume B, and page 39, paragraph 4 of brief for appellees, the share of Allan Gilmour's administratrix in assets of first firm of Kerr, Clark & Co. are stated to be $77,371.70, same being .8910261 per cent of $86,834.85.

Due Gilmour's administratrix from assets of first firm	$77,371 70	
She is charged with the following sums—		
One-half costs of suit		$1,235 39

Amounts brought forward	$77,371 70	$1,235 39
One-half of deeds to realty of Clark & Beatty, purchased by her and Kerr jointly .	$25,593 00	
Less amount allotted to her on account of Clark's indebtedness to Gilmour in second and third firms	11,940 77	
		13,652 23
One-half of fee of Clay & Banks, paid by commissioner		2,500 00
Amount adjudged to be paid her from money under the control of the court		7,174 81
Hugh Kerr's debts against second and third firms .		3,734 05
Debt of Grave & Co. against second and third firms,		1,376 87
Judgment for balance of proceeds of tobacco of first firm used by second and third firms		47,698 85
	$77,371 70	$77,371 70

For items making total cash, as per cash account, $50,686.33, table No. 6, commissioner's report, volume B, page 686, I refer to commissioner's report, pages 650, 651 and 652, volume B.

Table No. 8, assets realized from all sources, first item cash as per cash account. See commissioner's report, page 658, volume B, statement of cash.

Table No. 9, page 689, volume B, unrealized assets. The title to S. P. Smith's residence was in the first firm of Kerr, Clark & Co. The property at Richland, Ind., was conveyed to Kerr, Clark & Gilmour. See volume A, page 47. These being assets of the first in which Gilmour had no individual interest, by reason of his mortgage on account of Clark's indebtedness to him in second and third firms of Kerr, Clark & Co., are to be divided between Kerr & Gilmour in the ratio of their respective interests in or claims against the first firm—*i. e.*: Kerr's claim, $118,590.41, ratio .5772936; Gilmour's, $86,834.35, ratio .4227064. See table 1, commissioner's report, volume B, page 681.

The Boonville, Ind., property belonged to Clark & Gilmour, one-half to each; 5 acres, Morgan's subdivision, Evansville, Ind., belonged to Clark, as did the cottage and lots at Middle Bass Island, Ohio, and in these, by reason of his individual mortgage, Gilmour's percentage is .5829894; Kerr's percentage is .4170105. In Gilmour's half of Boonville, Ind., property of course Kerr has no interest.

On pages 691 to 695, inclusive, volume B, is worked out the balance due Gilmour on English account Hugh Kerr & Co., which, on page 691, is shown to be $2,350.28 at May 4, 1885, and which is charged to Hugh Kerr with interest in the judgment in this case at $2,721.39. See judgment volume B, page 608, and brief for appellee, page 39.

Table No. 2, page 682, volume B, gives the following items of Clark's indebtedness to Gilmour in second and third firms of Kerr, Clark & Co.:

Due Allan Gilmour from David Clark, second firm	$20,114 78
Due Allan Gilmour from David Clark, one-half of Beatty's, second firm	5,727 71
Interest on same from August 14, 1884, to October, 1888 . . .	6,406 04
Due Allan Gilmour from David Clark, third firm	19,887 60
Interest on same from August 14, 1886, to October, 1888 . . .	2,543 43
Total due Allan Gilmour from David Clark, second and third firms	$54,679 56
The cash adjudged to Gilmour's administratrix is	7,134 31
This deducted from the $54,679.56 above leaves	$47,505 25

Which is the true balance of the debt of David Clark to Gilmour from second and third firms of Kerr, Clark & Co. The judgment makes this balance $47.698.85. See volume B, page 610, and brief for appellee, page 41. The difference $193.60.

Judgment affirmed.

The court delivered the following extension of its opinion upon a motion for rehearing June 23, 1896:

On a re-argument of this case several questions were discussed not insisted upon on the first hearing. These complicated accounts, running through a period of near twenty five years from their inception to the filing of the petition in this case, renders it difficult if not impossible to arrive at that accuracy of conclusion which will satisfy the parties to the litigation or meet the full justice of the case.

It is argued that Hugh Kerr furnished no capital to conduct the business in which Gilmour was interested with him, and that the sum of £70,000 allotted him in the settlement of October, 1859, was a part of the profits or the capital that had been made by Kerr & Gilmour upon moneys borrowed from the firm of R. Kerr & Co.

This entire record shows Hugh Kerr to have been a man of much means and engaged in a much larger business or in other enterprises in which Gilmour had no interest, and from which Kerr derived large profits.

The proof is plain that, in October, 1859, there was in the hands of their commission merchants about £80,000, and that, in a settlement then made, Gilmour's share was fixed at £9,675 and £70,000 as belonging to Hugh Kerr.

This settlement, made in the year 1859, was never disturbed but acquiesced in by all the parties, and it is now claimed that, although there was this settlement made, and one again made in April, 1884, a large and fabulous amount of debts was omitted from the one or the other of these settlements, amounting to more than a quarter million of dollars. This claim we think is without foundation.

The tobacco purchased up to the year 1857 was accounted for in the settlement of 1859, and the tobacco of 1858 and 1859 was included in the settlement of 1884.

It is insisted that assets exist and unaccounted for, and still this court has been unable to find them, unless, as is now argued, the £70,000, set apart to Hugh Kerr in 1859, is capital or profits belonging to the parties or to the firm instead of Hugh Kerr individually.

This can not be so for the reason that there is no proof to justify such a conclusion; but, on the contrary, the settlement itself refutes any such idea. The burden certainly, after the appellee has produced the settlement, is on the appellant to show that this large sum belonged to the firm and not to Hugh Kerr.

Then if Kerr had £70,000 and Gilmour £9,675 when the new firm began, in 1858, there is no reason why they should not receive interest, particularly when the commission merchant had paid interest on the deposit.

The only objection manifest in the final settlement now before us is that, in ascertaining the amount to which Gilmour is indebted to Hugh Kerr, the firm is charged compound interest or on annual rests made, as is the English custom, and in this manner the claim of Hugh Kerr is enlarged.

It is said by counsel for the appellee that, if Hugh Kerr had drawn from his commission merchant the sum credited to him in the "*previous business*," £70,000, and deposited it with the bank, under an

agreement or custom that he was to receive interest, and the balance due him at the end of each year, with the accrued interest, was to be added, and all become principal for the next year, would not Kerr be entitled to recover it beyond question? We think clearly so.

Such, however, is not the case presented here. These men were originally partners, and had been, in conjunction with others, for years. Hugh Kerr finally left the firm and those succeeding him retained his assets and used them. They used them in purchasing tobacco in this country and not in England. There was really no contract in regard to interest, and now, after the lapse of many years, the one who has used the funds is made to account as a trustee or guardian of the fund by annual rests, compounding the interest, so as to swell the amount of the debt to a larger sum than the parties themselves ever contemplated.

Kerr acquiesced in its use without asserting any such claim, and, after the lapse of years, with all of those who used it in conjunction with Gilmour becoming insolvent, he is made to account for compound interest.

As between partners, where one has even an excess of capital, no interest is allowed unless there is some agreement to that effect. Hugh Kerr contributed the capital to enable these firms to operate their business. He did it with a view, doubtless, of aiding Gilmour; and interest should not have been compounded, either as to the *previous* business or as to any subsequent loans.

To the extent, therefore, that Gilmour has been charged with compound interest, either on the previous *business* or subsequent transactions, this judgment is erroneous. If allowed compound interest on the claim of Gilmour, to the extent of his interest, it should be disallowed. All compound interest allowed by the one against the other in the settlement should be eliminated from it. In all other respects the judgment below is affirmed; and for this reason *alone* the judgment of affirmance is set aside and the judgment reversed and remanded to correct this error only. The allowance to the commissioner, made in the order of affirmance heretofore, must be paid.

This is an addenda to the original opinion.

FINNELL V. LOUISVILLE SOUTHERN R. R. CO.

(*Filed June* 23, 1896.)

1. *Vendor's lien on land upon which railroad is built*—Where the purchaser of land by executory contract, being in possession, sold a right of way over the land to a railroad company, which constructed its road upon the land, in an action by the original vendor to enforce his lien upon the land for the purchase money, the court properly permitted the railroad company, after judgment had been rendered for the sale of the property on each side of the railroad, to file an answer and cross petition, asserting its claim to the right of way, the court having by its judgment reserved the right, in the event the land should fail to bring the debt, to proceed to make the unpaid purchase money out of "the said roadway," thus making it proper that the railroad company should be heard as to the mode in which the roadway should be disposed of, or in which it should be made to account for the full value of the land taken for its road.

2. *Same—Sale of right of way with rails, etc.*—The land on each side of the railroad having failed to bring the debt, the vendor was not entitled to a sale of the right of way with the improvements upon it in the way of rails, etc., the railroad company not being a trespasser; and the court having had a

jury to assess the value of the land taken by the company and also the damage to the remainder of the tract, as in a condemnatory proceeding, and then rendered judgment against the company for the aggregate of these amounts, the plaintiff can not complain of this mode of adjustment as he gets much more than the value of the land in discharge of his lien.

3. *Same—Lien*—The only error was in rendering judgment without creating a lien to that extent upon the company's roadbed. The judgment should require the payment of the money within a fixed period (say twenty days), otherwise the lien to be enforced.

Bell & Bell for appellant.

Frank D. Swope, Bullitt & Shield, C. A. Hardin, sr., C. A. Hardin, jr., and E. H. Gaither for appellee.

Appeal from Mercer Circuit Court.

Opinion of the court by Chief Justice Pryor.

John W. Finnell owned a tract of 352 acres of land in the county of Mercer, and by an executory contract (in writing) sold it to Jackson Vanarsdall and John H. Finnell for $12,300. Vanarsdall purchased of John H. Finnell his interest and took possession of the land under this purchase. The vendor, John W. Finnell, having died, and the purchase money not having been paid, his personal representative, W. H. Terhune, instituted this action to enforce the lien of the vendor. After this sale to Vanarsdall, who was in possession and the equitable owner, the Southern Railroad was constructed over a part of this land, and having been made a defendant to the action the company was allowed to make defense, or by an answer and cross petition to set up its claim to the right of way under the Vanarsdall agreement. It seems that this pleading on the part of the railway company was filed or permitted to be filed after a judgment had been rendered to sell the property. That judgment directed the land on either side of the railway to be first sold, with this *proviso:* "that if the land or the sale fails to bring the debt" the court will then proceed to make the unpaid purchase money out of it, viz, *the said roadway.* We do not see that the filing of the cross pleading by the railway was an error on the part of the court, as it might well determine the mode in which this roadway should be disposed of or the company made to account for its full value. The commissioner sold the land on both sides of the right of way, and it lacked $6,000 of satisfying the vendor's lien, and now it is insisted that this right of way, with the improvements upon it in the way of rails, etc., should be sold to satisfy the lien yet due. It seems the court refused to sell the roadbed, but undertook to have it condemned by ascertaining the actual value of the land taken and the damage to the tract by reason of the taking. The jury fixed the value of the land at $100 and the damages at $350, making in all $450, and for this sum gave a judgment.

It is argued by counsel for the appellant that the chancellor was without jurisdiction to have this land condemned, as under our statute there is but one way the land could be condemned, and that was by the Mercer County Court.

The land had, in fact, not been condemned, but the entry and building of this great public way was made by the consent of the owner and the party in possession. There was no appropriation of property without the consent of the owner, or any injustice to the vendor by reason of giving to him the full value and more than the full value of the land in discharge of his lien. It is evident the chan-

cellor would, under the circumstances, permit the company to remove its track and leave the land unaffected by the presence of the road upon it, and if this equitable right exists in what way is the party seeking to enforce his lien injured, when he obtains twice as much as the land is worth? This not being a wrongful entry, the party is not in the light of a trespasser as in the case of Holloway v. Louisville, &c., Railway Co., 92 Ky., 244, where an ejectment was maintained because of the wrongful entry, but a case is presented in a court of equity where an equitable adjustment becomes necessary, and to prevent a sale of that in which the public has an interest, and the sacrifice of the property of the appellee.

The argument that the way and only way to test the value is by a public sale of the tract is fallacious, as there can be no doubt but that on the facts the party would be allowed to remove the bed of his road, with the rails, etc., and no chancellor ought or would permit a great line of railway to be severed in this manner where the right to enter on the land existed, and where a court of equity can so adjudge as to fully compensate the holder of the lien. If the chancellor had withheld his judgment until proceedings could have been had in the county court the same objections would be urged, and where it is plain the appellant has received all and more than he is entitled to if the judgment below is enforced, it should stand. The only error is in rendering a judgment without creating a lien to that extent upon the company's roadbed.

The judgment is reversed, with directions to enter a judgment requiring the payment of this money within a fixed period (say twenty days) or the lien will be enforced.

COMMONWEALTH, FOR USE, &C. V. HOWARD, &C.

(*Filed June* 23, 1896.)

1. *County levy bond—Validity of county court orders*—County courts have the power to adjourn from day to day, but they are not required to adjourn each day when they cease to transact business. The court may, where it is in session more than one day, treat the entire time as one day, and make and sign but one adjourning order. Therefore, when an order approving a Sheriff's county levy bond was entered as of January 1, 1890, but no adjourning order appeared at the close of that day's business, or until after an order entered as of the 4th day of January, and there was no signature of the presiding judge except after the adjourning order on the 4th day of January, the whole must be held to be one day of the court, and, therefore, the order approving the county levy bond is valid.

2. *Validity of county levy bond*—The fact that no order of court appears showing that the Sheriff executed an official bond does not affect the validity of the county levy bond, as the county court could, if there had been no sheriff, have appointed a collector of the county levy and taken bond for the performance of that duty.

Tinsley & Faulkner for appellants.

Thomas H. Hines for appellees.

Appeal from Clay Circuit Court.

Opinion of the court by Judge Guffy.

This action was instituted in the Clay Circuit Court in the name of the Commonwealth of Kentucky, for the use of Clay county

against A. B. Howard, late sheriff of Clay county, and the other-named appellees, his sureties on his bond for the collection of *ad valorem* taxes, authorized to be levied and collected for the use and benefit of Clay county for the year 1890.

It is claimed in the pleadings that the said sheriff had collected the same, and that there was due from him $3,459.90, with interest from the 8th of May, 1893, which he, on proper demand, had failed to pay over. Plaintiff also claims $371 in damages.

Several defenses were relied on, some of which need not be noticed. A jury trial was waived and the law and facts submitted to the court, and the court rendered judgment in appellant's favor against Howard for the sums claimed, but dismissed the action as to the other appellees, and from that judgment, dismissing the action as to the appellees, who were Howard's sureties, this appeal is prosecuted. A separate finding of law and facts was requested and rendered by the court. Appellants' motion for a new trial was overruled, and a reversal is now insisted on by appellants.

The finding of facts, as stated by the court, in substance show that Howard was elected sheriff for 1890–1, and acted as such during the year 1890, and collected the county dues sued for in this action, but that no valid order of the county court was ever made or signed accepting his bond or approving the bond sued on herein, and no order at all accepting or approving his official bond as sheriff.

The evidence introduced by the plaintiff shows that the order book of the Clay County Court has a number of entries or orders on it. The commencement reads as follows: "Orders Clay County Court. January special term, 1st day of January, 1890. Present, John S. Herd, P. J. C. C. C." Then follows two orders authorizing different parties to appropriate vacant land, etc.

The next order recites the appearance of A. B. Howard, sheriff of Clay county, with sureties, naming them, and the execution of his revenue bond for 1890, and that the same was approved by the court. The next order recites the appearance of A. B. Howard, sheriff of Clay county, with the appellees as his sureties, and the execution and approval of his bond for the collection of the county levy for 1890. The next entry on the order book is "January, 4th day, 1890." Then follows an order appointing a guardian. The next entry is as follows: "January special term. 4th day of January, 1890. Present J. S. Herd, P. J. C. C. C." Then follows an order allowing some one to enter and appropriate vacant land. The next entry is: "Court adjourned until court in course. John S. Herd, P. J. C. C. C."

All the foregoing orders, except the last one, are on page 286 on Order Book No. 2 of the Clay County Court—the last one is on page 287—and the signature of the judge is at the bottom of said order on page 287.

The witness, who was the county clerk, testified that there was no adjourning order on page 286, and that no other orders are on said pages, and the signature to the adjourning order is the signature of John S. Herd, then county judge of Clay county. Witness also stated that the above-named orders are "all the orders that appear on my order book in regard to the bond of A. B. Howard as sheriff for the year 1890."

Appellee quotes sections 6 and 7 of article 17, chapter 28 of the General Statutes, and insists that by virtue of that statute the purported orders of the Clay County Court are nullities, and that inasmuch as no valid bond was executed the sureties are not liable.

Section 6 reads as follows: "Before every adjournment the minutes of the proceedings of the court shall be publicly read by the clerk

and corrected, if necessary, and then the same shall be signed by the judge as presiding justice."

Section 7, *supra*, is as follows: "The minutes shall be taken in a book, and carefully preserved among the records; and no minute or order shall be valid until the same be read and signed."

The court below seems to have been of opinion that the proceedings of each calendar day must of necessity be read and signed, otherwise the same would be invalid, but such is not the law. The statute quoted does not require each day's proceedings to be read and signed.

In Dye v. Knox, 1 Bibb, 575, it was said that "county courts have the power to adjourn from day to day, but they are not required to adjourn each day when they cease to transact business. They may, if they see proper, treat the entire time they are in session as one day, and make and sign but one adjourning order."

The foregoing was approved in Garrard County Court v. McKee, 11 Bush, 238. In the latter case the court said: "In this case the 25th and 30th days of October are treated as one day, or as one continuous session of the court, and the adjourning order and signature of the presiding officer, entered on record on the 30th, are a sufficient compliance with the statute."

The entire proceeding of the Clay County Court from the opening of the court the 1st of January, 1890, up to the making and signing of the order of adjournment, must be held to be one day of court. The fact that no order of court appears showing that Howard executed an official bond is not material in this case. If there had been no sheriff the county court could have appointed a collector of the county levy, and taken bond for the performance of that duty.

It is certain that all the bonds required by law to be executed were in fact executed, and the appellees in good faith intended to bind themselves as sureties for the sheriff on the bond sued on, and had no idea but what they were so bound until some time after this suit was brought, and until after defense had been made.

It results from the foregoing that the court below erred in dismissing the petition as to the appellees sued as the sureties of A. B. Howard.

The judgment appealed from is, therefore, reversed and cause remanded, with directions to award plaintiffs a new trial and for further proceedings consistent with this opinion.

COMMONWEALTH, FOR USE, &C. V. HOWARD, &C.

(*Filed June* 23, 1896—*Not to be reported.*)

County levy bond—Validity of county court orders—The facts of the case are the same as in the case of same style reported *supra*, 412, except that in this case it appears that the county court met January 5, 1891, and the order approving county levy bond was entered as of that date. Other business was done at different times up to January 28, at which time an order of adjournment until court in course was made and signed by the judge, no other order of adjournment or signature of the judge appearing. *Held*—That the order approving county levy bond was valid.

Tinsley & Faulkner for appellants.

Thomas H. Hines for appellees.

Appeal from Clay Circuit Court.

Opinion of the court by Judge Guffy.

This action was instituted by the Commonwealth of Kentucky for the use of Clay county, against A. B. Howard, sheriff, and his sureties on his bond, for the collection of the county levy of Clay county for the year 1891.

Defense was made by the defendants, and the law and facts submitted to the judge, and a separate finding of law and facts asked and obtained. The trial resulted in a judgment against Howard, but the court dismissed the petition as to the other appellees. The principal defense relied on was that no valid bond had been executed.

The court found as facts that, although entries had been made in the order book of the Clay County Court showing the execution of the bond sued on, yet such orders had never been signed. Appellant's motion for a new trial being overruled, it prosecutes this appeal.

The questions of law involved in this case are in substance the same involved in the case of appellant against A. B. Howard, &c., this day decided, and the opinion in that case is adopted as the opinion herein, so far as the law involved is concerned.

In this case the county court met the 5th of January, 1891, and transacted business, and it also appears that the justices met during the same day, after the transaction of other business of the county court. It seems that other business was done at different dates up to January 28th, at which time an order of adjournment until court in course was made, and signed "James Eversole, J. P. C. C."

The cases of Dye v. Knox, 1 Bibb, 575, and Garrard County Court v. McKee, 11 Bush, 237-8, are conclusive as to the validity of the proceedings and orders of the Clay County Court, and sustain the validity of the bond sued on.

The judgment appealed from is, therefore, reversed and cause remanded, with directions to award appellant a new trial and for further proceedings consistent with this opinion.

COURTS v. LOUISVILLE & NASHVILLE R. R. CO.

(*Filed June* 24, 1896.)

1. *Railroads—Requiring passenger to pay more than ticket fare where agent has refused to sell him ticket—Punitive damages*—Where a passenger on a railroad train was required by the conductor to pay and did pay more than the regular ticket fare, although the ticket agent had refused to sell him a ticket for the particular station to which he desired to go, he can recover of the company only the amount which he was required to pay in excess of the ticket fare, not being entitled to punitive damages, as both the conductor and ticket agent acted in good faith and within what they believed to be the orders of their superiors, and the conductor did nothing to harass or humiliate him.

2. *Same*—A plaintiff can not recover punitive damages unless the facts alleged in his petition show his right to such relief. But in this case neither the pleadings nor the evidence establish plaintiff's right to punitive damages.

W. E. Russell & Sons for appellant.

W. J. Lisle, H. W. Bruce and Thompson & McChord for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Landes.

This was an action to recover from the appellee damages for compelling him to pay more than the regular fare from Lebanon to Chicago Station on the Knoxville Branch of the appellee's railroad.

Appellant boarded passenger train No. 26 that passed Lebanon regularly about 5 o'clock in the morning on the 11th day of September, 1893, for the purpose of going to Chicago Station, where he was engaged as a hand at a brickyard, without having a ticket for the passage. The regular ticket fare between the two points was 36 cents. He applied to the ticket agent at Lebanon for a ticket but the agent refused to sell it to him because Chicago was not a regular stop station for that train. Not having a ticket the conductor, under the rules of the company, required him to pay 47 cents for his passage, which was 11 cents more than the regular ticket rate, the distance being 12 miles. He objected to paying the extra charge, urging as a reason that he had applied to the ticket agent at Lebanon for a ticket and he refused to sell it to him. His objection was of no avail and he had to pay the train rate.

It appears from the evidence that some time before this occurrence orders had been given by the proper officials to take up passengers on train No. 26 at Chicago until further orders. But it also clearly appears that both the ticket agent and the conductor were acting in good faith, and within what they believed to be the orders of their superiors, and according to the rules of the company, the one in refusing to sell a ticket to the appellant for that train and the other in requiring him to pay the extra or train fare.

It further appears from the evidence that after the train stopped at Lebanon on that morning the conductor discovered the appellant and another attempting to board the train by getting on at the front platform of the baggage car, and that he required them to enter a passenger car instead, and that the incident excited a suspicion that they were endeavoring to avoid paying fare, and that when he collected fare from the appellant he reminded him of this, and expressed his suspicion that he had tried to avoid paying the fare. This being substantially the state of facts brought out in the evidence, the court instructed the jury that if the order was given to stop train No. 26 at Chicago Station, which was not a regular stop station for that train, and the ticket agent refused to sell a ticket to the appellant to that point for that trip, and he was required to pay, and did pay the conductor on the train more than the regular rate for a ticket from Lebanon to Chicago Station, the appellant was entitled to the difference between the amount paid and the regular ticket rate, and that they should so find. At the same time the court refused to give an instruction requested by counsel for the appellant that the jury were not confined in estimating the damages, if any, to the difference between the regular ticket fare and the train rate, but that they might, in addition thereto, give punitive damages. The jury having found a verdict for the appellant for 11 cents, the difference between the two rates of fare, for which a judgment was rendered, and the court having refused to grant a new trial, the case is brought before us on appeal.

The only error for which a reversal is sought is the refusal of the court to give the instruction allowing punitive damages to be assessed. But after a careful examination of the case we have not been able to discover any fact brought out that would have justified an in-

struction of the kind. In the first place, it is not clear that the allegations of the petition were sufficient to authorize anything more than actual or compensatory damages. The substance of the case as stated in the petition is that the appellant applied to the ticket agent for a ticket to Chicago Station; that the agent refused to sell him the ticket, the regular fare being only 36 cents; that he boarded the train without a ticket, and was compelled and required by the conductor to pay 47 cents, which he paid under protest, and went on, as his business required him to go on that train; that extortion was thus perpetrated, whereby he was harrassed, vexed and humiliated.

Under the law the relief sought and adjudged must be based on the facts stated in the pleadings of the party seeking the relief. But here there is no allegation of fact showing that the conductor ought not to have required the payment of the 47 cents that was paid, or showing that he acted arbitrarily or in an insulting or abusive manner, or in such a way as to harrass or humiliate the appellant, upon which to base a recovery of any more than actual damages. But aside from this the evidence fails to show any fact that would have warranted the court in submitting any question besides that of compensation to the appellant for what seems to have been an honest mistake on the part of the ticket agent and conductor, whereby the appellant was required to pay more than the regular ticket fare for that trip. And the jury having allowed the difference between the regular ticket fare and the train fare which he was required to pay, which carried the costs with it, the appellant has recovered all that the facts alleged or proved show he was entitled to, and finding no error the judgment is affirmed.

HENDERSON BRIDGE CO., &C. V. CITY OF HENDERSON, &C.

(*Filed June* 24, 1896.)

1. *Municipal taxation—Taxation upon property within corporate boundary*—A city or town may by statute be constituted a taxing district with power as such to impose a railroad or school tax upon property therein without judicial inquiry as to individual benefits, and the city of Henderson having been constituted such taxing district for both railroad and school purposes, the entire bridge property of appellant within its boundary, extending to low-water mark on the Indiana shore, is subject to taxation by the city to pay interest on the railroad and school bonds.

2. *Collection of taxes based on yearly assessments—Res judicata*—The right to collect taxes is based upon yearly assessments, each of which in its turn may be called in question. Therefore, in a suit to collect taxes for one year, the defense that the assessment is unjust and excessive can not be treated as *res judicata* because of a decision in a court to collect taxes for former years. Whether the question as to the power to tax can be treated as *res judicata* because of a decision in a suit to collect taxes for former years is not determined.

3. *Correction of assessment*—As defendants had an opportunity to apply for correction of the assessment by the proper tribunal, of which they neglected to avail themselves, they can not now complain even if the assessments be excessive, which does not satisfactorily appear.

4. *Taxation of bridge*—Even if the rule which exempts from taxation for ordinary municipal purposes agricultural lands included within the boundary of a city against the will of the owner where they receive but little if any benefit from the city government can be applied to a bridge voluntarily

constructed within the city limits, that rule does not operate to exempt defendant's bridge property from such taxation, since it not only derives benefit and protection from the municipal government, but enjoys peculiar advantages and privileges by reason of its relative position not possessed by others who share with it the local burdens. And, therefore, the entire bridge within the boundary of the city to low-water mark on the Indiana shore is subject to taxation for ordinary city purposes.

The case of Louisville Bridge Co. v. City of Louisville, 81 Ky., 189, is overruled.

5. *Same*—The Legislature of this State had power to authorize the city of Henderson to tax the bridge notwithstanding the fact that by the compact with Virginia navigation of the Ohio river is made free and common to the citizens of the United States.

6. *Same*—The fact that the Henderson Bridge Co. accepted its charter and expended money in constructing its bridge upon the faith that under previous decisions of this court the portion of the structure north of low water mark on the southern shore would not be subject to municipal taxation does not give it a contract right to exemption therefrom.

Yeaman & Lockett, H. W. Bruce and Wm. Lindsay for appellants.

Clay & Clay and Montgomery Merritt for appellees.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge Lewis.

The Henderson Bridge Co. was, in 1872, by the statute of this State, incorporated with power to construct and own a bridge across the Ohio river. It was, however, not organized for business until 1880, when the Louisville & Nashville R. R. Co., an existing and distinct corporation, became the principal stockholder.

In February, 1882, the city of Henderson gave the bridge company the right to build the bridge over one of its streets and the use of another. But in the ordinance making the grant, which the company accepted and agreed to abide by, the right of the city to levy and collect taxes on that portion of the structure situated within the municipal boundary, then extending to low-water mark on the northern shore, was reserved, and the bridge thus located was about that date begun, and in 1885 completed.

In December, 1887, the city of Henderson brought an action to recover of the bridge company the amount of taxes alleged to be due for each of the years 1886 and 1887, according to the assessed value of that portion of the bridge property within its boundary; also prescribed penalties for nonpayment. The Louisville & Nashville R. R. Co. was, upon its petition, subsequently made a party defendant, having, as stated, acquired possession of the bridge and agreed to pay all the taxes properly assessed against it.

The lower court adjudged that plaintiff recover the amount sued for; that it had a lien therefor upon so much of the bridge property as was assessed, and the bridge company was ruled to pay it. That judgment was in 1890, and on appeal to this court, affirmed. (See 90 Ky., 499.)

The present action was brought December 4, 1890, to recover the amount of like taxes and penalties for the years 1888 and 1890, and a like judgment is now before us for revision.

It appears the taxes sued for in this as in the former action were levied to pay not only the ordinary municipal expenses, including current expenses of public schools, but interest on waterworks bonds,

railroad bonds and school bonds previously issued; and it is conceded by appellants that that portion of the bridge property south of low-water mark on the Kentucky shore, and within the city boundary, is subject to taxation for all the purposes mentioned. But they controvert the right of the city of Henderson to subject to taxation for municipal purposes that portion between low-water mark on the southern and low-water mark on the northern or Indiana shore, and arguing that the effect of funding the original waterworks, railroad and school bonds was to render all the new bonds municipal debts proper. They deny said portion of the bridge is now subject to taxation for any of those purposes.

But in the opinion on the former appeal the right of the city to levy taxes on the entire bridge within its boundary to pay interest on railroad and school bonds was recognized as still existing and distinct from the right to levy taxes thereon for purely municipal purposes. It was held, as had been previously done by this court, that a city or town might, by statute, be constituted a taxing district, with power, as such, to impose a railroad or school tax upon property therein without judicial inquiry as to benefits resulting to individuals, and that as the city of Henderson had been constituted such taxing district for both railroad and school purposes the entire bridge property within its boundary was subject to taxation to pay interest on the railroad and school bonds.

The right of the city to subject that part of the bridge within its boundary north of low-water mark on the southern shore to taxation for municipal purposes was likewise recognized, but decided to exist only in virtue of the contract whereby it was reserved in consideration for the grant of way and use of the streets.

It is, therefore, contended that adjudication and determination of the issues in that action are conclusive of the right claimed by plaintiff in this. But defendants contend and cite authority in support of the proposition that a suit to recover taxes for one year is no bar to a suit for taxes of another, and then argue, very properly, that if the State could not be bound by an erroneous decision neither ought a citizen be estopped defending a claim of an unpaid tax.

Whether that plea be available in other respects, the particular defence that assessments of the bridge property for the two last years named were unjust and excessive, can not be treated as *res judicata* because the right to collect taxes is based upon yearly assessments, each of which in its turn may be called in question. Appellants, however, have no right to complain of the assessments referred to, for if either had been too high, which does not satisfactorily appear, there was opportunity to apply for correction by the proper tribunal, of which they neglected to avail themselves. Even if the question had not been directly so determined on the former appeal we would now decide that the city of Henderson, as a taxing district, has power to subject all the bridge property within its boundary to the railroad and school taxes, for such is the settled doctrine of this court. But as counsel for appellants, with some plausibility, insist that if the city of Henderson did not have the power to tax the same property for purely municipal purposes, it could not acquire it by said contract, and state some reasons, not heretofore presented, why the power does not exist at all, we deem it proper, without, however, deciding as to the plea of *res judicata*, to reconsider and discuss the main question.

The rule recognized and applied by this court is that although power may be given by the Legislature to enlarge the boundary of a city or town and tax for municipal purposes persons and property

constructed within the city limits, that rule does not operate to exempt defendant's bridge property from such taxation, since it not only derives benefit and protection from the municipal government, but enjoys peculiar advantages and privileges by reason of its relative position not possessed by others who share with it the local burdens. And, therefore, the entire bridge within the boundary of the city to low-water mark on the Indiana shore is subject to taxation for ordinary city purposes.

The case of Louisville Bridge Co. v. City of Louisville, 81 Ky., 189, is overruled.

5. *Same*—The Legislature of this State had power to authorize the city of Henderson to tax the bridge notwithstanding the fact that by the compact with Virginia navigation of the Ohio river is made free and common to the citizens of the United States.

6. *Same*—The fact that the Henderson Bridge Co. accepted its charter and expended money in constructing its bridge upon the faith that under previous decisions of this court the portion of the structure north of low water mark on the southern shore would not be subject to municipal taxation does not give it a contract right to exemption therefrom.

Yeaman & Lockett, H. W. Bruce and Wm. Lindsay for appellants.

Clay & Clay and Montgomery Merritt for appellees.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge Lewis.

The Henderson Bridge Co. was, in 1872, by the statute of this State, incorporated with power to construct and own a bridge across the Ohio river. It was, however, not organized for business until 1880, when the Louisville & Nashville R. R. Co., an existing and distinct corporation, became the principal stockholder.

In February, 1882, the city of Henderson gave the bridge company the right to build the bridge over one of its streets and the use of another. But in the ordinance making the grant, which the company accepted and agreed to abide by, the right of the city to levy and collect taxes on that portion of the structure situated within the municipal boundary, then extending to low-water mark on the northern shore, was reserved, and the bridge thus located was about that date begun, and in 1885 completed.

In December, 1887, the city of Henderson brought an action to recover of the bridge company the amount of taxes alleged to be due for each of the years 1886 and 1887, according to the assessed value of that portion of the bridge property within its boundary; also prescribed penalties for nonpayment. The Louisville & Nashville R. R. Co. was, upon its petition, subsequently made a party defendant, having, as stated, acquired possession of the bridge and agreed to pay all the taxes properly assessed against it.

The lower court adjudged that plaintiff recover the amount sued for; that it had a lien therefor upon so much of the bridge property as was assessed, and the bridge company was ruled to pay it. That judgment was in 1890, and on appeal to this court, affirmed. (See 90 Ky., 499.)

The present action was brought December 4, 1890, to recover the amount of like taxes and penalties for the years 1888 and 1890, and a like judgment is now before us for revision.

It appears the taxes sued for in this as in the former action were levied to pay not only the ordinary municipal expenses, including current expenses of public schools, but interest on waterworks bonds,

railroad bonds and school bonds previously issued; and it is conceded by appellants that that portion of the bridge property south of low-water mark on the Kentucky shore, and within the city boundary, is subject to taxation for all the purposes mentioned. But they controvert the right of the city of Henderson to subject to taxation for municipal purposes that portion between low-water mark on the southern and low-water mark on the northern or Indiana shore, and arguing that the effect of funding the original waterworks, railroad and school bonds was to render all the new bonds municipal debts proper. They deny said portion of the bridge is now subject to taxation for any of those purposes.

But in the opinion on the former appeal the right of the city to levy taxes on the entire bridge within its boundary to pay interest on railroad and school bonds was recognized as still existing and distinct from the right to levy taxes thereon for purely municipal purposes. It was held, as had been previously done by this court, that a city or town might, by statute, be constituted a taxing district, with power, as such, to impose a railroad or school tax upon property therein without judicial inquiry as to benefits resulting to individuals, and that as the city of Henderson had been constituted such taxing district for both railroad and school purposes the entire bridge property within its boundary was subject to taxation to pay interest on the railroad and school bonds.

The right of the city to subject that part of the bridge within its boundary north of low-water mark on the southern shore to taxation for municipal purposes was likewise recognized, but decided to exist only in virtue of the contract whereby it was reserved in consideration for the grant of way and use of the streets.

It is, therefore, contended that adjudication and determination of the issues in that action are conclusive of the right claimed by plaintiff in this. But defendants contend and cite authority in support of the proposition that a suit to recover taxes for one year is no bar to a suit for taxes of another, and then argue, very properly, that if the State could not be bound by an erroneous decision neither ought a citizen be estopped defending a claim of an unpaid tax.

Whether that plea be available in other respects, the particular defence that assessments of the bridge property for the two last years named were unjust and excessive, can not be treated as *res judicata* because the right to collect taxes is based upon yearly assessments, each of which in its turn may be called in question. Appellants, however, have no right to complain of the assessments referred to, for if either had been too high, which does not satisfactorily appear, there was opportunity to apply for correction by the proper tribunal, of which they neglected to avail themselves. Even if the question had not been directly so determined on the former appeal we would now decide that the city of Henderson, as a taxing district, has power to subject all the bridge property within its boundary to the railroad and school taxes, for such is the settled doctrine of this court. But as counsel for appellants, with some plausibility, insist that if the city of Henderson did not have the power to tax the same property for purely municipal purposes, it could not acquire it by said contract, and state some reasons, not heretofore presented, why the power does not exist at all, we deem it proper, without, however, deciding as to the plea of *res judicata*, to reconsider and discuss the main question.

The rule recognized and applied by this court is that although power may be given by the Legislature to enlarge the boundary of a city or town and tax for municipal purposes persons and property

thus included, the exercise of it is subject to judicial review and may be restrained. That rule, which is not adopted in most of the States, and the wisdom and policy of which has been criticised by eminent text-writers as an encroachment upon the legislative department, was first applied in the hard case of agricultural lands being brought by statute within a city or town boundary and made subject to municipal taxation against the will of the owners. And it never was applied to other subjects of taxation until the case of the Louisville Bridge Co. v. City of Louisville, 81 Ky., 189, was before this court in 1883.

But even in the leading case of Cheaney v. Hooser, 9 B. M. 330, it was held "that there must necessarily be vested in the legislative department a wide range of discretion, not only as to the objects for which a tax, general or local, may be enforced, as to which its judgment would seem to be conclusive, but also as to the particular subjects a species of property, which shall be liable to taxation, and as to the extent of territory within which a local tax shall operate." And it was further held that courts are authorized to interfere in such cases only where the burden, though called so, is palpably not a tax, but is under the form of a tax, the taking of private property for the use of others or for the public without compensation. In all such cases it was held that exact equality in the local burdens imposed should not, because unattainable, be made a test of the right to extend the corporate boundary of a city or town so as to bring in persons and property not hitherto included, but that if such persons and their property have nearly all the advantages which actual citizens derive from its business improvements, institutions and good government. No such flagrant case is presented as authorizes the court to declare the statute unconstitutional.

In none such cases was it held allowable or proper for the court to interfere in behalf of a person who had voluntarily sought or consented to the extension of town or city boundary so as to include him and his land.

If the right or propriety of this court interfering to relieve the Henderson Bridge Co. from municipal taxation of that part of its bridge now in question be tested by the rule as heretofore applied in cases of agricultural lands included by extension of town or city boundaries, even where done against the will of the owners, we would not be authorized to do so. For it is too plain for discussion that not only does that bridge derive benefit and protection from the municipal government, but it has obtained and now enjoys peculiar advantages and privileges, by reason of its relative position, not possessed by others who share with it the local burdens.

But this is not the case of a person and his property peing included by extension against his will of the corporate boundary of a city or town. On the contrary the bridge company voluntarily located and constructed its bridge within the corporate boundary of the city of Henderson, that then, like territorial limits of the State, extended to low-water mark on the northern shore. And that the benefits and advantages of such location and exceptional privileges granted by the city of Henderson, as estimated by the bridge company itself, do fully compensate it for the local burden imposed is shown by the contract with the city, though it is now repudiated.

Applying the just and equitable rule of making burdens and benefits of government reciprocal, we think the whole bridge structure, within the corporate limits of the city of Henderson, is liable for municipal taxes; for neither the benefits to the bridge company were lessened nor corresponding duty to bear its full share of the

burden is impaired or affected by the fact that a portion of the bridge is over water. And as such conclusion is inconsistent with the ruling in Louisville Bridge Co. v. City of Louisville, that case must be overruled.

But it is contended by counsel for appellants that, because by what is called the compact with Virginia, navigation of the river Ohio is made free and common to the citizens of the United States, the Legislature of this State could not authorize the bridge taxed by the city of Henderson.

That question seems to have been made in the case of Louisville Bridge Co. v. City of Louisville and properly decided contrary to the views of counsel.

It is also contended, substantially, that, inasmuch as the Henderson Bridge Co. accepted its charter, expended money in constructing the bridge and upon the faith that, in the sense of previous decisions of this court, the portion of the structure north of low-water mark on the southern shore would not be subject to municipal taxation, it has acquired a contract right to exemption therefrom.

A simple and sufficient answer to that proposition is that what is called a contract is wholly without consent or consideration, essential and vital elements of every contract.

Wherefore, the judgment is affirmed.

HENDERSON BRIDGE CO., &C. V. CITY OF HENDERSON, &C.

(*Filed June* 24, 1896—*Not to be reported.*)

Yeaman & Lockett, H. W. Bruce and Wm. Lindsay for appellants.

Clay & Clay and Montgomery Merritt for appellees.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge Lewis.

This appeal involves the right of the city of Headerson to tax the Henderson Bridge Co. and its property for municipal and other purposes for the years 1890, 1891, 1892 and 1893, and the same questions of law are involved as in the other case of the same style this day decided (*ante* 417); and, for the same reasons therein given, this judgment is also affirmed.

TREASY V. MOORE, &C.

(*Filed June* 23, 1896—*Not to be reported.*)

1. *Correction of mistake in judgment—Revivor*—Where judgment was rendered for the recovery of a lot of ground which was erroneously described as being the lot upon which a certain house was located, when in fact the house referred to was upon a different lot, the court had the power at a subsequent term by consent of the parties to correct the mistake. And it is immaterial

that the plaintiff in the judgment had in the meantime died and that there had been no revivor against her heirs or representatives, as they were brought before the court upon a motion to set aside the order correcting the mistake.

2. *Same— Attorney and client*—The appellant, one of the defendants, can not complain that he did not personally consent to the correction of the mistake, his attorneys having the right to consent for him under the circumstances.

E. E. McKay for appellant.

J. M. Chatterson for appellees.

Appeal from Jefferson Circuit Court, Law and Equity division.

Opinion of the court by Judge Guffy.

In the suit of Jane M. Treasy against The Fidelity Trust and Safety Vault Co., &c., in which the appellant, Martin Treasy, was a defendant, pending in the Jefferson Circuit Court, the plaintiff was adjudged to be the owner of and entitled to one-fourth interest absolutely in a lot of ground and the improvements thereon situated on the south side of Market street, fronting on Market street 17½ feet and extending back southwardly same width 200 feet. Said house is numbered 708, West Market street, and is known and described in the commissioner's report as the Phillips house, said property having been held as firm property by the late firm of James Treasy & Bro. The above judgment was rendered June 9, 1891. On the 9th of May, 1892, an amended judgment was entered, which reads as follows:

"Now come Michael Moore, a brother of, and Catherine Igoe, a sister of, and being the only heirs-at-law of the plaintiff herein, Jane M. Treasy, who departed this life intestate on the — day of January, 1892, by counsel, and also come the defendants, The Fidelity Trust and Safety Vault Co., the executor of James Treasy, deceased, and Martin Treasy, all by counsel, and by agreement the judgment entered herein on the 9th day of June, 1891, is now and hereby amended and corrected as follows, so as to correctly describe by metes and bounds the lot and improvements fronting on the south side of Market street, between 7th and 8th streets, in Louisville, Ky., and in which the plaintiff decedent, Jane M. Treasy, was adjudged a one-fourth interest absolutely and which is erroneously called the 'Phillips house,' and erroneously numbered 708; and it is now and herein adjudged that the description intended to have been embraced by said judgment, and which was adjudged to be held by James Treasy & Bro. as partnership property, and in which the said decedent, Jane M. Treasy, was adjudged to be the owner of a one-fourth interest, and Martin Treasy, the owner of the other three-fourths, was and is as follows: A lot of land and the improvements thereon, lying in the city of Louisville, Jefferson county, Kentucky, on the south side of Market street, and being (17½) seventeen and one-half feet on said street, and running back two hundred feet (200) to an alley, and being the extreme eastern 17½ feet of 52½ feet formerly owned by William Talbot, and being recorded in deed book 259, page 310. And, by agreement of all parties in interest herein, this amended judgment may be entered, so as to correctly and accurately describe said property.

"And so much of said former judgment as adjudges Jane M.

Treasy or Martin Treasy any interest in the house known as the Phillips house and numbered 708, is hereby set aside and held for naught.

"STERLING B. TONEY, *Judge.*
"HUMPHREY & DAVIE,
"*Attorneys for Martin Treasy.*
"MARSHALL & LOCHRE,
"*Attorneys Fidelity Trust & S. V. Co.*
"J. M. CHATTERSON,
"*Attorney for Michael Moore.*
"SAML. S. BLITZ,
"*Attorney for Catherine Igoe.*"

At the June term, 1894, the appellant moved to set aside the order and judgment of May, 1892, upon the ground that it was made after the death of the plaintiff and without any revivor in the name of her heirs or representative, and because he, appellant, did not consent to the same.

The court, upon final hearing, overruled appellant's motion and dismissed the same, and from that judgment appellant prosecutes this appeal.

All the heirs and legatees of Jane M. Treasy were made parties to appellant's motion to set aside the order of May, 1892, hence it is now immaterial whether they were all before the court consenting to the order of May, 1892, or not.

It is evident the lot of ground described in the judgment of May, 1892, is the same intended to be described in the judgment of June, 1891, and is in fact the same ground, but the order of June, 1891, erroneously stated that the house, known as the Phillips house No. 708, was on the lot when in fact that house was not on the ground adjudged to plaintiff. It was, therefore, proper to make the correction, and we think the court had jurisdiction to do so.

Appellant's attorneys in the suit had the right to consent to the correction under the facts shown in this cause, even if it be true that appellant did not personally consent to the correction.

Judgment affirmed.

HAFNER V. COMMONWEALTH.

(*Filed June* 24, 1896—*Not to be reported.*)

Indictment— Obtaining money under false pretenses—Where one sent to another by express several boxes which he represented to the consignee as containing tobacco suitable for making cigars, when in fact they contained only tobacco stems and rubbish, and by this representation, which he knew to be false and which he made with intent to defraud, he feloniously obtained from the consignee $170, he was guilty of obtaining money by false pretenses, and an indictment alleging these facts charges a public offense.

George W. Swope for appellant.

W. S. Taylor for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Chief Justice Pryor.

The charge is: The defendant caused to be expressed from Louisville to Owensboro four large boxes, and represented the boxes con-

tained cigar supplies of tobacco suitable for making cigars, and procured Daily, to whom they were consigned, to pay the express company $170 therefor; that the boxes only contained tobacco stems and rubbish and were not suitable for making cigars; that he feloniously obtained from Daily by false pretense and with the intention to commit a fraud $170; that the representations were false and fraudulent, and known to be so by the accused, and the said Daily was deceived and defrauded thereby.

In the indictment the defendant pleaded guilty, and now insists that there is no public offense charged. The defendant is charged with the false and fraudulent representation of what the boxes contained when he knew they were false, and made them to deceive and defraud Daily, and to induce him to part with his money. This was obtaining money under false pretenses, and the judgment is affirmed.

The Kentucky Law Reporter.

EDITOR:
WALTER G. CHAPMAN, ... Frankfort, Ky.

VOL. 18. DECEMBER 15, 1896. No. 12

KENTUCKY COURT OF APPEALS.

NATIONAL BANK OF CYNTHIANA v. MATTINGLY & SONS.

(*Filed December* 21, 1895—*Not to be reported.*)

Execution of accommodation paper by corporation—The appellee, a corporation, drew a bill of exchange upon another in favor of and for the accommodation of J. G. Mattingly & Sons, a firm, for all practical purposes identical with appellee, which, after acceptance by the drawee, was sold by the said firm to the appellants for a valuable consideration. Upon suit being brought against the appellee for the amount of the bill, the defense was made that its secretary and treasurer, who executed the bill for the corporation, had no authority to bind the corporation by the execution of bills or notes, and that the corporation had no legal authority to make and execute accommodation paper.

Held—That inasmuch as the secretary and treasurer was the general business manager of the corporation and was in the habit of signing the notes of the corporation, and there appears to be no by-law designating any person to sign the name of the corporation, the signing of the bill must be held to be the act of the corporation; and also that the corporation and firm being practically identical, the execution of the bill for the benefit of the firm would inure to the benefit of the appellee and should, therefore, be obligatory upon it.

Humphrey & Davie for appellant.

O. A. Wehle for appellees.

Appeal from Jefferson Circuit Court, Chancery division.

Opinion of the court by Judge Guffy.

This action was instituted in the Louisville Chancery Court by the appellant against the appellees, seeking to recover judgment for $2,501, the amount of a bill of exchange drawn by appellees in favor of J. G. Mattingly & Sons' firm, and upon Eisemen Bros. & Co., and accepted by them and sold, as is alleged, by said firm to the appellant for a valuable consideration.

The appellees made defense, and in substance alleged that it was a corporation, and that B. D. Mattingly, secretary and treasurer, had

no authority to bind the corporation by the execution of notes or bills; that the bill sued on was executed as an accommodation to the firm of J. G. Mattingly & Co., and that the corporation had no legal authority to make and execute accommodation paper; that the bill sued on was used to pay off and discharge an antecedent debt owing to appellant by the firm of J. G. Mattingly & Sons, and that appellant had notice of the facts so pleaded, all of which was denied by appellant, except that the proceeds of the bill went to the credit of the firm of J. G. Mattingly & Sons.

A trial resulted in favor of appellees, judgment being rendered dismissing appellant's petition, and from that judgment this appeal is prosecuted. No question is made as to the due presentation and protest of the bill. It appears from the evidence in the case that B. D. Mattingly was the principal business manager, both of the firm and corporation, and was in the habit of signing the notes and obligations of the corporation as secretary and treasurer, and it nowhere appears that any by-law or order had been made designating any person to sign the name of the corporation, hence it seems clear to us that the signing of the bill sued on must be held to be the act of the corporation.

It is insisted for appellee that the corporation had no authority to execute paper for the accommodation of other parties, and quotes numerous authorities in support of that contention. We deem it unnecessary to review the authorities referred to, nor is it necessary to decide whether as a general rule a corporation like the one before us has power to issue accommodation paper, for the reason that for all practical purposes the firm of J. G. Mattingly & Sons and the appellees were one and the same person, and that all transactions that would enure to the benefit of one would also benefit the other, and this being true the execution of the bill in suit would be for the benefit and accommodation of appellees, and, therefore, obligatory upon appellees.

It does not certainly appear that appellant knew that the bill sued on was in fact for the accommodation of the said firm. It is appellant's contention that it purchased and discounted the bill in the regular course of business; but we need not determine that question as in our opinion it is not decisive of this case.

It seems to us that the court below erred in dismissing appellant's petition, and that judgment is reversed and cause remanded, with directions to render judgment in appellant's favor for the amount claimed.

The court delivered the following response, overruling a petition for rehearing, Nov. 21, 1896:

We have carefully considered the petition for rehearing in this case, as well as the oral argument in support of the same, but we are unable to perceive any error in the opinion handed down December 21, 1895, hence the same is adhered to.

Petition overruled.

CITY OF LOUISVILLE V. WILSON.

SAME V. NEVIN.

SAME V. HOERTZ.

SAME V. MARTIN.

SAME V. O'CONNELL.

(*Filed June* 24, 1896.)

1. *City officers—Ordinance changing salary*—The salary of a city officer may be fixed by statute or ordinance after he goes into office where no salary has theretofore been fixed, as section 161 of the Constitution, which provides that "the compensation of any city, county, town or municipal officer shall not be changed after his election or appointment, or during his term of office," relates to the "changing" of salaries that have already been fixed, and not to the "fixing" of salaries.

2. *Same*—The statute providing that each member of the boards of public safety and public works of a city of the first class "shall receive a salary of not less than $2,500" did not fix the salaries of those officers, but left them to be fixed by the general council under its power to fix the compensation of officers, subject only to the limitation imposed.

3. *Officers—Who are within meaning of Constitution*—The members of the boards of public safety and public works of the city of Louisville, the secretary of the board of public works, the assistant bailiff of the police court and the official stenographer of that court are all officers within the meaning of section 161 of the Constitution, and their salaries having been once fixed can not be increased or diminished during the terms for which they were appointed or elected; and this is true although their salaries may have been fixed after they went into office.

H. S. Barker, Fairleigh & Straus and John W. Barr, jr., for appellant.

Dodd & Dodd, Humphrey & Davie, Carroll & Hagan and D. W. Baird for appellees.

Appeal from Jefferson Circuit Court, Law and Equity division.

Opinion of the court by Judge Lewis.

It is agreed in these five cases, submitted and decided without action, as follows: Appellees Wilson and Nevin were appointed by the mayor for the term of four years, December 14, 1893, confirmed by the board of aldermen of Louisville, and immediately qualified as members respectively of the board of public safety and board of public works.

January 9, 1894, by ordinance of the general council the salary of each member of the two boards was fixed at $3,000 per annum.

By ordinance approved January 26, 1894, it was provided there should be one secretary of the board of public works, his compensation being fixed at $2,000 per annum; and January 31, 1896, appellee Hoertz was, by the board of public works, appointed secretary for the term of four years.

By ordinance approved May 21, 1894, it was provided the compensation of deputies of the police court should be $1,500 each, payable monthly; and January, 1895, appellee, J. J. O'Connell, was by I. N. Vetter, bailiff of said court, appointed one of his assistants or deputies.

January 9, 1894, by ordinance, the compensation of official stenog-

rapher of the city court was fixed at $1,000 per annum; and February, 24, 1894, appellee, John P. Martin, was, by the judge of the court, appointed to the office.

December 26, 1895, the general council, composed of newly-elected members, passed an ordinance, duly approved by the mayor, changing salaries of members of the boards of public safety and of public works to $2,500 each per annum; that of secretary of board of public works to $1,200 per annum; that of deputy bailiff to $1,200 per annum; and that of official stenographer to $900 per annum.

The main question in this case is whether the ordinance of December, 1895, violates section 161 of the Constitution, as follows: "The compensation of any city, county, town or municipal officer shall not be changed after his election or appointment or during his term of office; nor shall the term of any such office be extended beyond the period for which he may have been elected or appointed." And the proper determination of it involves the inquiry whether the various ordinances referred to, which first fixed the compensation of these officers, were valid and effectual for that purpose.

If any of them be invalid at all it is only because they were passed after the officers affected by them had qualified and commenced the discharge of their duties, for all appear to have been regularly passed and approved under authority conferred by section 2756, Kentucky Statutes, applicable to Louisville, a city of the first class, as follows: "Except as otherwise herein provided, the general council may, by ordinance, prescribe the duties, define the terms of office, *fix the compensation*, and the bonds and time of election of all officers and agents of the city."

But as none of those ordinances, except the particular one fixing salaries of members of the board of public health and of the board of public works, were passed subsequent to appointment and qualification of the several officers mentioned, there is no reason for calling in question the validity of any except it may be that one.

The purpose of section 161 was to prevent as well the reduction of compensation of officers, sometimes the result of prejudice and false economy, as increase of it, sometimes brought about by importunity and undue influence on their part, and so there can not be any change at all of an officer's compensation during his term; but there is an essential difference which we are satisfied the framers of the Constitution had in mind, between *fixing* the amount of compensation an officer shall receive, not hitherto ascertained and settled, and *changing* it after it has been fixed.

It is the obvious and uniform policy of government, State and municipal, as well as just to each officer, to fix his compensation definitely and certainly as to amount, except when he is paid by fees of office. And section 161 does not in terms, nor was intended to forbid or at all, relate to any statute or ordinance that for the first time does fix the salary of an officer; but it is equally necessary for the protection of both the government and officer that his salary, when once fixed, should not be changed during his term, and for no other purpose than to prevent that evil was section 161 made part of the Constitution.

It is, however, contended that section 2824 and section 2861 had the effect to fix and secure to the members respectively of the board of public safety and board of public works a definite amount of compensation, the two sections being alike, and as follows: "Each member shall receive a salary of not less than twenty-five hundred dollars."

But it is plain the Legislature did not intend thereby any more

than to prescribe a minimum of the compensation which the general council had been, by section 2756, already empowered to definitely and authoritatively fix; and it is to us equally plain that until the ordinance of January 9, 1894, was passed and approved the members of the two boards did not have the legal right to demand nor the city treasurer legal authority to pay them any compensation whatever.

In our opinion the last-named ordinance is valid, and, consequently, the one of December 26, 1895, must be held invalid.

There can be no question of appellees Wilson and Nevin being officers in the meaning of section 161, and the remaining inquiry is whether the other appellees are.

There are various tests by which to determine who are officers in the meaning of the law, but at last, in case of uncertainty, the intention of the law makers control. To constitute an officer it does not seem to be material whether his term be for a period fixed by law or endure at the will of the creating power; but if an individual be invested with some portion of the functions of the government, to be exercised for the benefit of the public, he is a public officer. (Meacham on Public Offices, section 1.)

The board of public works is by statute vested conjointly with the mayor with executive power, and, as its name indicates, has control and supervision of public places and public improvements, with authority to make contracts in regard thereto.

By section 2803 it has power to prescribe rules, not inconsistent with any statute or ordinance, regulating its own proceedings and conduct of its *officers*, clerks and employes, distribution and performance of its business, and preservation of the books, records, papers and property under its control; and, while it does not appear from the agreed statement of facts what particular duties are assigned to the secretary of the board, it is manifest he was intended to be and is more than a mere employe, for he is required to execute bond for the proper discharge of his duties, and, being next in authority to members of the board, is the proper person to keep the required journal of its proceedings, preserve books, papers and records affecting the public. In our opinion he should be held an officer in meaning of section 161.

As to appellee O'Connell performing, as assistant bailiff, the duties of a peace officer, and having authority to serve process and make arrests, there can be no question of his being an officer. Besides, the statute expressly provides for the appointment of assistant bailiff, as it does for the appointment of official stenographer, whose official acts have in degree the same verity and force as do those of the clerk of the police court.

We think appellees are all officers in the meaning of section 161.

Judgment affirmed.

Judges Guffy and DuRelle dissenting.

Judge Guffy delivered the following dissenting opinion:

The principal question involved in these five appeals is the power of the council of Louisville to regulate or change the salary or compensation of the officers named. The majority opinion of the court holds that the appellees are included within the provision of section 161 of the Constitution, which is as follows: "The compensation of any city, county, town or municipal officer shall not be changed after his election or appointment, or during his term of office; nor shall the term of any such officer be extended beyond the period for which

he may have been elected or appointed." We can not assent to that conclusion.

Section 160 of the Constitution creates the offices of mayor, or chief executive, police judge and members of the legislative boards or councils, fixes their terms of office and the manner of their selection. It seems to us that section 161, *supra*, only refers to the officers named in the preceding section, and to such other officers as are named in other sections of the Constitution.

Various offices were created by the Constitution, and we think that, upon reason as well as authority, when that instrument speaks of officers, it means only those theretofore named. The fact that section 161 follows section 160, which authorized the Legislature to create other offices, does not at all sustain the contention of appellees; for it will be observed that section 161 mentions county officers and no mention is made of county officers in section 160, but in other parts of the Constitution county officers were created, and the manifest object and purpose of section 161 was to protect as well as to provide against the undue influence of such officers.

It is true that section 160 authorizes the Legislature to provide for the election or appointment of other officers, and when such officers are elected by the voters of a town or city their term shall be four years. No limit is fixed to the term if the officer be appointed. Hence if section 161 includes officers not named in the Constitution an officer might be appointed for a term of ten years at a fixed salary, which must continue during ten years, although the duties of the officer might become merely nominal.

The majority opinion in these cases holds that the reason for the insertion of section 161 was twofold, viz: To make the officer secure in his compensation and free him from danger of injustice from an unfriendly power that was authorized to fix salaries and fees, and also to prevent the officers from procuring an increase of compensation by undue influence.

We heartily assent to that view, and we think that it sustains our views as to the true meaning of section 161. We can readily see that the mayor, police judge and legislative authorities of towns should be restrained as provided in the section *supra*. The police judge, being a judicial officer, ought to be free and independent of the other departments, and the same may be truly said of the mayor and legislative authorities. But is it possible that the framers of our organic law intended that the salary or fees of the thousands of subordinate officers of cities, towns and counties should be beyond the power of change during their term? We think not. There can be no reason for such intent, but upon the contrary there are many reasons which demand that such officers should be somewhat dependent upon higher authority. Such dependence would be likely to insure a faithful and efficient discharge of their duties. We know that a subordinate officer may be inefficient and negligent, yet not be liable to impeachment and removal, and it seems from the opinion of the majority of the court in the case of Todd v. Tilford that but few, if any, of the municipal officers can be removed in any other way.

It is the well-settled rule of law that the power that creates an office can abolish the same at any time, and thus leave the incumbent without either employment or compensation. And yet if the majority opinion is correct we have this strange condition of affairs, viz: A large number of officers whose compensation can not be increased nor diminished during their terms, but the office can be abolished and the incumbent left without office or compensation.

Surely the framers of the Constitution did not intend any such thing.

Our interpretation of section 161 is in harmony with the manifest intent of the provisions, while the attempt to extend its provisions to officers not named in the Constitution involves inconsistencies if not absurdities.

Section 107 of the Constitution provides "that the General Assembly may provide for the election or appointment for a term not exceeding four years of such other county or district, ministerial and executive officers as may, from time to time, be necessary."

Section 235 provides: "The salaries of public officers shall not be changed during the terms for which they were elected."

If the majority opinion is to be the rule of law, then all the subordinate officers appointed or created by virtue of section 107 come within the provision of section 161, and their compensation can not be changed during their terms, whether it be a fixed salary or fees or *per diem*. Such a construction is unreasonable and not in accord with business principles. Subordinate offices may for one year require about all the time of the incumbent, but the next year the duties might not require one-fourth of his time, and yet there could be no reduction of compensation under the majority opinion, and the only relief, if any, to the public would be the entire abolition of the office, although the incumbent might be glad to hold it at a reduced salary.

It is fair to assume that such, to some extent, was the case in regard to the appellees, especially Nevin and Wilson. The Legislature evidently had an idea that $2,500 per annum was probably fair compensation, hence required that they should have that much. The incumbents accepted the offices and could not have known that they would get more.

A short time afterwards the council reached the conclusion that the compensation should be $3,000 per annum, and the then mayor (Tyler) approved the ordinance. After the incumbents had been in office perhaps a year or more the council fixed the compensation at $2,500, and the ordinance was approved by the same Mayor Tyler. In our opinion each ordinance was and is valid because these officers are not embraced by section 161, but if they are embraced by the section *supra* then their compensation was fixed at $2,500 at the time they were appointed and qualified, and could not be raised to $3,000. The act provided that the compensation should not be less than $2,500, and the most that can be claimed is that the Legislature authorized the council to raise their compensation, which it failed to do for a month or two after the qualifications of the appellees, Nevin and Wilson.

Suppose the act of the assembly had provided that the salary should be $2,500, but the same might be increased by the council, would anyone contend that the salary had not been fixed? It seems to us that the provision made is substantially the same in fact and in law.

It seems clear to us that the business interests of the towns, cities and counties, as well as the genius of our institutions, demand that the compensation of all officers not mentioned in the Constitution should be at all times subject to the control of the legislative power that creates the offices and fixes the compensation. The taxpayers need protection as well as officers. The law-making power of the towns and cities are by the Constitution required to be elected bi-

ennially, but according to the opinion of the majority of the court they can not effect any reform or change in respect to a large and very important matter of public policy only once in four years.

We can not assent to any such doctrine. We think that the ordidances complained of should be held to be valid.

AMERICAN HARROW CO. V. MARTIN.

(*Filed June* 11, 1896—*Not to be reported.*)

1. *Sales of personal property—False representations*—To entitle the buyer of personal property to a rescission upon the ground of false representation he must show that he was actually deceived and induced to purchase by the alleged false representations. And the false representations must be of material facts and not merely commendations of value and utility.

2. *Caveat emptor*—While the rule *caveat emptor* generally applies when the article offered for sale is open to inspection of the buyer, yet that rule does not apply where the seller has full knowledge of the quality, character and capacity of the article or implement, and the buyer, by reason of lack of experience or capacity, has not such knowledge and must necessarily and does rely upon representations of the seller.

3. *Same*—In this action upon a note executed for the purchase price of a number of farming implements, as it appears that defendant, before completing the purchase, had ample opportunity to and did test the character and quality of the implements, and it is not alleged they are wholly valueless, the rule *caveat emptor* should be applied.

J. K. Hendrick and William Marble for appellant.

N. H. Bigham and J. C. Hodge for appellee.

Appeal from Livingston Circuit Court.

Opinion of the court by Judge Lewis.

The American Harrow Co. brought this action on a promissory note for $600 executed by J. L. Martin, November 5, 1892, and due December 1, 1893, the consideration being twelve farming implements, each being called and known a "seeder, harrow and cultivator combined."

The ground of defense is alleged fraudulent representations made by plaintiff to defendant as to the quality, efficiency and utility of the implements; and the question on this appeal is whether the lower court properly overruled the demurrer to the answer which, because plaintiff declined to plead further, was followed by a judgment dismissing the action.

In determining whether the buyer of personal property is entitled to rescission upon the ground of fraudulent representation as to quality and capability of the article sold, distinction must be kept in view between the statement of a material and essential fact in regard to it, and mere commendation of its value and utility; and it is a fundamental condition of the buyer's right to rescind upon such ground that he was actually deceived and induced to purchase by the alleged false representation of material fact or facts.

Also the rule *caveat emptor* generally applies when the article offered for sale is open to inspection of the buyer; but that rule does not apply when the seller has full knowledge of the quality, character and capability of the article or implement, and the buyer, by

reason of lack of experience or capacity, has not such knowledge, and must necessarily and does rely upon representations of the seller.

Many representations as to the character and capability of the farming implement in question are alleged in the answer of defendant to have been made to him by plaintiff, but most of them were evidently mere commendations of the machine, and not representations of material facts; but the alleged representations that it could be used successfully and profitably as a plow, harrow, rake and seed sower; that it would harrow through stalks or weeds as well as clean ground; and that it worked well in roots, which did not interfere with its operation, were material, and in regard to which plaintiff, being the manufacturer, must be considered to have had full knowledge, while defendant was comparatively uninformed. But it is admitted in his answer that defendant, before concluding the purchase and executing the note sued on, did actually test one of the implements by sowing with it about forty acres of wheat; and that was done more than a month before the conclusion of the purchase of the twelve implements, all but one of which he evidently purchased for resale.

It is true he states it was not known to him at date of the note the fact afterwards found out that the seed wheat so sown did not fully germinate; but it seems to us a person of ordinary experience and diligence might by examination have discovered at the date of the note whether wheat sown six weeks previously had germinated.

As, therefore, defendant had, before completing the purchase, ample opportunity to and did test the character and quality of the implements, and it is not alleged that they are wholly valueless, the rule *caveat emptor* should be applied; and, consequently, the lower court erred in overruling plaintiff's demurrer to the answer and counterclaim.

The judgment is reversed for further proceedings consistent with this opinion.

MEGUIAR V. WALSH.

(*Filed September* 17, 1896—*Not to be reported.*)

1. *Corporations—Transfer of stock—Liability of vendor for indebtedness*—Where the incorporators and managers of a woolen mill company executed their joint note in bank to raise money for the company, which had exceeded the limit of corporate indebtedness allowed under its charter, and, as indemnity, the signers of the note had a large quantity of wool set apart to themselves in the rooms of the mill, the title to this wool must be regarded as still in the corporation, and one of the signers of the note having subsequently sold his stock in the corporation to one of his co-obligors, that sale carried with it practically the property charged specifically with the payment of the note, and the purchaser, with knowledge of that fact, must look to the property he bought to pay the debt and not to his vendor, and, having paid the debt, he can not look to his vendor for contribution.

2. *Contract of release*—In addition to this reason for releasing the vendor of the stock the proof is sufficient to sustain a specific contract of release upon which he relies.

Edward W. Hines and George C. Harris for appellant.

Thomas H. Hines and Goodnight & Roark for appellee.

Appeal from Simpson Circuit Court.

Opinion of the court by Judge Hazelrigg.

Appellant and appellee, with two others, were the incorporators and managers of the Franklin Woolen Mill Co., and, needing money for the company with which to pay off its overdrafts and buy wool, executed their joint note to the banking house of McElwain, Meguiar & Co. for the sum of $5,000, the proceeds of which were placed to the credit of the company.

The corporate name was not used in this transaction because the limit of indebtedness allowed under the charter had been reached already. As indemnity the signers of this note had some 20,000 pounds of wool weighed and set apart in the rooms of the mill.

Shortly thereafter the appellee became dissatisfied with the business or its management, and sold his stock to the appellant.

To a suit brought by appellee on the note executed for this stock the appellant plead that he had paid off the appellee's share of the note of $5,000, and, therefore, owed him nothing.

The latter replied by saying that in the sale of his stock to appellant he was to and did surrender to appellant all his interest in and to the company's property, including the wool set apart as aforesaid, and was to be released from all debts of the concern, including the joint note at the bank. This the appellant denied.

The case was transferred to the equity docket without objection, and, on the proof, the chancellor sustained the contention of the appellee and rendered judgment for the full amount of the note sued on.

This judgment may be approved upon either of two theories. We may regard the legal title to the wool as in the corporation. A sale of the stock in such event carried with it practically the property charged specifically with the payment of the bank debt, and a purchaser with knowledge of this fact must look to the property he bought to pay the debt, and not to his vendor; or we may regard the proof as sufficient to sustain the specific contract of release from this date, relied on by appellee. On this point the evidence is contradictory, and we do not feel authorized to disturb the finding below.

Judgment affirmed.

EMBRY v. LOUISVILLE & NASHVILLE R. R. CO.

(*Filed September* 17, 1896—*Not to be reported.*)

1. *Railroads—Duty to trespassers*—The servants in charge of a railroad train are not required to keep a special lookout for trespassers on the track, being under no obligation to act for their safety until they are actually discovered.

In this action against a railroad company to recover for injuries to plaintiff, alleged to have resulted from the gross negligence of defendant in running one of its trains against plaintiff, the petition is fatally defective in failing to show that plaintiff had any right to be on the track or that defendant owed him any duty, and, therefore, a peremptory instruction to find for defendant was proper.

2. *Allegations of petition in action for damages*—The statement in the petition that the track at the place in question had been used as a passway for many years "with the consent and knowledge of defendant," can not be construed to import an express consent to such use so as to have made it the duty of defendant or its servants in charge of its trains to keep a special lookout for persons on the track at that point. Besides, the testimony shows that the

use of the track at that point was at most merely permissive, and did not establish a license for the people of the neighborhood to use it for any purpose.

3. *Evidence*—It was not competent for plaintiff to prove that the engineer had stated that he saw plaintiff sitting on the side of the track ahead, but was "afraid to ring the bell or blow the whistle for fear plaintiff would straighten up and the cylinder would hit and kill him," as this was hearsay testimony, and the statement being made after the plaintiff had been taken to his home and the engineer was returning to his train, it did not constitute a part of the *res gestæ*; but, even if true, it gave a good reason for not sounding the alarm, if in fact none was sounded.

Sprigg & Chelf for appellant.

W. H. Marriott for appellee.

Appeal from Hardin Circuit Court.

Opinion of the court by Judge Landes.

The appellant sought by this action in the Hardin Circuit Court to recover from the appellee damages for injuries inflicted upon him by being struck by a locomotive drawing a fast freight train of the appellee, at a point near the town and station of Sonora, in Hardin county, on the right of way of the appellee, along which the people of the neighborhood for many years had been in the habit of passing in going to and from the town.

It was alleged in the petition that the accident occurred "while the plaintiff was at and near a crossing over and along said defendant's railroad track, which crossing was frequently and continually used as a footway by the citizens of the neighborhood, by and with the consent and knowledge of the defendant," the agents or servants of the defendant in charge of the train of cars having failed to give "any warning to the plaintiff" or to exercise "ordinary care for the safety of the plaintiff;" and that "through the gross and willful neglect of its agents and servants in charge of one of its freight trains," the said train was run "against the plaintiff, by reason of which" the injuries complained of were inflicted. A demurrer to the petition was filed by the appellee, which was overruled.

The answer, filed simultaneously with the demurrer, contained, first, a traverse; and, second, an averment that the injuries complained of were the result of contributory negligence on the part of the appellant.

The case was submitted to a jury, and at the conclusion of the testimony introduced by the appellant the court, on the motion of counsel for appellee and over the objections of counsel for the appellant, instructed the jury "to find for the defendant," and, the verdict having been so returned by the jury, judgment was rendered dismissing the petition at the cost of the appellant, and this appeal is prosecuted to reverse that judgment.

The only question to be decided relates to the propriety of the peremptory instruction, in pursuance of which the jury returned a verdict adverse to the appellant, and this may well be ascertained by referring to the petition.

There was no statement in the petition that showed that the appellant had any right to be on the appellee's track or right of way, or that he was other than a trespasser when he was struck by the locomotive; and it contained no allegation that the agents or servants of the appellee, who were in charge of the train, saw him on

the track before they "ran said train against" him, or showing that they owed him any duty whatever in handling the train at that place and time.

These were necessary allegations, and without them the petition would not have sustained a verdict and judgment against the company in the action, for it is well settled that a railroad company or an engineer in charge of one of its trains of cars is not required to keep a special lookout for trespassers on its track, and is under no obligation to act for the safety of trespassers until they are actually discovered. (Central R. R. Co. v. Vaughn, 93 Ala., 209: 30 Am. St. Rep., 50; Masser v. Chicago, &c., Ry. Co., 68 Iowa, 602; Burg v. Chicago, &c., Ry. Co., 48 Am. St. Rep., 419; Brown's adm'r v. L. & N. R. R. Co., 17 KY. LAW REP., 145, and cases there cited.)

It follows that the substantial rights of the appellant were not prejudiced by the peremptory instruction; but if the petition had contained all of these necessary allegations, and if it had been in all respects sufficient, still, on examining the testimony introduced by the appellant, as reported in the bill of exceptions, we find that it was not sufficient to sustain the claim of appellant for damages against the appellee.

It did not show that the appellant, or the people of the neighborhood generally, had acquired any right whatever from the company to use its railroad track as a passway. The statement in the petition that it had been so used for many years "with the consent and knowledge of the defendant" can not be construed to import an express consent to such use, so as to have made it the duty of the appellee or its servants in charge of its trains to keep a special lookout for persons on the track at that point; but this allegation is denied, and, according to the testimony, the use of the railroad track or right of way there was at most merely permissive, and did not establish a license for the people of the neighborhood to use it for that purpose or for any other purpose.

It showed that the crossing referred to in the petition, "at and near" which the appellant alleged he was when he was injured, was a private crossing, and that, instead of being "at and near it," he was no less than one hundred yards from it.

It further showed that the appellant, at the time of the accident, was not walking on the track or right of way, and thus using it as "a footway," as he claimed the right to do under the alleged consent to and knowledge of such continual use by the appellee, but that being under the influence of intoxicating liquor, of which, according to his own testimony, he had freely partaken, he sat down on the end of a cross-tie and fell asleep, his elbows resting on his knees, his body leaning forward and away from the track, and his head in his hands, in which condition and position he was when the engine struck him and knocked him over.

It was also shown that the alarm whistle was sounded just before the accident occurred, at a distance varying in the testimony from twenty steps to forty yards, but what the alarm was given for the testimony did not clearly reveal. It may be inferred that the engineer discovered the appellant ahead, and that the alarm was sounded as soon as he saw him, and this is probably true; and, if true, it is all that he was required to do to avoid the accident. But after the accident occurred the train was stopped and backed to where the appellant was lying, and he was placed in the caboose and taken to his home, a short distance north of the station.

After this was done and while the engineer and conductor were returning to the train, a witness was permitted to testify, against

the objections of counsel for the appellee, that in a conversation with the witness the engineer stated that he saw the appellant on the track ahead, but that he was "afraid to ring the bell or blow the whistle for fear plaintiff would straighten up and we would kill him —the cylinder would hit and kill him."

This testimony was not admissible because it was hearsay testimony, and not a part of the *res gestæ;* but, if true, it seems to us that a good reason was given for not sounding the alarm, if it was not done, and it may be that to this failure the appellant owes his life.

The evidence did not show any failure of duty on the part of the appellee's servants and agents in charge of the train, but it was sufficiently clear from the evidence that the appellant's injuries resulted from his own negligence; and, the appellant having failed to allege or to prove a state of case fixing liability on the appellee for the injuries sustained by him, it was proper for the court below to instruct the jury to find for the appellee. And there being no error, the judgment must be affirmed.

BLANKENBAKER, &C. V. SNYDER, &C.

(Filed September 18, 1896—*Not to be reported.)*

Construction of devise—Where a testator who had been married twice died, leaving his second wife surviving, and also children by both marriages, a devise by him of his homestead to "my present wife and her children" can not be regarded as embracing a child of the wife by a former marriage, she being a widow with one child at the time the testator married her. The expression "her children" was intended to mean only the testator's children by her, and was used for the purpose of distinguishing them from his children by the former marriage.

Woolfolk & Klein and Joe Clove for appellants.

Abbott & Rutlege for appellees.

Appeal from Oldham Circuit Court.

Opinion of the court by Chief Justice Pryor.

This case is here for the construction of the will of John Snyder. He had been twice married, leaving several children by his first wife surviving him, and also four children by his last wife. His last wife was a widow, and had one child by her first husband, who was also living at testator's death. Her name was Elizabeth Wilhoite. She married, and died after the testator, leaving a daughter, Rosa, who married Blankenbaker.

The question involved in the case is: Was the mother of Rosa (Elizabeth Wilhoite) entitled to share with testator's children by his last wife in the devise of the estate made to them?

The devise or clause under which the claim is made is as follows: "I desire that my present wife and her children shall have my homestead, containing 400 acres, to remain undivided, for her and their benefit, during widowhood."

If this was the only provision of the will there might be some difficulty in giving the construction to the instrument placed upon it by the court below.

In making this final disposition of his estate the testator seems to

have designated, first, his children by his first wife, and proceeds: "I desire to give to my first children all my negroes," and then proceeds to make specific the devise to them of other property, and says: "I desire that my present wife *and her children* shall have my homestead, containing 400 acres." After giving to his wife certain personalty, he further directs the balance sold, and the proceeds equally divided among *all of his children without distinction.*

Again he says: "I desire that all my notes and accounts shall be collected, and the proceeds equally divided between my children *without distinction.*"

These two last devises followed those by which the testator attempted and did in express terms devise to his children by his first wife the bulk of the estate intended for them, and the bulk of the estate intended for his children by his last wife, but in the devise to his children by his last wife he uses the words "*to my present wife and her children*" to distinguish them from the children by his first wife, and never intended to make one not of his blood to share equally in his estate with his own children.

After making this classification, showing what the children by his first and last wife were to have, he then proceeds to direct, in two separate clauses of his will, certain personalty sold and notes collected, and the proceeds equally divided between *his children without distinction*, showing plainly his purpose to distinguish the devises first made between the children by his first and second wife so as to leave no doubt in regard to what they were to get, and then to divide the residue equally without distinction. In other words the language "to my wife and her children" was used to distinguish the children by his last wife from those by his first wife. The appellant's mother, therefore, took nothing under the devise.

Judgment affirmed.

GERMAN NATIONAL BANK OF COVINGTON V. WARING, &C.

(*Filed September* 18, 1896—*Not to be reported.*)

Construction of deed—A deed conveying to the grantor's son "a life estate" in a tract of land, "and at his death to his heirs and assigns in fee forever," reserving a life estate to the grantor, created in the grantee only an estate for life, remainder to his children, the word "heirs" being used in the sense of "children."

Wright & Anderson for appellant.

L..J. Crawford for appellees.

Appeal from Campbell Circuit Court.

Opinion of the court by Judge Guffy.

This appeal involves the construction of a deed executed by Robert Waring to Robert C. Waring.

The material facts of the deed read as follows: "Know all men by these presents: That Robert Waring, who is unmarried, of Newport, Campbell county, Ky., for and in consideration of $1 lawful money and other valuable considerations, to him paid by his son, Robert C. Waring, the receipt of which is hereby acknowledged, do hereby bargain, sell and convey to the said Robert C. Waring a life estate,

and at the death of Robert C. Waring to his heirs and assigns in fee forever, the following described real estate. * * *

"It is, however, agreed between the parties that said grantor retain and reserve a life estate in the above described property, and full possession and the free use and enjoyment thereof during the life of the said Robert Waring, this being a material part of the contract, together with all the privileges and appurtenances to the same belonging; to have and to hold the same to the said Robert C. Waring, subject to all the conditions herein named, to his heirs and assigns forever. The grantor, his heirs, executors and administrators hereby covenant with the grantee, his heirs and assigns, that the title is clear, &c."

The grantee made a general assignment of all his property not exempt from execution for the benefit of his creditors, and appellant sought to have the property mentioned in the deed above referred to subjected to the payment of grantee's debts, claiming that he was by the deed authorized to sell the property and pass the fee subject to the life estate of the grantor.

The appellee, George S. Waring, infant son of the grantee, claims that the grantee only took a life estate in the property conveyed. The court below held that the grantee took only a life estate, with remainder to his children, holding that the word "heirs" meant "children."

It seems clear to us that a life estate only was given to the grantee in the granting clause of the deed, and we fail to find anything in the deed which authorizes the grantee to dispose of the fee.

Judgment affirmed.

WEBSTER V. TATTERSHALL.

(*Filed September* 18, 1896—*Not to be reported.*)

Mechanics' lien upon property of married woman—Estoppel—To create a mechanics' lien upon the property of a married woman the service or labor must be performed or the materials furnished under a written contract signed by her. A written contract signed by the husband is not sufficient, as such liens can be created only in the manner pointed out by the statute; and while the doctrine of estoppel might be held to apply as to a married woman where fraud is practiced by her, the facts of this case do not come within that rule. The wife's mere acquiescence does not make her property liable for the debt.

J. L. Elliston and Raymond C. Gray for appellant.

Walker C. Hall and A. C. Ellis for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Chief Justice Pryor.

The appellee erected upon the lot of the appellant a frame building under a written contract with her husband, to which the wife (appellant) was not a party. While the house was undergoing completion, a part of the contract price being due, the appellee attempted to assert a mechanic's lien on the property, and by the judgment of the chancellor the property was ordered sold. There

is but one way to create a lien of that sort on the realty of the wife and that is by a writing signed by her evidencing the contract.

The statute authorizing or creating such liens provides in express terms as follows: "The provisions of the preceding sections shall apply to and be enforced against a married woman and property owned by her, if the service or labor was performed or the materials furnished under a written contract signed by her." (Section 2479, Kentucky Statutes.)

No equitable lien exists against the property of the married woman and it can only be created in the manner pointed out by the statute. The mechanic undertaking the risk must examine the title, and particularly in a case where it is a matter of record in the county where the property improved is situated.

The chancellor below adjudged the property sold under the doctrine of estoppel, the proof conducing to show on the part of the appellee that the wife represented the title as in her husband and not in herself. The testimony on this point is meagre and rather tends to show that it was the husband's representations the appellee was relying upon. It is true the wife gave directions about the construction of the building, and tried to raise money to pay the appellee; still this did not make her property bound for the debt in the face of a statute designating in express terms the manner in which the estate of the *feme* could be held bound.

When looking to the testimony of the wife, and that introduced in her behalf, it appears that appellee knew of the title and that she was opposed to making the expenditure, and if the wife's estate can be made liable under the facts of this case it is a virtual repeal of the statute, and the wife's acquiescence merely making her liable for the debt.

While the doctrine of estoppel might be held to apply as to a married woman where fraud is practiced by her or the party misled into making a contract for her benefit upon a representation she knew to be false, the facts of this case do not come within this rule.

Philips on Mechanic's Lien, section 106: "Where a statute designates the particular mode in which the lien may be created, the direction defines and limits the rights of mechanic against the property of married women, as where the law requires the consent of the owner for the erection of the building to be in writing. The land of a married woman is not liable under a contract made by her husband, even if she, during the erection of the building thereon, acquiesces in its erection and gives directions in relation thereto."

The chancellor is powerless to afford the relief, whatever may be the hardship of the particular case. It is the statute that gives the lien, and to follow it obviates the necessity of resorting to the facts of each case, and the pecuniary condition of the parties, so as to create an equity that would compensate the mechanic for his labor. To what extent the chancellor might authorize the removal of the building when erected upon a mistake of fact is not a question before us.

The judgment is reversed, with directions to dismiss the petition as to the wife.

HOLLY V. COMMONWEAMTH.

(Filed June 18, 1896—Not to be reported.)

1. *Practice in criminal cases—Time of trial*—The trial of a defendant indicted for a felony can be fixed for the same term of the court at which the indictment is found.

2. *Continuance*—Where the defendant moved the court for a continuance because he had been unable to procure counsel, and the court thereupon appointed two members of the bar to act as counsel for him, and it was not thereafter suggested that the counsel appointed were not prepared to go on with the trial, the defendant can not complain of the failure of the court to grant a continuance upon that ground.

3. *Same—Absence of material witnesses*—As the attorney for the commonwealth upon the filing of an affidavit by the defendant for a continuance upon the ground of the absence of material witnesses agreed that the affidavit might be read as the depositions of the absent witnesses and "that the statements therein should be taken as true," and the defendant thereupon announced ready for trial before the court had an opportunity to act upon the motion for a continuance, he can not complain of the failure to grant a continuance.

4. *Same*—When a continuance is asked upon the ground of the absence of material witnesses at the term at which the indictment is found, the affidavit being sufficient, the court can not force a trial unless the attorney for the Commonwealth will admit the truth of the facts which it is stated the absent witnesses would prove. But as the defendant in this case, after the Commonwealth's attorney had agreed that the statements of the affidavit for a continuance might be taken as true, did not offer to read the affidavit to the jury or ask to have the statements it contained taken as true, he can not complain that this was not done.

5. *Evidence*—Upon a trial for murder the court properly refused to permit council for defendant to ask a witness for the Commonwealth upon cross-examination if he had not said, the evening before the killing, that defendant would be killed before the next night, as this would have raised an immaterial issue, and would not have tended to prove a conspiracy to kill accused.

6. *Time of pronouncing sentence*—The defendant can not complain that sentence was pronounced upon him on the day on which the verdict was returned, as it can not be said that the court was not about to adjourn. And while the motion for new trial was made after judgment was rendered, it was considered as if the judgment had not been pronounced, the court still having control of the verdict and judgment.

7. *Separation of jury*—The court did not err in refusing to set aside the verdict because one of the jurors was permitted to separate a short distance from the other jurors, as there was no evidence of undue influence or interference by others.

8. *Evidence*—It was not error to permit the Commonwealth to show by a witness for defendant upon cross-examination that she and defendant had been living together without being married, as this tended to show her interest and probable bias.

9. *Same*—When the court admitted evidence to impeach the general moral character of defendant it was not its duty to admonish the jury that the evidence was competent only to discredit him as a witness.

J. C. B. Bach, G. W. Fleenor and W. W. Vaughn for appellant.

W. S. Taylor for appellee.

Appeal from Breathitt Circuit Court.

Opinion of the court by Judge Paynter.

The defendant was indicted for the murder of James Combs, tried, convicted and sentenced to confinement in the penitentiary for eighteen years.

The killing took place on the 17th day of February, 1896. On the 30th day of March, 1896 (the third day of the term), the grand jury returned the indictment. The court on the same day fixed the fourteenth day of the term for the trial of the case. The trial ended on the 4th of the month. The defendant was in custody when the indictment was found.

A trial of a felony case can be fixed for the same term of the court at which indictment is found. (Section 185, Civil Code.)

When the case was called for trial the defendant moved the court for a continuance because he had been unable to procure counsel. Thereupon the court appointed two members of the bar to act as counsel for him. He then moved the court for a continuance of the cause, and filed his affidavit in support of the motion, and in which he named the witnesses whose testimony he desired, and set forth the facts which he expected to prove by them. Thereupon the attorney for the Commonwealth agreed that the affidavit might be read as the depositions of the absent witnesses, and "*that the statements therein should be taken as true.*" The defendant then announced ready for trial.

It appears from the order that the court did not act upon the motion for a continuance, which was made after the appointment of counsel, on account of the absent witnesses, but the defendant, upon the agreement of the Commonwealth's attorney that the statements it contained should be taken as true, announced ready for trial. As appears from the order the court did not have an opportunity to commit an error in refusing a continuance on account of the absence of witnesses, because before the court acted the defendant announced his readiness for trial.

Notwithstanding it was agreed that the affidavit was to be read as the deposition of the absent witnesses, and the statements therein were to be taken as true, the defendant never offered to read the affidavit or asked to have the statements it contained taken as true. The trial took place at the same term at which the indictment was returned, and the court could not properly have forced a trial at that term unless the attorney for the Commonwealth admitted upon the trial that the facts which the affidavit stated the absent witnesses would prove were true. (Section 189, Criminal Code; Hardesty v. Commonwealth, 92 Ky., 537.)

After counsel had been appointed to represent the defendant, it does not appear that it was suggested to the court that the case could not be tried because counsel was not prepared to go on with the trial of the case, nor does the affidavit contain any such statement.

The court did not refuse to allow defendant to prove from any facts tending to show a conspiracy on the part of the deceased, Nick Combs and James Spencer, to kill the defendant. Spencer was introduced by the Commonwealth. On cross examination the defendant made him his witness to prove the gun which Nick Combs had on the day of the killing was taken to Luther Combs by the witness, and also by his cross-examination had Spencer to prove that he had nothing to do with the killing. The defendant did not offer to prove that the gun found with deceased was borrowed by James Spencer for the purpose of killing defendant. Counsel for defendant did ask Spencer "if he had not said, the evening before the killing, that defendant would be killed before the next night." The court properly refused to let the witness answer the question. It would have raised an immaterial issue, and would not have thrown any light on the conduct of the parties at the time of the killing, nor would it have tended to prove that the deceased or Nick Combs were conspiring to take the life of the accused.

There was no evidence offered before or after the interrogatory in question which would have rendered the answer competent. The defendant had by the cross-examination of Spencer made him exculpate himself from the imputation made in the grounds for a new trial.

Jack Little was asked the question if he had heard Spencer talk any at the time suggested in the question propounded to Spencer just referred to. He replied that he "heard him talk some." He was then asked: "Do you remember the substance of what he said?" An objection to this question was sustained and properly so. He may have heard him talk about many things wholly disconnected with the subject under investigation. He could not have been permitted to contradict Spencer because no foundation had been laid for it.

The bill of exceptions does not contain any part of the argument of the attorney for the Commonwealth, nor any exceptions to any statements he may have made; therefore, there is nothing appearing in the record for the court to review in this particular. It is insisted that the court erred because he passed judgment on defendant in less than three days after he was convicted. The orders do not show when the court adjourned, but they do show that the day following the judgment sentencing the defendant to confinement in the penitentiary grounds for a new trial were filed and time extended for preparing and filing a bill of exceptions. The record does not show that the court remained in session two days after the verdict, and it can not be said the court was not about to adjourn when the judgment was rendered, as the only order made thereafter may have been the one entering motion for a new trial and filing grounds therefor. Besides, it does not appear that the defendant has been prejudiced by the judgment being entered on the day of the verdict. (O'Brien v. Commonwealth, 89 Ky., 357.)

The grounds for a new trial were heard and considered as if the judgment had not been pronounced. The court still had control over the verdict and judgment.

The court did not err in refusing to set aside the verdict because one of the jurors was permitted to separate a short distance from the other jurors. It does not appear that the juror was out of the sight of the sheriff or the balance of the jury, nor that the juror did or had an opportunity to converse with any one during such a separation. There was no evidence of undue influence or interference by others. (Blyew v. Commonwealth, 91 Ky., 200.)

Ann Johnson was introduced as a witness for defendant. It was not error, for the purpose of showing her interest and probable bias, to allow her to prove on cross-examination that she and the defendant had been living together without being married. When the court admitted the evidence to impeach the general moral character of the defendant it was not its duty to admonish the jury that it was only competent to discredit him as a witness. The jury could not possibly have concluded it was for any other purpose. The evidence introduced by the Commonwealth, if true, showed that the defendant killed Combs without any sort of provocation or excuse; that he began to shoot at him when he was trying to avoid meeting the defendant. On the other hand the defendant's testimony tends to show that the killing was in self-defense. The court properly instructed the jury. They were the judges of the facts.

Believing that no error was committed which prejudiced the substantial rights of the accused, the judgment is affirmed.

LOUISVILLE INSURANCE CO. v. MONARCH, &C.

(*Filed June* 24, 1896.)

1. *Marine insurance—Abandonment of goods—Evidence*—In an action upon a policy of marine insurance, it appearing that the insurance company sent an agent to the scene of the wreck for the purpose of recovering the insured goods, and that it afterward abandoned that purpose upon the ground that it was not liable upon the policy, defendant, in view of the instructions to the jury, was not prejudiced by the action of the court in permitting one of the plaintiffs to testify upon his re-direct examination as to what the agent who had been sent to recover the property said to him about the recovery of the goods after he left the wreck.

2. *Same*—As the evidence was sufficient to show that an agent of defendant with whom one of the plaintiffs had talked about the settlement of the claim was an agent with unlimited powers, and was authorized to speak for the company in the adjustment of the claim, it was not error to permit the plaintiff with whom the conversation was had to relate the whole conversation, including a statement which the agent said had been made to him by the special agent whom he had sent to recover the property.

3. *Same*—The testimony of witnesses, taken upon an investigation had in the office of hull inspectors as to the facts attending the disaster, was properly rejected, as plaintiffs were not parties to that proceeding and were not present when it took place.

4. *Same—Sufficiency of boat crew*—It was proper to permit the captain to testify that the boat had a sufficient number of officers and men to make the trip, as that testimony tended to rebut any presumption that might be indulged that the boat was unseaworthy because the crew was not equal to the number designated in the license, that number not being necessary because the boat was to make the trip in daylight.

5. *Same—Seaworthiness of boat*—It was proper to permit the captain to testify that the boat might strike an obstruction and the contact not be perceivable to those on board, as the company was attempting to create a presumption that the boat was unseaworthy because of the defective condition of the hull.

6. *Evidence as to insurance on boat*—It was proper to permit plaintiffs to show that the boat was not insured and that it was worth $5,000, as this evidence tended to show that the owners and officers could have no motive or desire to destroy the boat. But even if the evidence was not relevant it could not have been prejudicial.

7. *Practice in civil cases*—Where a party has testified for himself in chief before he has introduced other testimony for himself in chief, it is in the sound discretion of the court as to whether he may be recalled after he has introduced other testimony for himself in chief. And the court in this case did not abuse its discretion in permitting one of the plaintiffs to be recalled after he had introduced other testimony for himself in chief.

8. *Competence of steamboat captain and crew*—As it was charged in the answer that the captain and crew of the steamboat were incompetent, unskillful and unfit for the service in which they were engaged, it was competent for plaintiffs to show their competency and fitness for such service and their general reputation therefor.

9. *Amendments*—The court properly rejected amended answers offered to conform to the proof, as the defendant might by ordinary diligence have sooner known all the facts alleged, if true. And, besides, they do not conform to the proof.

10. *Negligence no defense to policy*—The mere negligence of the owners of the vessel or the officers in charge of it constitutes no defense to a policy which insures against the perils of the river.

11. *Seaworthiness of boat—Instruction*—The question of the seaworthiness of the boat was properly submitted by an instruction telling the jury that in order to find for plaintiffs they must believe from the evidence that at the

time the boat departed on the voyage she was in a reasonably good condition for the voyage, and reasonably sufficient to withstand the ordinary perils of the voyage; that she was tight and stanch in hull; that she was provided with a competent master and sufficient number of competent officers and crew.

12. *Abandonment*—The right of abandonment does not depend on the certainty but on the high probability of total loss, and if the facts present a case of extreme hazard and of probable expense exceeding half the value of the property the insured may abandon, though it should happen that the property was afterward recovered at less expense.

13. *Partial loss—Mandate*—Although the action was for a total loss, there can be a recovery for a partial loss, and, the value of the insured goods being $15,000 and the amount of insurance being $5,000, the insured, by the terms of the policy, is entitled to recover in the same proportion in case of a partial loss, the expense of recovering goods being divided in the same proportion. And, as some of the goods were recovered at the time of the disaster, it was error to instruct the jury that if they should find for the plaintiff the verdict must be for the full amount of the policy. But as there was no contrariety of testimony as to the value of the goods recovered, or as to the expense of recovering them, the court, instead of sending the case back for a new trial, remands it, with direction to render a judgment for the amount of the policy less one third the difference between the value of the goods recovered and the expense of recovering them.

14. *Recovery of goods—Expense*—The defendant is not entitled to credit by any part of the expense which it incurred in preparing to recover the property which was never recovered, as it did not abandon the effort because the property could not be recovered or because the expense of recovering it would exceed its value, but because it reached the conclusion that it was not liable under the policy.

Barnett, Miller & Barnett, C. S. Walker and Walter Evans for appellant.

Fairleigh & Straus, Eli H. Brown and Wilfred Carrico for appellees.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Paynter.

Monarch & Cate owned certain woolen mill machinery, wool and other goods, and desired to transport it from Rumsey, Ky., on the Green river, to Owensboro, on the Ohio river. Their purpose was to ship it by water, and to do so it would have to be placed upon a boat, carried down Green river to its mouth; thence up the Ohio river to Owensboro.

On the 5th day of March, 1892, the Louisville insurance Co. issued to them on the property a marine insurance policy to the amount of $5,000. The adventures and perils which the company agreed to bear and take upon itself were the "unavoidable dangers of the * * * rivers." * * *

The property was valued at $15,000, and here it may be added that that amount is the conceded value of it. The steamboat George Strecker, under a contract which Monarch & Cate made with her owner, Capt. Crainmund, was to carry the property from Rumsey to Owensboro. The policy covered the property during the voyage.

The property was received on board of the boat. On the morning of the 8th day of March, 1892, the boat started on the voyage, and at a point between ten and eleven miles below Rumsey she sank in the middle of the river, where the water was forty feet deep, entirely submerging her, except the chimneys and the top of the pilot

house. After her peril was discovered by the crew she sank so rapidly that it was impossible to get her to the shore. There was a rise in the river soon after she sank, and she remained submerged for several months.

This action was brought by Monarch & Cate to recover of the company the amount of the policy because of the alleged total loss of the property.

The answer denies that there was a total loss of the property; that the sinking of the boat was a peril against which it insured; that there was an abandonment of the property or any part of it. The company alleged the loss was occasioned by the willful, fraudulent and gross misconduct, negligence and carelessness of the owners, officers, agents, servants and seamen in charge of the boat.

There are other matters pleaded in the answer which at this point are not necessary to mention. The trial resulted in a judgment for the plaintiffs for $5,000.

Many errors, the appellant claims, were committed on the trial of the case which entitles it to a reversal and a new trial. We will consider some of the questions thus raised, somewhat in the order in which counsel discuss them in their briefs.

Immediately or soon after the boat sank the company was notified of it. It sent its agent, Captain Harpham, to the wreck to see its condition, with the view of recovering the property under "sue and labor" clause of the policy, which fixed the proportion of expense that should be borne respectively by the insured and company.

It is insisted that the court erred in permitting Cate to tell, upon his *redirect* examination, what Harpham had said to him about the wreck after he had left it. Harpham was sent by the company to act for it in an effort to recover the property. Cate's redirect examination related to what Harpham said as to the meaning of the policy, as to the expense of recovering the property, and the interest each party would have in such as was recovered.

While what Harpham said as to the meaning of the policy was immaterial, as both parties conceded their rights were to be determined by its provisions, yet the court told the jury substantially that, if plaintiffs were entitled to recovery at all, they were entitled to recover the full amount, $5,000; and also that the company was not entitled to be allowed the expense it incurred before it determined to deny its liability for the loss, and abandoned its purpose to recover the property.

In view of the conclusions of the court the evidence of Cate in his redirect examination could not have and did not prejudice the rights of the company.

It is claimed that the court erred in permitting Monarch to tell, when recalled, what Captain Harpham had said to Shallcross. Shallcross was the agent of the company; he was in its office looking after its affairs; talked with Monarch about the settlement of the claim; directed the movements of Harpham in his preparation to recover the property; ordered Harpham to discontinue his preparation to recover the property; looked after the payment of the expense Harpham had incurred; he appeared in court aiding in this case; made an affidavit for a continuance, and verified pleadings therein.

There is no proof in the record showing he was an agent with limited powers. Under these circumstances it fully appeared that he was authorized to speak for the company in the adjustment of the claim in controversy. If he choses to tell Monarch in a conversation about the adjustment of the claim that he had certain information from another agent of the company, it was not error to permit

Monarch to prove the entire conversation which they had. Besides, if Shalleross was the agent of the company without limited powers, as he appears to have been, then this testimony was competent as tending to prove that Harpham was authorized by the company to adjust the loss with Cate.

There was an investigation made in the office of hull inspectors at Evansville, Ind., as to the facts attending the disaster; the testimony of certain witnesses was taken and reduced to writing. The defendant offered as evidence the so-called duplicates of this evidence. Monarch and Cate were no parties to that proceeding, and were not even present when it took place.

A mere statement of the facts shows that the court did not err in refusing to admit them as evidence.

Captain Crainmund testified that the boat had a sufficient number of officers and men to make the trip. It was proper to admit this because it appears that the boat was to make the trip in daylight, and that, therefore, an additional crew was not needed. This testimony would tend to rebut any presumption that might be indulged that the boat was unseaworthy because the crew was not equal to the number required by the certificate of inspection and license. It could not be said that the company could defeat a recovery when there was a sufficient crew on the boat to properly handle her, although not the number designated in the license, especially when there is no evidence even tending to prove that the sinking of the boat resulted from an insufficient crew.

It was likewise proper to allow Crainmund to testify that the boat might strike an obstruction, and the contact not be perceivable to those on board. His own experience as steamboatman enabled him to have a knowledge of such matters. This testimony was relevant because the effort was being made by the company to show or to create a presumption that she was unseaworthy because of the defective condition of the hull.

The answer charges that the boat was sunk because of the willful and fraudulent misconduct of the owners and officers, etc., of the boat. Crainmund was allowed to testify that the boat was not insured, and that she was worth $5,000.

This evidence was properly admitted to show the owners and officers could have no desire or motive to destroy the boat. If this evidence was not relevant it was not misleading to the jury, and we can not, from any point of view, see how it was prejudicial to the rights of the company. Testimony may be entirely irrelevant, and yet not prejudicial to the rights of the party objecting thereto.

It is insisted that the court erred in permitting the plaintiff, James Cate, to be recalled and to testify for himself in chief after having introduced other testimony for himself in chief.

Subsection 4, section 606, Civil Code, provides that "no person shall testify for himself in chief in an ordinary action after introducing other testimony for himself in chief."

This court in several cases has held that when a party has introduced other testimony for himself in chief he should not be permitted to testify for himself in chief. We adhere to that rule. The questions presented in those cases are not involved here. Cate had testified for himself in chief before he introduced other testimony for himself in chief.

After such testimony had been introduced he was recalled as a witness to prove facts which, if competent, could have been testified to by him in chief. After a party has testified for himself in chief the fact that he may have to introduce other testimony in chief does

not bar his right to be recalled to testify to such facts as are appurtenant to the issues. His right to do so is in the sound discretion of the court. It is within the control of the court, as it is as to the testimony of any other witness who may have testified, except if it was manifest the party had purposely withheld certain testimony while he was testifying for himself in chief with a view of being recalled after he had introduced other testimony in chief, to give additional testimony in chief, the court would not abuse its discretion in refusing to allow him to testify. In this case no facts appear which indicate that there was any abuse of the court's discretion.

It was charged in the answer that the captain and crew of the steamboat were *incompetent*, *unskillful* and *unfit* for the service in which they were engaged. It was sought to show the boat was unseaworthy by reason thereof.

The evidence as to their competency and fitness for the service in which they were engaged when the boat sank, and their general reputations as to such competency and fitness was admissible.

It was directly on the issue raised by the answer. It showed they were skillful in the service in which they were engaged, and, besides that, their general reputations were such, as steamboatmen, that the owner of the boat was justified in engaging them in their respective capacities for the voyage in question.

The allegations contained in the amended answers, which were offered at the close of the testimony, as stated therein to conform to the proof, may be summarized as follows: That more than one-half of the machinery and goods insured were rescued and afterwards sold to the Owensboro Woolen Mills Co. for a certain amount of the capital stock of that company; that the goods and machinery were not properly or carefully stored or loaded upon it; that the crew on the boat was not the number required by the United States laws, and that they were necessary for the proper and safe running and management of the boat; that the defendant did not learn these facts until during the trial.

In the first place, there is no reason why the defendants may not have known all the facts alleged, if true, by the exercise of ordinary diligence. In the second place, they do not conform to the proof.

The testimony of the parties connected with the loading of the boat was that it was properly and carefully loaded; that the carrying capacity of the boat was over one hundred and fifty tons, and the highest estimate as to the weight of the cargo was something over eighty tons. This testimony is not contradicted. Besides it is not alleged in the amendments offered that the disaster resulted from the fact that the boat was not carefully and properly ladened.

In view of the fact that the proof in the record was insufficient to show that the boat was not carefully or properly ladened, etc., the court did not abuse its discretion in refusing to allow the amended answer to be filed on account of the allegations as to ladening of the boat.

The proof showed, and was uncontradicted, that the crew in charge of the boat was sufficient for the voyage, as it was to be made in daylight; besides there was not the slightest evidence tending to show that the boat sank because of the inefficiency of the crew.

The court did not err in overruling the motion to file the amended answers.

It was held in the case of Leaman v. Enterprise Fire and Marine Ins. Co., 21 Federal Reporter, 781, that the omission of a starboard rudder at the port of departure or anywhere along the line can not

be said to be a lack of seaworthiness when its absence did not materially affect the steerage power of the vessel or prevent the pilot from maintaining good control over its motions.

Why should a recovery be defeated because the vessel did not have a night crew in a daylight run? Their absence did not affect in any degree the control of the movements of the boat. There was no *express* warrant that there should be a given number of officers and seamen in charge of the boat. The implied warranty of the insured was that a sufficient number of officers and men should be in charge of the boat during the voyage, and that they should be reasonably skillful for the service.

There is an obligation resting in the law on the insured to see that the vessel is seaworthy. Whether provided in the contract or not, the insured warrants the vessel to be seaworthy when she leaves the port of departure.

The mere negligence of the owners of the vessel or the officers in charge of it is no defense to the policy. (Orient Ins. Co. v. Adams, 123 U. S., 67.)

It was said in Waters v. Merchants Louisville Ins. Co., 11 Peters, 213, "that in marine policies, whether containing the risk of boating or not, a loss when the proximate cause was a peril insured against is within the protection of the policy, notwithstanding it might have been occasioned remotely by the negligence of the master and mariners."

To the same effect is General Mut. Ins. Co. v. Sherwood, 14 Howard, 352; Phœnix Ins. Co. v. Erie Transportation Co., 117 U. S., 312.

The court held (123 U. S., 73), that the only misconduct of the master and officers which would defeat a recovery on the policy was fraud or design.

When the policy insures against the perils of the river, the mere neglect of those in charge of the vessel does not free the insurer of liability, although the policy insures against the unavoidable danger of the river, as such a provision relates to the peril embraced by the policy and not to the skill or care to be exercised by those in charge of the boat. (Pence case, 93 Ky., 96.)

In Levi v. The New Orleans Insurance Association, 2 Wood, 66, it appeared that the custom of the river was that the ascending boats should run under the points near the shore and the descending boats followed the main channel. The failure of the pilot to observe this rule resulted in the collision. The court held it was negligence, carelessness and unskillfulness, but it was not willful misconduct.

There was an entire failure of proof in this case to show such misconduct on the part of the officers in charge of the boat as indicated that she was sunk by their fraudulent or unskillful misconduct.

Under the instructions of the court before the jury was authorized to find for the plaintiff they had to believe from the evidence that at the time the George Strecker departed on the voyage she was in a reasonably good condition for the voyage, and reasonably sufficient to withstand the ordinary perils of the voyage; that she was tight and staunch in hull; that she was provided with a competent master and sufficient number of competent officers and crew, and that they were competent and fit for the voyage. In view of the pleadings and the evidence we are of the opinion that the court's instructions were sufficient in submitting the question of seaworthiness of the boat to the jury.

The plaintiff sought to recover as for a total loss. While the company denies liability, it insists that there was only a partial loss, and if liable then only for the partial loss.

The vessel lay submerged for many months. After the disaster the insurance company determined to try to rescue the cargo. It procured a diver, a boat and necessary appliances for the purpose, and after getting them at the scene of the wreck the river had raised and continued in this condition for two months. About the time it was at such stage of water that the work of recovering the property could be undertaken it abandoned the project and notified the insured that it was not liable on the policy. The plaintiffs soon thereafter notified the company that they abandoned the property and for it to take charge. The cargo was of a character to be destroyed by the action of the water upon it. Its situation was such that there was no reasonable probability that it could be recovered after the company withdrew the men and means provided for the purpose. The situation, in our opinion, was such that justified the insured in abandoning the property *then submerged.* In determining the question of abandonment of property it is proper to take into consideration where the vessel lay, and all other attendant circumstances. (123 U. S. 75.)

The imminencey of the peril and apparent extent of expenditures required to deliver the property from it will justify an abandonment (12 Peters, 398.)

The right of abandonment does not depend upon the certainty but on the high probability of total loss. The insured is not to act upon certainties but upon probabilities. If the facts present a case of extreme hazard and of probable expense, exceeding half the value of the property, the insured may abandon, though it should happen that it was afterwards recovered at less expense. (3 Kent, 321.)

We are of the opinion that the insured would have been justified in an abandonment of all the machinery, household goods and wool not then recovered at the time the company abandoned its purpose to recover the property and at the time it notified the company of its purpose of abandonment.

The difficulty which we see in holding it was a total or a constructive total loss is the fact that *at the time* of the disaster 1089½ pounds of wool, worth $200, was recovered which the insured received and appropriated to their own use, and also afterwards received some of the machinery, the value of which, owing to its damaged condition, was slightly the advance of old iron, but it was appropriated by the insured.

In view of these facts we are of the opinion that there was only a partial loss. As held in the Pence case, although the action was for a total loss, there could be a recovery for a partial one. The cargo is admitted to have been of the value of $15,000. The policy was for $5,000. Had there been a total loss then the company would have been liable for one-third of the value of the cargo, which is $5,000, the exact amount of the policy. For a partial loss the company is liable in same proportion, for the policy provides: "And in all other cases the said insurance company shall be chargeable with its proportion of loss according as the sum herein insured bears to the whole sum at risk."

So the court erred in telling the jury if the company was found to be liable under the policy they should find the full amount of it. The petition alleged a total loss. The answers denied there was a total loss. The reply admitted there was recovered property of the value of $800 at an expense of something over $600. The rejoinder says that the property recovered was of a greater value than stated. There was an issue formed upon this question. But one witness testified as to the value of the property, and that was Cate, one of the

insured. He testified that the value of the property in the damaged condition in which it was received was $800, and this includes the 1089½ pounds of wool. He testified that the necessary expense in recovering it was $631.09. An account of this expenditure was presented. The charges for fee bills paid Miles, Walker & Carrico, amounting to $33.50, are not allowable for expenses of recovering the property. This would leave $597.59 as the amount of expenses incurred by the insured in recovering the property, and under the policy the acts of insurer or insured in recovering the property are to be "considered as done for the benefit of all concerned."

The effect of recovering any part of the property benefits the insurer inasmuch (in this case) as he is entitled to credit for one-third of its value, less the expense of recovering it.

The value of the property recovered being $800, less $597.59, the expense of recovering it, which makes the amount of property to be credited on amount at risk $202.41, which makes the total loss $14,797 59, for one-third of which, $4,932.53, the insurer is liable, instead of $5,000, as determined by the court below, being $67.47 less than the verdict and judgment.

The question of the liability of the company on the policy was fully tried, and the verdict of the jury and the judgment of the court was to the effect that it was liable. There was a total loss except the value of the property recovered.

There was an issue on this question upon which the company could have introduced evidence. It failed to do so. It had its day in court on the issue. The plaintiff alone introduced evidence as to the property recovered and its value. There is no *conflict* in the evidence on the issue. The jury could not under the proof have found the facts as to the property recovered or its value other than as we have fixed.

As the company has had the jury to pass upon the question of its liability on the policy, and had its opportunity to contradict the evidence as to the property recovered and its value, we do not think the case should be reversed, with directions to grant a new trial.

The company incurred something over $1,000 in preparing to recover the property—getting diver, boat and necessary appliances, etc. This was done soon after the disaster. The river did not get in a condition for the work for about two months thereafter. Then, without the consent of the insured, the purpose to recover the cargo was abandoned, and the boat and appliances, etc., which were to be used for the purpose were taken away.

The company did not abandon the effort to recover the property because it could not be recovered or because the expense of recovering it would exceed its value, but because it reached the conclusion that it was not liable under the policy.

The insured received no benefit whatever from the expense incurred by the company, nor did the company encounter any obstacle which rendered it impossible to prosecute its effort to recover the property.

The effort is to make the insured pay something over $600 because the company reached the conclusion that it was not liable on the policy. The policy does not authorize the company to incur expense which the insured is liable for in a preparation to recover the property, unless it was developed after such preparation that it could not be recovered, or that the expense of recovering it would be so great that it would not be profitable to engage in the effort, or that some unforseen casualty occurred which prevented it.

When the company abandoned the purpose to recover the property it risked its right to recover any part of the expenses of the insured on its ability to defeat a recovery on the policy.

Wherefore, the judgment is reversed, with directions that the court set aside the judgment for $5,000 and enter one against the defendant for $4,932.53.

DOSS V. KINCHELOE'S ADM'R, &C.

(*Filed September* 19, 1896—*Not to be reported.*)

1. *Decedents' estates—Sale of lands by administrator—Adverse claimants to lands*—In this action, brought by the administrator to settle the estate of his intestate and seeking to sell certain real estate for the payment of debts, in which the appellant set up claim to the land by virtue of a purchase from a mortgagee, who had bought the same at judicial sale to enforce the mortgage, the evidence shows the contention of H , who held a mortgage against the land, that the claim of appellant had been satisfied in the lifetime of the intestate to be correct; and the judgment in favor of H. should be sustained.

2. *Same—Estoppel*—Where a person lived in the vicinity for years after suit brought to subject lands to the payment of decedent's debts, and knew of mortgage liens upon the land but never appeared to claim the same, although it was in the possession of others, and moreover had, during the lifetime of the intestate, told one who was about to negotiate a loan to be secured by mortgage on the land that he had no claim upon it, these facts are circumstances tending to show that he had no claim.

Jonson & Wickliffe for appellant.

Edward W. Hines for appellees.

Appeal from Muhlenberg Circuit Court.

Opinion of the court by Judge Hazelrigg.

In 1876 Kincheloe's administrator brought this suit to settle the estate of his intestate, and sought to sell certain real estate for the purpose of paying debts.

He described the real property owned by the decedent, and alleged that James P. McIntire, who was made a defendant, was setting up some claim to certain portions of it, and asked that he be compelled to answer and set up his claim, if any he had.

Process issued against him, and, while there is no return showing service on him, a judgment subsequently rendered recites that the parties were all duly summoned.

Another defendant to this suit was the present appellee, E. L. Hines, who was a creditor of the estate, and who held a mortgage, assigned to him by one Cox, on the land which McIntire was alleged to be claiming. Hines appeared, and, after proper reference of the case to the commissioner and adjustment of the amount of the various debts, this mortgaged land was finally sold by order of the chancellor in 1890, and Hines became the purchaser.

Pending the motion to confirm the sale the appellant, Doss, appeared in the case, and, by his pleadings, alleged that he was the owner of the land by purchase from McIntire in 1884; that the latter formerly held a mortgage on it, suit to foreclose which had been brought in 1868, and judgment of sale had been rendered shortly thereafter; that at that sale McIntire had become the purchaser, but had obtained no deed therefor until after Kincheloe's death in 1874.

Hines answered that this deed had been obtained without notice to the heirs of Kincheloe, and that the McIntire debt had been fully paid by Kincheloe in his lifetime, and, moreover, that in 1874, before he loaned the money to Kincheloe and obtained the mortgage to secure it, hearing of McIntire's claim, he sought him for the purpose of learning the extent of his interest, and was informed by McIntire that he no longer had any claim against the land.

Upon these issues there was no proof taken save on behalf of Hines, and it abundantly sustains his averments, both as to payment and the facts showing an estoppel. Other circumstances confirm this positive proof.

While McIntire lived in the vicinity for some ten years after suit brought to subject the land to pay debts, and knew of the Hines mortgage thereon, he never appeared or in any way claimed the land, although it was in the possession of others, who were using it as their own.

We think the chancellor's conclusions were correct, and the judgment is affirmed.

GRAVES V. GEORGE, &C.

(Filed September 22, 1896—Not to be reported.)

1. *Contract with married woman*—Where the owner of lands conveyed the same to his married daughter and her three infant children for the consideration that she should support and care for him during his life, pay off all his debts and after death give him a decent burial, and it is shown that the daughter has complied with the terms of the contract and is still willing to continue doing so, the grantor is not entitled to a rescission of the contract or a cancellation of the deed, although the daughter could not be compelled to perform the contract, it being void as to her.

2. *The grantor has a lien* upon the land conveyed to secure him in the event that the grantees fail in the future to care for him as required by the contract to do.

Winfield Buckler for appellant.

Thomas Owens for appellees.

Appeal from Nicholas Circuit Court.

Opinion of the court by Judge Guffy.

The appellant, John B. Graves, conveyed his homestead, a small tract of land, to his married daughter, Ida B. George, and her three infant children, the consideration being that the grantees would support and care for the grantor during his life, and give him a decent burial after death and also pay all the debts due from the grantor at the time of the conveyance.

The appellant brought suit to have the deed canceled, alleging a failure to comply with the covenants of the deed, but by an amended petition he set up the fact of the coverture of his daughter alleging that the trade was made with her alone, and that the agreement on her part to take care of him and pay his debts was void as to her, and consequently void as to him.

The evidence shows that the contract was made with the daughter, and that no one else agreed to perform the services and make the payments stipulated for in the deed. The only question presented for decision is as to whether the contract is void as to appel-

lant because void as to Mrs. George. It is true that Mrs. George could not be compelled to perform the contract, but it appears from the pleadings that she has been complying with the contract, and has paid or caused to be paid more than $200 of plaintiff's indebtedness, besides caring for him as required by the contract, and so far as this record discloses is yet ready and willing to still care for appellant as required by the deed. If there had been a failure or refusal upon the part of Mrs. George to comply with the contract appellant would have been entitled to relief. He still has a lien upon the land to secure him in the event that appellees fail in the future to care for him as required by the contract to do. The contract in this case is so far executed by both parties that we are of opinion that appellant is not entitled to a rescission or cancellation thereof.

The judgment of the court below is, therefore, affirmed.

VANDERGRIFT'S ADM'R V. CONE.

(*Filed September* 23, 1896—*Not to be reported.*)

Payment by administrator to distributee, who had assigned his interest—Where an administrator, pursuant to a judgment of distribution, made a payment to one of the distributees without knowledge of the fact that he had assigned the interest upon which the payment was made, a subsequent judgment against the administrator in favor of the assignee of that interest should have been credited by the amount thus paid, as it can not be treated as an overpayment, and the administrator can not, therefore, recover it from the distributee to whom it was paid.

R. Richardson and W. H. Holt for appellant.

D. A. Glenn for appellees.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Hazelrigg.

This action was brought to surcharge the settlements of the appellant as administrator of Mrs. Vandergrift and to have a final distribution of her estate.

A reference to the master resulted in an elaborate report, which was subsequently confirmed by the chancellor, and from which the administrator has appealed.

Notwithstanding some forty odd thousand dollars were distributed after considerable litigation and annoyance, there is but a single point of difference among the parties to this appeal. The chancellor adjudges Cone one of the plaintiffs and a legatee to be entitled to recover of the administrator the sum of $694.72, and it is the contention of the administrator that this is too much by $362.13. It appears that Cone and one Iler were each entitled to one-fourth of the estate. T. J. Vanosdell, another legatee, was entitled to one-tenth of the estate, and, at the inception of appellant's conduct of the administration, assigned his one tenth interest to Iler, subject to a lien in favor of the Gullet Gin Manufacturing Co. Such were the recitals of a judgment of the Kenton Chancery Court. With this judgment before him the administrator paid to Iler his one-fourth interest, and also the Vanosdell one-tenth interest, to the extent that the funds of the estate could then be distributed. This was in 1884. After this distribution it appears that Iler assigned one-half

of his Vanosdell interest to Cone, who thereafter received this interest as well as his owner. The judgment complained of here fails to credit the administrator with $362.13 paid to Iler in pursuance of the old chancery judgment. If Cone was then the owner of this Vanosdell interest or one-half of it there is no evidence in the record that the administrator knew it. On the contrary the testimony of the administrator is directly to the effect that he did not know it until after the payment to Iler. The judgment treats the payment to Iler as an overpayment, and adjudges the administrator entitled to recover it from Iler.

It was not an overpayment, and the administrator is not entitled to recover it from him, but is entitled to a credit on the judgment against him in favor of appellee Cone. The petition for a modification of the erroneous judgment came too late and was properly dismissed, but the appeal from the original judgment was in time.

Reversed, with directions to enter judgment accordingly.

ANDERSON, &C. V. RICHARDS' EX'ORS.

(*Filed September* 24, 1896.)

Apportionment of rent between executor and devisee.—Where land devised had been rented by the testator to another for a term which had not expired at the time of his death, although no part of the rent was due until the expiration of the time, the executor and not the devisee was entitled to the rent for that part of the term preceding the death of the testator, as it may be said to have "accrued," although not due, at the time of the testator's death; and the devisee is entitled to the rent for that part of the term succeeding the death of the testator.

Adair & Morton for appellants.

Allen & Hughes for appellees.

Appeal from Union Circuit Court.

Opinion of the court by Judge Guffy.

W. G. Richards died the 11th day of November, 1892, having first made a will, which will was probated in December, 1892. By his will he devised 107½ acres of land to the appellant, Maggie Anderson. The land was under rent for the year 1892, ending December 31, 1892.

The devise is to Maggie Anderson, to have and to hold to her, her heirs and assigns forever. But should she die without issue of her body then living this legacy is to lapse, and said land is to vest in the sons of my deceased brother.

The appellant claims the rent due for the full year 1892, while the executor, W. C. Richards, contends that the devisee is entitled only to rent from the death of the testator. An agreed statement was made and submitted for judgment in the court below, which court adjudged that the devisee was only entitled to rent from the death of the testator, and that the executor was entitled to the residue. To reverse that judgment this appeal is prosecuted.

The contention of appellant seems to be that, inasmuch as the rent was not due or the time ended at the date of the death of the testator, the whole of such rent must be deemed to have accrued after the death of the testator. We find that Mr. Webster defines

accrue: "First, to increase; to augment. Secondly, to come to by way of increase; to arise or spring as a growth or result; to be added as increase, profit or damage, especially as the produce of money lent; interest accrued to principal."

It has been often decided by this court that the rent which accrued after the death of the owner of the real estate belonged of right to the heir or devisee, but we are not aware of any decision which sustains the contention of appellant. More than ten months of the rent of the land in question had accrued (whether due or not) before the death of the testator, and that rent so accrued was properly adjudged to the appellee and the residue to appellant.

Judgment affirmed.

STATE BOARD OF HEALTH v. STONE, AUDITOR.

(*Filed September* 24, 1896—*Not to be reported.*)

Construction of statute—Cost of printing for particular State department to be paid out of its appropriation—The court is never authorized, unless the language used be explicit and unambiguous, to so construe a statute as to give a public officer or agent unrestricted power to appropriate or expend public money.

Section 2053 of the Kentucky Statutes, which provides that the necessary printing of the State board of health shall be done in the same way and upon the same condition as other public printing is done, was not intended to authorize the cost of such printing to be paid out of the general fund, but the intention was that it should be paid out of the annual appropriation of $2,500 made by section 2054 of the Kentucky Statutes to pay the expenses of the board.

Edward W. Hines for appellant.

W. S. Taylor for appellee.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Lewis.

Although it is provided by section 2053, Kentucky Statutes, that the necessary printing of the State board of health shall be done in the same way and upon the same conditions as other public printing is done, it does not necessarily or properly follow the cost thereof was intended by the Legislature to be paid to the contractors for State printing out of the general fund. On the contrary we think the plain intention was it should be paid out of the fund provided by section 2054, which is as follows: "The sum of $2,500 per annum, or so much thereof as may be deemed necessary by the State board of health, is hereby appropriated to pay the salary of the secretary, meet contingent expenses of the office of secretary, and the expenses of the board, which shall not exceed the sum hereby appropriated. Said expenses shall be certified and paid in the same manner as the salary of the secretary."

Although the State board of health is an institution invested with considerable responsibility and undertakes to perform duties deemed essential to the general health and physical well being of the citizens of the State, the position of its members is one rather of professional distinction than pecuniary gain, and hence the only officer connected with it entitled under the statute to compensation for

services rendered is the secretary, whose salary, though fixed by the board, can not exceed $1,200. The residue appropriated, being $1,300, was evidently regarded by the Legislature sufficient and all it was disposed to appropriate to meet contingent expenses of the office of secretary, as well as expenses of the board, which fairly and fully comprehend all legitimate cost of printing. A different construction of the statute would invest the State board of health with full discretion as to the amount to be expended for printing, when clearly such was not the intention of the Legislature, and give it power to involve the State far beyond the sum of $2,500 that manifestly was intended to cover the cost of expenses of the board for every purpose.

The court is never authorized, unless the language used be explicit and unambiguous, to so construe a statute as to give a public officer or agent unrestricted power to appropriate or expend public money.

The mandamus upon the auditor to draw his warrant in favor of the State board of health for the payment of the cost of the printing done for it out of the general fund was properly denied by the lower court, and, therefore, the judgment in this case is affirmed.

BRAMBLETT & GIBSON V. FELTMAN, &C.

(Filed May 6, 1896—Not to be reported.)

1. Tobacco warehousemen—Breach of contract—The appellants, tobacco buyers, having undertaken to ship to appellees, tobacco warehousemen, for sale all of a certain lot of tobacco purchased by them, in consideration of appellees advancing the money to pay for the tobacco, and appellees having refused to furnish the full amount of money necessary to complete the payment for the tobacco, in consequence of which appellants were compelled to ship a part of the tobacco to others in order to obtain the money required to complete payment, appellees can not claim damages for the failure of appellants to ship to them the tobacco which, by reason of their breach of contract, appellants were compelled to ship elsewhere.

2. Same—Freight—The appellants, being tobacco men, must be supposed to have been acquainted with the rule that freight charges were payable out of the proceeds of the tobacco when sold, and, as between the consignor and warehouseman, such charges were not due until such sale. Therefore, the charges for freight against the appellants were not erroneous.

3. Same—The appellants having entered into a contract with appellees that with $20,000 furnished them by the latter they would buy and ship to appellees all the tobacco which that sum would buy, and having performed these obligations, should not be held to account to appellees for fees, charges and commissions which the latter would have received on a certain number of hogsheads of tobacco which it is alleged appellants should have shipped to them under the contract, since the price of tobacco advanced materially and that amount of tobacco could not have been purchased with the amount of money advanced.

William Lindsay, John P. Norvell and H. M. Woodford for appellants.

O. P. Schmidt and C. H. Fisk for appellees.

Appeal from Kenton Chancery Court.

Opinion of the court by Judge Lewis.

accrue: "First, to increase; to augment. Secondly, to come to by way of increase; to arise or spring as a growth or result; to be added as increase, profit or damage, especially as the produce of money lent; interest accrued to principal."

It has been often decided by this court that the rent which accrued after the death of the owner of the real estate belonged of right to the heir or devisee, but we are not aware of any decision which sustains the contention of appellant. More than ten months of the rent of the land in question had accrued (whether due or not) before the death of the testator, and that rent so accrued was properly adjudged to the appellee and the residue to appellant.

Judgment affirmed.

STATE BOARD OF HEALTH v. STONE, AUDITOR.

(*Filed September* 24, 1896—*Not to be reported.*)

Construction of statute—Cost of printing for particular State department to be paid out of its appropriation—The court is never authorized, unless the language used be explicit and unambiguous, to so construe a statute as to give a public officer or agent unrestricted power to appropriate or expend public money.

Section 2053 of the Kentucky Statutes, which provides that the necessary printing of the State board of health shall be done in the same way and upon the same condition as other public printing is done, was not intended to authorize the cost of such printing to be paid out of the general fund, but the intention was that it should be paid out of the annual appropriation of $2,500 made by section 2054 of the Kentucky Statutes to pay the expenses of the board.

Edward W. Hines for appellant.

W. S. Taylor for appellee.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Lewis.

Although it is provided by section 2053, Kentucky Statutes, that the necessary printing of the State board of health shall be done in the same way and upon the same conditions as other public printing is done, it does not necessarily or properly follow the cost thereof was intended by the Legislature to be paid to the contractors for State printing out of the general fund. On the contrary we think the plain intention was it should be paid out of the fund provided by section 2054, which is as follows: "The sum of $2,500 per annum, or so much thereof as may be deemed necessary by the State board of health, is hereby appropriated to pay the salary of the secretary, meet contingent expenses of the office of secretary, and the expenses of the board, which shall not exceed the sum hereby appropriated. Said expenses shall be certified and paid in the same manner as the salary of the secretary."

Although the State board of health is an institution invested with considerable responsibility and undertakes to perform duties deemed essential to the general health and physical well being of the citizens of the State, the position of its members is one rather of professional distinction than pecuniary gain, and hence the only officer connected with it entitled under the statute to compensation for

services rendered is the secretary, whose salary, though fixed by the board, can not exceed $1,200. The residue appropriated, being $1,300, was evidently regarded by the Legislature sufficient and all it was disposed to appropriate to meet contingent expenses of the office of secretary, as well as expenses of the board, which fairly and fully comprehend all legitimate cost of printing. A different construction of the statute would invest the State board of health with full discretion as to the amount to be expended for printing, when clearly such was not the intention of the Legislature, and give it power to involve the State far beyond the sum of $2,500 that manifestly was intended to cover the cost of expenses of the board for every purpose.

The court is never authorized, unless the language used be explicit and unambiguous, to so construe a statute as to give a public officer or agent unrestricted power to appropriate or expend public money.

The mandamus upon the auditor to draw his warrant in favor of the State board of health for the payment of the cost of the printing done for it out of the general fund was properly denied by the lower court, and, therefore, the judgment in this case is affirmed.

BRAMBLETT & GIBSON V. FELTMAN, &C.

(Filed May 6, 1896—Not to be reported.)

1. Tobacco warehousemen Breach of contract The appellants, tobacco buyers, having undertaken to ship to appellees, tobacco warehousemen, for sale all of a certain lot of tobacco purchased by them, in consideration of appellees advancing the money to pay for the tobacco, and appellees having refused to furnish the full amount of money necessary to complete the payment for the tobacco, in consequence of which appellants were compelled to ship a part of the tobacco to others in order to obtain the money required to complete payment, appellees can not claim damages for the failure of appellants to ship to them the tobacco which, by reason of their breach of contract, appellants were compelled to ship elsewhere.

2. Same--Freight The appellants, being tobacco men, must be supposed to have been acquainted with the rule that freight charges were payable out of the proceeds of the tobacco when sold, and, as between the consignor and warehouseman, such charges were not due until such sale. Therefore, the charges for freight against the appellants were not erroneous.

3. Same--The appellants having entered into a contract with appellees that with $20,000 furnished them by the latter they would buy and ship to appellees all the tobacco which that sum would buy, and having performed these obligations, should not be held to account to appellees for fees, charges and commissions which the latter would have received on a certain number of hogsheads of tobacco which it is alleged appellants should have shipped to them under the contract, since the price of tobacco advanced materially and that amount of tobacco could not have been purchased with the amount of money advanced.

William Lindsay, John P. Norvell and H. M. Woodford for appellants.

O. P. Schmidt and C. H. Fisk for appellees.

Appeal from Kenton Chancery Court.

Opinion of the court by Judge Lewis.

Under an agreement made in January, 1887, between Waller Sharp and H. Feltman & Co., tobacco warehousemen and owners of Moris Warehouse, in Cincinnati, Ohio, the former undertook to purchase in Bath and adjacent counties of Kentucky 1,600,000 pounds, more or less, of leaf tobacco, to be shipped to and sold by the latter as commission merchants, who, in consideration of the benefits and profits to be derived from such sales, were to advance to him money, bearing interest at the rate of 6 per cent., to enable him to purchase and pay for the tobacco.

By July 12, 1887, Sharp had purchased about 900,000 pounds of tobacco, of which he had prized and shipped to H. Feltman & Co. about 168 hogsheads, and had received from them as advance about $47,183.27; but on that day a contract was closed between him and Bramblett & Gibson, though it appears dated July 7, 1887, by which, at 12½ cents per pound, he sold to them "his entire purchase of tobacco now on hand, in and around Sharpsburg, Ky., said to be one million pounds, more or less; also what is on the market in Cincinnati."

It was agreed and understood by the parties the purchase was to be shipped for sale to the Moris Warehouse, Cincinnati. Bramblett & Gibson further agreed to assume the indebtedness of Sharp to H. Feltman & Co., and the tobacco should continue to belong to Sharp until put in hogsheads, and when weighed and paid for to become the property of Bramblett & Gibson.

There was also made the following contract: "This article of agreement, entered into this 12th day of July, 1887, between Bramblett & Gibson, of the State of Kentucky and county of Nicholas, party of the first part, and H. Feltman & Co., of the city of Cincinnati, State of Ohio, of second, Bramblett & Gibson have purchased from Waller Sharp his entire purchase of tobacco, consisting of one million pounds, more or less, located in or near Sharpsburg, Bath county, Kentucky. H. Feltman & Co. have advanced Waller Sharp on this tobacco the sum of $47,183.27, including interest to July 7, 1887, which amount Bramblett & Gibson agree to pay H. Feltman & Co., by sales of said tobacco at their warehouse in Cincinnati, between date of contract and January 1, 1888, H. Feltman & Co. charging for selling said tobacco the regular warehouse fees, commissions, etc., customary with the Cincinnati warehouses, and interest at the rate of 6 per cent. per annum. It is further agreed should Bramblett & Gibson dispose of said million pounds of tobacco, or part thereof, in any other way than through the breaks of the warehouse of H. Feltman & Co., then the said Bramblett & Gibson agree to pay regular fees, which would be four dollars per hogshead, one per cent. commission, called outweights. H. Feltman & Co. also agree to furnish the money for the remaining purchase of Waller Sharp's tobacco, which has not been delivered, at the rate of six per cent. per annum."

It appears that there had been a previous agreement between Bramblett & Gibson and H. Feltman & Co., by which the former agreed to ship to the latter for sale, on the usual terms, tobacco, other than that purchased from Sharp, which they might purchase directly from planters, with the sum of $20,000 advanced and loaned to them for that purpose by H. Feltman & Co.

This action was brought December 24, 1888, by Bramblett & Gibson to recover from H. Feltman & Co. an alleged balance due, after deducting from the aggregate sales of their tobacco made by the latter the whole amount of money advanced, and charges and expenses; but the lower court having sustained the counterclaim and set-off

pleaded, and rendered judgment over against them, they prosecute this appeal.

According to recital in the judgment the entire quantity of the Sharp tobacco when prized amounted to 706 hogsheads, of which only 414 hogsheads were shipped to H. Feltman & Co., the residue, 292 hogsheads, having been shipped by Bramblett & Gibson to and sold for them by other warehousemen; and the lower court, construing the contract as requiring Bramblett & Gibson to ship to H. Feltman & Co. the entire lot, adjudged against them on account of consequent loss to H. Feltman & Co. of commission fees and charges on 292 hogsheads the sum of $2,496.60.

It appears that after the purchase of the Sharp tobacco H. Feltman & Co. advanced and loaned to Bramblett & Gibson $7,500, but, though requested, refused to advance or loan any more; and, in consequence of such refusal, Bramblett & Gibson, as they allege and show, were compelled to borrow from tobacco warehousemen in Louisville a sum sufficient to complete payment of what they had agreed to pay Sharp, but, in order to secure the requisite sum, they had to ship the 292 hogsheads to the firm advancing the money; therefore, whether Bramblett & Gibson committed such a breach of the contract as entitled H. Feltman & Co. to recover damages of course depepends upon the proper construction of it.

It seems to us the only fair or even allowable meaning that can be given to it is that, as Bramblett & Gibson agreed to not only assume the payment of $47,183.27 previously advanced to Sharp, but also to give to H. Feltman & Co. the profit and advantange of selling the entire purchase, amounting to about 538 hogsheads, exclusive of the 168 hogsheads already in their warehouse, they had a right to expect and H. Feltman & Co. plainly bound themselves to advance and loan such sums as might be required to enable them to pay cash to Sharp, without doing which they could not obtain possession of the tobacco.

As then H. Feltman & Co. disregarded and violated the contract, they have no right to recover on account of the failure of Bramblett & Gibson to ship to them that part of the tobacco which, by reason of such breach, they were compelled to bind themselves to ship elsewhere; for it is not contended they did not ship to H. Feltman & Co. enough tobacco to reimburse them for all the money they had advanced, in addition to giving them profit and advantage of selling 414 hogsheads.

But it seems to us the court did not err in adjudging defendants' entitled, as set-off, to $1,603.32, fees, charges and commissions they would have received on the sale of the 193 hogsheads of the tobacco which Bramblett & Gibson purchased with the $20,000 advanced by H. Feltman & Co., and that they were, under the contract, bound to ship and consign to them for sale, though we think the court erred in including as part of the damages anything paid or alleged to have been paid as insurance on the 193 hogsheads.

Wherefore, the judgment is reversed and cause remanded for proceedings consistent with this opinion.

Judge Hazelrigg delivered the following response to motion for modification of opinion October 29, 1896:

The appellants were tobacco men, and must be supposed to have been acquainted with the rule that freight charges were payable out of the proceeds of the tobacco when sold, and as between the consignor and the warehouseman such charges were not due until such sale.

We perceive no error, therefore, in the charge of $555.97 against appellants for freight on the Sharp tobacco. In the original opinion, without making a calculation, we assumed from the finding below that the appellants failed to ship 193 hogsheads of tobacco to appellees which they ought to have shipped under the contract of February, 1887. This was an error. The contract was that with the $20,000 furnished the appellants would buy and ship all the tobacco that sum would buy. The proof discloses that this money was furnished in installments, and some of it when the price of tobacco had advanced materially. Instead of buying 400,000 pounds, as alleged, this sum could only have bought 252,000 pounds, and the appellants are shown by the proof to have shipped this much and more under the February contract. It thus clearly appears that not only have the appellants performed their obligations under the July contract, as held in the original opinion, but have also carried out the February contract by shipping to the appellees all the tobacco which the $20,000 advanced to them would buy at the prices prevailing at the various dates when the advancements were made. The item of $1,603.83 is therefore, wrongfully charged to the appellants. It may be admitted that the pleadings on this branch of the case are not as definite as might technically be demanded. Thus the appellees say that they furnished at certain named times moneys aggregating the sum of $20,000, with which the appellants were to and did purchase 400,000 pounds. Manifestly the appellants could not have purchased that number of pounds or have agreed to do so unless the price per pound should remain at five cents, and certainly no agreement as to price was intended to be made.

The appellants set up that with this money they were to buy as much tobacco as would be "sufficient to repay the amount advanced," and they deny they bought 400,000 or any number of pounds in excess of ——— pounds. As the number of pounds which $20,000 would buy depended wholly upon the price at which it could be bought, and involved merely a calculation, no motion was made to have this blank filled, and each party, as well as the court below, treated the issues as fully made up by the pleadings as they stood.

We are of opinion further that the item of $752 for insurance is excessive. The full risk for the year at the rate fixed by the secretary of the board of tobacco trade would be about $612, and for the time for which appellants were chargeable could not exceed some $459. The items of $39.12 and $202.54 for interest which was originally allowed the appellants by the appellees in their account should remain as such credit. Appellees charged interest, and it is proper that they account for interest on moneys received by them.

To the extent indicated herein the former opinion is modified and the petition is overruled.

LUMPKINS, &C. V. HARTON, TRUSTEE, &C.

(*Filed September* 18, 1896—*Not to be reported.*)

1. Contract for benefit of slaves—Consideration. Where the purchaser of a slave executed a writing, reciting his purchase and undertaking to give to the slave and his wife fifty acres off a tract of land described, which was to be held in trust for them during their lives, and at their death to descend to their children, this writing is to be considered in connection with a writing signed by the vendor evidencing the sale of the slave, and the two construed as one contract; therefore, the undertaking to give the land was supported by a sufficient

consideration, and the fact that the persons for whose benefit it was made were then slaves does not render it invalid. And the heirs and devisees of the purchaser of the slave having converted to their own use the land described in the contract, the children of the slave, their parents being dead, are entitled to judgment against the trustee of the estate for the value of the land, and if there are not sufficient assets in his hands to satisfy that judgment, then they may have judgment against such of the heirs or devisees as have received a sum or sums equal to that amount.

2. *Limitation*—As the right of the plaintiffs to sue did not accrue until 1881, the date of the death of their father, and this suit was brought in 1892, it was not barred by limitation, although the contract was made in 1839, the property being held in trust for plaintiffs until the death of their parents.

Hawkins & Hawkins and Jno. W. Menzies for appellants.

Geo. Washington for appellees.

Appeal from Campbell Circuit Court.

Opinion of the court by Judge Guffy.

This suit was brought by plaintiffs (appellants here) upon the following writing, executed by General James Taylor, and duly recorded:

"I, James Taylor, of Campbell county, Kentucky, having purchased of W. H. Lacy, of same county and State, his colored man, Burrill, a slave, for the term of five years from the 10th day of the present month, I do hereby engage to give to my servant woman, Susan, and her husband, the said servant man Burrill, 50 acres of my tract of land, called the Clark tract, on the waters of Pond creek, entered, surveyed and patented in the name of John Clark, containing about 1,000 acres, the same tract and some of my adjoining lands I intend to lay off into lots of about 50 acres, agreeably to quality and situation, and divide it among my slaves, in lots of equal value as near as may be, in course of the present year. The said 50 acres shall be for the use of the said Susan, my servant, and the said Burrill, now purchased, for and during their natural lives, provided the said Burrill live with the said Susan as her husband during her, said Susan's, life, and they or either of them conduct themselves well as good and faithful servants, and at the death of the said Susan and Burrill the said land is to descend forever to the children of the said Susan and the children of the said Burrill and Susan. This land is to be held in trust for the purpose aforesaid by myself during my life, and at my death the said lot is hereby vested in my son, James Taylor, jr., who is hereby vested with full power to fulfill this my obligation. It is understood and expressly declared that I guarantee the said lot of land against myself, my heirs and all persons claiming the said land or any part of it under me.

"As witness my hand this 9th day of May, 1839.

"JAMES TAYLOR. [Seal.]"

"Signed, sealed, etc., in presence of

"JAMES TAYLOR, JR."

It appears that the appellants are the heirs of Burrill Lumpkins and his wife Susan.

The principal defense relied on is that the said Burrill and Susan were slaves at the time, hence that the contract was without consideration and void. The statute of limitations is also pleaded. The defendants filed the following with their answer:

"Know all men by these presents: That I, William H. Lacy, of Campbell county, State of Kentucky, have bargained and sold unto James Taylor, of the same county and State, my colored man, Burrill, a slave, for the term of five years from the 10th day of the present month, and at the end of the said period of five years the said man Burrill is to be liberated and set from servitude. This is on the condition that the said Burrill conduct himself in an industrious manner during said period to the end of the aforesaid period of five years from the date aforesaid, to wit: The 10th day of the present month; and I, the said W. H. Lacy, do warrant the said servant man, Burrill, to the said James Taylor, his heirs or assigns, for the full term of the said five years from the date aforesaid.

"As witness my hand and seal the 9th day of May, 1839.

"W. H. LACY. [Seal.]"

"Signed, sealed and delivered in the presence of

"JAS. TAYLOR, JR."

These writings, in effect, constitute one contract and the consideration moved from Lacy to Taylor, and it seems to us that Lacy could have enforced the contract; and, inasmuch as appellants were free at and before the time that they were entitled to receive and possess the land named in the contract, we can see no reason why they may not maintain this action.

The statute of limitations is no bar to this action. The right of appellants to sue did not accrue until 1881, the date of the death of their father, and this suit was brought in 1892, and it will be seen that the property was to be held in trust for these appellants until the death of their parents.

It seems pretty clear that so much of the Clark land as General Taylor was entitled to was converted to the use of his heirs or devisees. The proof is not satisfactory as to the value of the land. The long delay upon the part of appellants to assert their rights makes it difficult to ascertain the real value of the land or its rental value. Upon a full consideration of the facts and circumstances we are of opinion that appellants should recover $1,800, with legal interest from April 1, 1892.

The judgment of the court below is reversed and cause remanded, with directions to render a judgment in favor of appellants against W. H. Harton, as trustee of Col. Jas. Taylor, and, if there are not sufficient assets in his hands to pay same, judgment may be rendered against such of the heirs or devisees of Col. Jas. Taylor, if any, as have received as such a sum or sums equal to the claim of appellants, and for proceedings consistent with this opinion.

KELLEY V. YANDELL.

(*Filed September 22, 1896—Not to be reported.*)

1. Preferential conveyance—Sufficiency of petition.—In an action seeking to have a mortgage declared preferential and adjudged to operate as an assignment of all the mortgagor's property for the benefit of creditors, all the necessary averments should be definitely and distinctly made in the petition and a denial of knowledge or information as to whether the mortgagee loaned the mortgagor the money, which the mortgage purported to secure, simultaneously with the mortgage or at any time is not sufficient.

2. Same—Time of recording mortgage.—The fact that the mortgage was not recorded for some considerable time after its execution can not affect the de-

cision of this case, for the proviso of the statute as to recording the mortgage within thirty days from its execution (section 1910, Kentucky Statutes) applies only in cases where there has been an antecedent preferential conveyance.

W. C. McChord for appellant.

Clements & Thurman for appellee.

Appeal from Washington Circuit Court.

Opinion of the court by Judge DuRelle.

This case comes up on demurrer to appellant's petition, seeking to have a mortgage by Grundy and wife to appellee declared preferential and adjudged to operate as an assignment of all Grundy's property for the benefit of his creditors.

The only question necessary to the decision of this case is whether the petition is sufficient. Appellant was a judgment creditor of Grundy, and had an execution levy upon the lots of land covered by the mortgage which is sought to be declared preferential.

The petition contains no direct averment or charge that the mortgage was executed to secure a pre-existing debt, or that it was fraudulent. The averment upon that subject is as follows: "Plaintiff says by the terms of said mortgage it purports to be executed to defendant Yandell to ——— him the sum of fifteen hundred dollars, which said Yandell, simultaneous with the execution of said mortgage, loaned the said defendants, Thomas S. and Maggie B. Grundy; as to whether or not defendant Yandell at that time, or at any other time, loaned said defendants, or either of them, the sum of fifteen hundred dollars, or any other sum, plaintiff has no knowledge or information sufficient to form a belief. Plaintiff denies that defendant did loan said money on that or any other time."

This would be a sufficient denial of an averment by the other party (Civil Code, section 113), but it is not, in our judgment, a sufficient charge that the loan to Grundy was not made simultaneously with the execution of the mortgage.

In order to bring the case within the statute as to preferential conveyances, all the necessary averments should be definitely and distinctly made, and this is not done by a denial of knowledge or information sufficient to form a belief in a petition seeking affirmative relief.

The fact that the mortgage in question was not recorded for some considerable time after its execution can not affect the decision of this case, for this court distinctly held, in Meier v. Flinsbach, 95 Ky., 146, that the proviso of the statute, as to recording the mortgage within thirty days from its execution (Kentucky Statutes, section 1910), applies only in cases where there has been an antecedent preferential conveyance.

Judgment affirmed.

GRIFFITH V. RIGG, &C.

(Filed September 22, 1896—Not to be reported.)

1. Reservation in deed of passway over land—Grantee bound by reservation—A reservation by the grantor in a deed of conveyance of a passway over the land conveyed in favor of a third person, who was not a party to the deed, is binding upon the grantor and also upon a subsequent purchaser under the reservation. The reservation being during the life of the third party or until she

sells, the right of passway shall continue for that time only, but should embrace the members of her family residing with her, including her husband.

2. *The testimony in this case does not sustain* the claim of the appellee to a right of passway by prescription, and her only right was acquired by the reservation in the deed of conveyance to appellant.

J. J. Osborne for appellant.

Hanson Kennedy for appellees.

Appeal from Robertson Circuit Court.

Opinion of the court by Judge Guffy.

The appellee, Dorcas Rigg, and her husband, Dennis Rigg, instituted this action against the appellant, Mary J. Griffith, seeking to enjoin her from closing a passway over her land claimed by appellees. The material averments of the petition are that, in 1892, Nancy L. Meadows sold and conveyed to the defendant, Mary J. Griffith, a certain tract of land, describing it, and by the terms of said conveyance a passway was reserved to and granted to plaintiff, Dorcas Rigg, during her life or until she sells. The exact language of the deed is: "Be it known that Dorcas Rigg is to have the privilege of a passway from Rigg's orchard round to a gate during her life or she sells;" and the said second party is to have the same privilege of a passway on said Dorcas Rigg's farm.

It is also alleged in the petition that one Walter Sewall once owned the two tracts of land and forty years ago sold off the 50 acres now owned by appellant, and reserved for his benefit and for the benefit of the residue of the said 100 acres the same passway; and the same reservation has been made in each successive conveyance down to appellant; and plaintiffs also plead and rely on possession and use for more than thirty years.

The appellant in her answer avers that, in 1878, Dorcas Rigg and D. C. Rigg, plaintiffs in this cause, were owners of the land that defendant now owns, said Riggs then owning the fee simple title, and that they conveyed to Wm. J. Woodward and others all their right, title and claim to said land by general warranty.

Appellant also denied the allegations as to the reservation in the deed from Sewall and in the succeeding conveyances, and denied the adverse holding or use by appellees, and alleged that all the right to the use of the passway by appellee was permissive and at all times subject to revocation.

Appellant also averred that if plaintiff had any right to a passway at all it was personal to herself alone.

The court, upon final hearing, adjudged in favor of appellee Dorcas Rigg, and perpetually enjoined appellant from closing the passway in contest or from preventing the plaintiff and her family, including her husband, from using the passway. To reverse that judgment this appeal is prosecuted.

Appellant's contention is that plaintiff did not acquire a right by a reservation in a deed to which she was not a party. It may be that very respectable authorities sustain that contention, but, under the facts of this case, we do not think that the authority relied on by appellant should be given the decision in this case.

It seems that one Walter Sewall once owned the Rigg land and the Griffith land, and that he sold the 50-acre Griffith tract to Wells, reserving a passway through it to a certain road to get his timber. He sold the residue to Dennis Rigg, husband of Dorcas, and also conveyed to him the right of a passway out to the Kentontown

road, through the land of Mrs. Woodward, reserved by the said Sewall.

It does not appear how or when Mrs. Woodward became the owner of the Griffith land, but it does appear that Dorcas Rigg and her husband conveyed the land to her son, J. T. Woodward, and others. It seems that she had an interest in the land, and she and her husband conveyed all the right, title and claim they had in and to the land to the said Woodwards, who afterwards conveyed to Meadows, reserving the passway privilege for Dorcas Rigg as before stated, and Meadows conveyed to appellant with the reservation aforesaid.

The testimony in the cause does not at all sustain the claims of appellee to a right of passway by prescription, hence the only right, if any, acquired by the appellee Dorcas was by and through the reservation in the deed to Meadows and from Meadows to appellant.

It is quite reasonable that the son would desire that his mother should have the right to use the passway, hence the reservation; and Mrs. Meadows, of course, would not be inclined to convey more than had been conveyed to her, therefore inserted the reservation aforesaid in the deed to Miss Griffith.

It seems to us that appellant is estopped now to deny the right of appellee Dorcas to use the passway during her life or until she sells the land now occupied by her, but this right is only to continue during the life of Dorcas or until she sells, including members of her family residing with her, including her husband.

The judgment of the court below is reversed and cause remanded, with directions to render a judgment in accordance with this opinion.

PADUCAH LAND, COAL & IRON CO. V. COCHRAN, ASS'EE, &C.

(*Filed September* 22, 1896—*Not to be reported.*)

1. *Waiver*—The objection that an amended petition was filed in vacation can not be sustained where the defendant appeared and filed answer to it.

2. *Special judge*—The fact that a motion for a judgment in accordance with the mandate of the Court of Appeals was heard and decided by a special judge while the regular judge was holding a regular term of court, which had been set apart by a rule of court for the trial of criminal cases, is not cause of reversal because the special judge had all the powers of the regular judge, and had the power to set aside or suspend the rule.

3. *Same*—The special judge, having the same powers as the regular judge, could select a time at which the regular judge was holding court to hold his session, and his orders were as valid as those of the regular judge.

4. *Attachment—Judgment*—It was not an objection that the validity of an attachment was not determined before a personal judgment was entered. The sufficiency of the grounds of attachment may be tried and determined as well afterwards.

5. *Res judicata*—where the validity of an attachment could have been prevented on a former appeal, and the mandate of this court on that appeal directed the entry of the judgment from which this appeal is taken, that question must be presumed to be *res judicata*.

Greer & Reed and J. W. Bloomfield for appellants.

Helm & Bruce and Thos. E. Moss for appellees.

Appeal from McCracken Circuit Court.

Opinion of the court by Judge DuRelle.

Appellee Hays sued the appellant for unpaid salary and took out an attachment. Appellant denied its liability and pleaded certain counterclaims and set-offs. Judgment was rendered for appellee Hays after allowing some of the set-offs. On appeal to this court the case was reversed, with directions to the lower court to enter a judgment for appellee, but without one year's interest, which had been allowed by the lower court. A motion was made for a judgment in pursuance of the mandate, and the motion was set for trial, but no action was taken on the motion at that term. On a subsequent day of that term the court ordered an amended answer tendered by appellant to be filed. Cochran, who had become the assignee of Hays, moved for a judgment in his favor as assignee in accordance with the mandate, and an order was entered requiring him to file written pleadings setting up his claim. The assignee declined to file written pleadings, the motion of the assignee for judgment was overruled, appellant moved to discharge the attachment, appellee objected, and the court, *suo motu*, ordered that all of the orders entered that day be set aside.

In the following vacation the assignee filed an amended petition stating the fact of the assignment, and filing exhibits showing his appointment and qualification as assignee. Notice was given appellant of the filing of the amended petition and exhibits, and that on the second day of the September term, 1894, the assignee would move to be substituted for Hays as plaintiff, and for a judgment in accordance with the mandate. The appellant appeared by counsel, filed an amended answer, counterclaim, set-off and answer to the amended petition of the assignee, claiming damages for the alleged wrongful levy of the attachment, and setting off the judgment in its favor for costs in this court on the appeal. After hearing, the motion of the assignee was sustained, but the appellant's claim to set off the costs in this court was allowed. From the judgment thus entered appellant prayed the present appeal.

It is objected that the assignee filed his amended petition in vacation, but the appellant appeared and filed an answer to it. It is further objected that the motion for judgment in accordance with the mandate was heard and decided by the special judge while the regular judge was engaged in holding the regular term of the circuit court, and a term which, by rule of court, had been set apart for the trial of criminal cases, except that the rule permitted default judgments to be taken at that term in cases where no good defense was interposed. It is a sufficient answer to this objection that the special judge had all the powers of the regular judge, and the regular judge could undoubtedly have set aside or suspended the rule. Notice was given of the motion, and the appellant was represented by counsel. That the special judge sat at the same time as the regular judge is no objection to the correctness of the judgment. Having the same powers they could select the same time for their sessions, and the orders of one were as valid as those of the other.

Nor is it an objection to the judgment that the validity of the attachment was not determined before the judgment was entered. The sufficiency of the grounds of attachment can still be tried and determined as well as if the personal judgment had not been entered. Moreover that question could have been presented on the former appeal, and must be presumed to be *res adjudicata* in this case, as the mandate directed the entry of the judgment from which this appeal was taken.

Judgment affirmed.

GROVER, SR., &C. V. WILSON.

(Filed September 22, 1896—Not to be reported.)

Action to enforce purchase-money lien—Asserted lien of cross petitioner—Allegations of petition—In this action on a purchase-money note to enforce a lien upon the land for its payment, a former partner of the grantor in a mercantile business, by a cross action, asserted a prior lien upon the land, arising, as alleged, out of the fact that the grantor of same had withdrawn from the firm the money to pay on the sale bonds which he had executed upon purchase at commissioner's sale. It was also alleged that the grantor is insolvent, and that if he had not used the partnership funds the cross petitioner, who was surety on the sale bond, would have been compelled to pay the bonds. *Held*—That the allegations of the cross petition do not entitle the plaintiff therein to a lien upon the land.

Cochran & Son for appellants.

E. L. Worthington for appellee.

Appeal from Mason Circuit Court.

Opinion of the court by Judge Guffy.

December 1, 1877, P. W. Suet bought at commissioner's sale 29½ acres of land for $1,209.98, and executed bonds for the purchase money, with appellants W. T. Grover and W. T. Suet as sureties. These bonds were paid off by said P. W. Suet, and deed made to him.

On the 23d of September, 1879, P. W. Suet sold by title bond the land to Ellen Milliken for $1,300, took two notes for $698 each, and afterwards assigned one of the notes to Thomas Suet; the other note was paid off.

Thomas Suet died, and his executors brought suit on it to enforce the lien upon the land in March, 1889. Judgment by default was rendered July 13, 1889, and a sale ordered. After this judgment appellee Wilson bought the note and judgment, paying full face value thereof, as is claimed, took an assignment, and an order was made that the suit should thereafter be docketed in his name.

Prior to the purchase of the land by the said Suet he and appellants were partners in a mercantile business, selling goods, etc., in Sardis, Mason county, Ky., which continued many years after the purchase of the land.

In 1880 said Suet, who had also been engaged in other business besides the firm business, made an assignment of all his property for the benefit of his creditors. In 1889 the assignee brought suit against appellants for a settlement of the partnership affairs.

The appellants, by a cross action, asserted a prior lien on the land for $740.29, with more than ten years' interest. The facts relied on by appellants to support their action are that, on the 9th of January, 1879, said Suet drew out of the firm assets $400, and paid the same on the said sale bonds, and on the 3d of June, 1879, he drew out of said firm assets the sum of $340.29, and paid on said bond.

It is also alleged in the answer and cross petition that said Suet had no individual means at the time out of which to pay said bonds, and that if the partnership business had been then wound up that there would have been nothing coming to him; that if said Suet had not so used the funds of the firm that appellants would have had to have paid the bonds, and that he has ever since been largely indebted to the firm, and is insolvent, and that the firm is also insolvent.

A demurrer was sustained to the cross petition and to it as amended, and the same dismissed, and appellants have appealed. The contention of appellants is in substance that they are entitled to be subrogated to the liens of the payee in the sale bonds, and at any rate they have a lien as against Suet.

It seems to us that the allegations of the pleadings fail to show that appellants have any lien upon the land mentioned.

Judgment affirmed.

GOINS, &C. v. TAYLOR.

(*Filed September* 22, 1896—*Not to be reported.*)

1. *Action on note Usury* In this action on a note for $500 it appears that the obligor received only $425, and that the additional $75 was estimated interest on the principal sum until the date of maturity at the rate of 15 per cent.; also that the obligor paid interest upon the full sum of $500 at the rate of 15 per cent. for several years until the death of the payee. The judgment, therefore, should have been for the sum of $425, with interest at the rate of 6 per cent. from date of execution of the note, subject to a credit of a sum equal to 15 per cent. per annum on $500 from the said date, and of the further credits of sums as shown by endorsements on the note.

2. *The obligor in the note is not a competent witness* as to payments made to the deceased payee nor as to any other transactions between them, but as to payments made to the executor of the payee and to a purchaser of the note he is a competent witness.

3. *Endorsements on a note are prima facie evidence against the owner in possession.*

4. *Promise to pay* A promise by the obligor in a note to the purchaser of same to pay the note after it was assigned to her does not defeat his right to make the defense relied upon, nor does it disprove or overthrow the testimony of his witnesses.

J. A. Violett for appellants.

James Andrew Scott for appellee.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Guffy.

Appellant, Francis Goins, executed his note to Solomon Bright for $500, dated December 9, 1882, due 10th of March, 1884. Several years afterwards said Bright died, and the note passed to his executor, Long, who held it for a while, and finally assigned it to the appellee, Mrs. Taylor, who brought suit upon it seeking a personal judgment and an enforcement of the mortgage lien on land and personal property which had been mortgaged to secure the note.

Appellant answered, and alleged that he only received $425, and that the residue of the note, $75, was the estimated interest in advance, counted at 15 per cent. per annum, and that he made divers payments of interest at the rate of 15 per cent. per annum on said note until the death of Bright, and then paid interest for a time to the executor, Long, and afterwards made sundry payments to appellee Taylor. Most of these allegations were denied.

The court below rendered judgment in favor of appellee for $500, with 6 per cent. interest from the 10th of March, 1884, until paid, subject to the following credits, viz: $26.66, October 1, 1888; $3, January, 6, 1890; $50, February 26, 1890; and $50 January 1, 1891; and

also adjudged a sale of the mortgaged property. From that judgment this appeal is prosecuted.

The following endorsements appear upon the note: "Received $26.66, amount of interest due October 1, 1888. J. S. Long, Ex'or S. Bright. Received on the within note $25, January 6, 1890. Interest all paid till January, 1892, without recourse. J. S. Long, Ex'or of Sol. Bright. Dec. 12, 1889. Interest paid on the within note up to the 10th day of March, 1885. Interest paid on the within note up to the 10th of March, 1886. Interest paid on the within note up to the 10th day of July, 1886. Interest paid on the within note up to the 10th day of November, 1886. Interest paid on the within note up to the 10th day of November, 1887."

Appellant's contention is that he made these payments of interest in advance, and at the rate of 15 per cent. per annum upon the sum of $500. Appellant is not a competent witness as to payments made to decedent, nor as to any other transactions between them, but as to payments to the executor and to appellee he is competent.

The endorsements on the note are *prima facie* evidence against the owner in possession, and, from the endorsements on the note, it is evident that the interest was paid up to the 10th of November, 1887, before the death of Bright. It is said he died in 1888.

Appellant's contention is that he paid interest on the $500 at the rate of 15 per cent. per annum during the life of Bright. We think that appellant's claim in that respect is established by the evidence of John D. Moore.

The testimony of J. H. Sudduth shows that $425 was the amount of money received by appellant at the time he executed the note and mortgage.

The fact, if fact it is, that Goins promised Mrs. Taylor to pay the note after it was assigned to her can not defeat his right to make the defense relied on, nor does it disprove or overthrow the testimony of the witnesses introduced by appellant.

It is satisfactorily proven that the appellant only received $425, at the time of the execution of the note, and that the additional $75 was interest in advance at nearly 15 per cent. per annum up to the 10th of March, 1884, and that appellant paid to Bright interest thereon at the rate of 15 per cent. per annum to the 10th of November, 1887, besides the other credits claimed.

The judgment of the court below should have been for only $425, with 6 per cent. interest thereon from the 9th of December, 1882, to the 10th day of March, 1885; then to be credited by a sum equal to 15 per cent. per annum on $500 from the 9th of December, 1882; then interest on the remainder and like credits to 10th of March, 1886; and in like manner up to the dates of the other credits of interest, and up to November 10, 1887; and, in addition thereto, appellant should be allowed the further credits of $26.66, paid October 1, 1888; $25, paid 6th of January, 1890; $50, paid February 26, 1890; and $50 paid January 1, 1891.

For the reasons given the judgment of the court below is reversed and cause remanded for judgment as indicated in this opinion.

LOCKRIDGE V. FESLER, &C.

(Filed September 23, 1896.—Not to be reported.)

1. Liability of livery-stable keeper—Negligence in hitching horse.—In this action against a livery-stable keeper to recover damages for the death of plain-

tiff's horse alleged to have resulted from defendant's negligence in so hitching the horse that he slipped the halter and ran upon the street, where he slipped and fell, thus receiving the injuries from which he died, it was error to strike from defendant's answer an allegation that the injury was caused by accident, against which ordinary prudence could not guard; that the horse was properly hitched, but that, being breachy and restless, "by his own wrong" he slipped the halter and escaped without any carelessness or negligence upon the part of defendant or his employes.

2. *Same -Evidence* Even if expert testimony was proper in such a case it was an error to permit witnesses who did not show that they had had any experience in that regard to testify as experts as to the proper and prudent way for livery men to halter and hitch horses.

3. *Same*- The court erred in refusing to permit defendant to prove that the horse was frightened and caused to slip and fall on the pavement by the noise made by persons on the street, as this tended to show that the negligence of defendant, if any, did not cause the injury.

4. *Same -Instructions* -It was error in instructing the jury not to require them to believe, in order to find for plaintiff, that the negligence of defendant, if any, was the proximate cause of the injury.

O'Rear & Bigstaff and C. P. Chenault for appellant.

Appeal from Montgomery Circuit Court.

Opinion of the court by Judge Landes.

The appellant was a livery-stable keeper in the city of Mount Sterling, and the appellees were the owners of a valuable horse, which was left at the stable of appellant by appellee Fesler, and hitched under a shed attached to the stable. The horse slipped the halter and escaped from the lot, and in running upon the street slipped and fell, and was so badly hurt from the fall that he died in about twenty minutes after being hurt.

It appears from the evidence that the appellee, Fesler, had an arrangement with the appellant by which he was to hitch the horse in the stable whenever he came to town for safe keeping, and for which he was to pay to the appellant $15 by the year. On the day upon which the horse was hurt appellee Fesler drove him to the stable, where one of the hands employed there took charge of him, and put a rope halter on over the bridle without removing or detaching the reins, and hitched him in the shed, which was in the stable lot, and was enclosed by a fence, the entrance to the lot being through an opening closed by a set of bars. At the time the horse was hitched under the shed the weight of the evidence showed the bars were up, but having slipped the halter the horse escaped into the streets, the bars having been let down in some way or by some one not clearly shown by the evidence. It was made to appear with sufficient clearness from the evidence that the horse was hitched in the way that was usual or customary at that stable, and that the appellee, Fesler, saw the manner in which the halter was placed and the horse hitched, and it did not appear that he objected to it. But it was alleged that the hitching was done in a careless manner, the halter being so loosely and carelessly placed on the horse that he got loose, and that the "gates and doors" having been carelessly and negligently "left open" the horse ran into the street and "slipped and fell and killed himself." The allegation was made "that it was through the negligent and careless hitching of said horse with ropes and halters insufficient to hold him, and so carelessly and negligently put upon said horse that caused him to get loose, * * * and through the negligence and carelessness of defendant's employes the gates and doors

were left open and let said horse aforesaid upon the streets and upon said sidewalk, where he slipped as aforesaid and killed himself." These allegations having been traversed, a demurrer to the answer having been filed and overruled, the case was submitted to a jury, which, under the instructions of the court, returned a verdict against the appellant for the sum of $100 damages, for which judgment was rendered, and, motion for a new trial having been made and overruled. the case is before us on this appeal.

We will notice some exceptions that were taken during the progress of the case in the court below to certain rulings of the court. Among other things the answer contained the following allegations, which, on motion of counsel for the appellee, were stricken from the answer, viz: "He says that he and his employes and servants were not guilty of carelessness, negligence or improper conduct charged in the petition, and says that the injury therein complained of was caused by accident, against which ordinary care and prudence could not guard and could not prevent."

This was followed by allegations in substance that the horse was properly hitched, but that being breachy and restless "by its own wrong" slipped the halter and escaped without any carelessness or negligence upon the part of the appellant or his employes. These allegations, taken together, were in our opinion proper, and we perceive no good and sufficient reasons for striking out those that have been quoted, and the court erred to the prejudice of appellant's substantial rights in striking them out.

During the trial before the jury J. B. Crouch, J. G. Crouch Smith Judy and James Freeman were permitted, over the objection of counsel for the appellant, to testify as experts as to the proper and prudent way for liverymen to halter and hitch horses, when they had not qualified as experts by showing that they had had experience in this regard. We think the court erred in allowing these witnesses to testify on this subject further than to show if they knew just how the horse was haltered and hitched. We are not sure that it was a case for expert testimony, but in any event these witnesses were not shown to be experts in that matter, and the jury, knowing the facts, were as able and as well qualified as they were to determine from the evidence whether or not the horse was properly haltered and hitched. This so called "expert testimony" was manifestly prejudicial to the substantial rights of the appellant in the trial.

The appellant offered to prove that the horse was frightened, and caused to slip and fall on the pavement by the noise and hollowing made by persons on the street, and the court refused to permit the testimony offered to be given. This was error. The charge was that the injury to the horse was occasioned by the carelessness of the appellant or his employes. This testimony was material as tending to prove that the injury was occasioned by the acts of others, and no testimony had been given showing that the injury and death of the horse was the necessary result of the alleged negligence of the appellant or his employes in haltering or hitching the horse or permitting his escape from the shed and let into the street, or a result which might reasonably have been expected to follow from such alleged negligence. In other words, there was no evidence showing that the alleged carelessness or negligence of the appellant or his employes was the proximate cause of the injury and death of the horse, without which the appellees were not entitled to recover, while the rejected testimony tended to show that they were occasioned by other intervening efficient cause or agency.

The instructions given by the court to the jury at the instance of

Whether the lot owners shall pay the cost of improving Shelby street in the city of Louisville, or whether said improvement must be at the expense of the city, is the chief question on this appeal.

The statutes provide that when the improvement is the *original construction* of any street, road, lane, alley or avenue, such improvement shall be made at the exclusive cost of the owners of the lots; but when the improvement is the reconstruction of such streets, etc., the city is to pay the costs. The law seems to have been founded on the theory that for such original construction the lot owners should meet the expense because they are proportionately benefited; but that, when the owners have done this much, the city should thereafter maintain the way.

The street in question was originally a turnpike road leading into the city. By an act of the General Assembly, in 1868, the limits of the latter were extended so as to include a portion of the road, and it was thereafter a public way of the city and as such a few repairs were made on it.

In 1890, for the first time, an ordinance was passed looking to a radical improvement in the old road, and making it conform to the general street system prevailing in the city.

The carriage way of the street, from the center line of Meriwether avenue, if extended, to the center line of Stonewall street, was to be thirty-six (36) feet in width, and be improved by grading and paving with Macadam pavement, with corner stones at the intersections of streets and alleys, flagstone gutters, and footway crossings across all intersecting streets and alleys, all in accordance with the drawings and specifications on file in the city engineer's office.

In our opinion this was an original construction of the street by the city within the meaning of the statute, and the costs should be borne by the lot owners.

It appears that the method of apportionment was based on the assumption that the contiguous property was not divided into squares by principal streets, and it is the appellant's contention that the property was in fact so divided, and that, therefore, the method applied was erroneous. While the record does not show clearly the situation of the property in this respect, the exhibits, maps, etc., seem to show no such division into squares; but if it were otherwise, it does not appear that, under a different method of apportionment, the appellant would be required to pay less than under the method adopted.

It is further contended that the ordinance under which the work was done was not published as required by the charter.

Proper averment on this behalf is found in the petition, but this is denied by the answer, and there is no testimony on the subject.

The statute, however, disposes of this question by providing that copies of the ordinance authorizing the improvement or work, a copy of the contract therefor and of the apportionment, each attested by the clerk of the board of councilmen, shall be proof of the due passage, approval and publication of the ordinance and *prima facie* evidence of every other fact necessary to be established by the plaintiff in actions to enforce such liens. And this statute was upheld in Tabb v. Louisville Baptist Orphans' Home, 92 Ky., 91.

The judgment is affirmed.

DUMESNIL, &C. V. GLEASON.

(*Filed September* 23, 1896.)

Assessments for street improvements--In assessing property for the cost of construction of an alley in the interior of a square, the quarter-square and not the whole square is the taxing district, and no lot should be exempted from its due proportion of the cost of such improvement if the quarter of which it forms a part binds on the improvement: but when the improved way lies in two quarters of a square each lot binding on the improvement is liable only for its ratable proportion of the cost of constructing so much of the alley as lies in the quarter of the square in which the lot lies, and not for its proportion of the cost of constructing the whole alley.

Grubbs & Morancy for appellants.

Lane & Burnett for appellee.

Appeal from Jefferson Circuit Court, Chancery division.

Opinion of the court by Judge Landes.

This case belongs to the same class of cases to which the cases of Beck v. Obst, &c., 12 Bush, 268; Smeltz, &c. v. Giles, &c., *Ib.*, 491; Washle, &c. v. Nehan, 3 KY. LAW REP., 387; and Dumesnil, &c. v. Shanks, &c., 17 KY. LAW REP., 170, belong.

Each of these cases involved the question as to the apportionment of the cost of improvements in the interior of certain squares in the city of Louisville, and originated under substantially the same statutory provisions regulating such assessments and apportionments, which also apply to this case.

The Shanks case and this case each relates to the original construction of an alley in the interior of the same territory, which is designated a "square," and which is bounded on the north by Ormsby avenue; on the east by Fourth street; on the south by Park avenue; and on the west by Sixth street. This territory extends from north to south, between the two avenues, something more than 450 feet, and from east to west, between the two streets, 900 feet, and is about twice the size or dimensions of the squares to the north, lying on both sides of Fifth street, which street runs from the Ohio river to Ormsby avenue.

The rule for the apportionment of the cost of the original construction of "public ways" under the provisions of the charter of the city, and which has been so often recognized by this court, is that the cost of such improvements must be apportioned and assessed upon each *quarter-square contiguous thereto*, the object and result of the rule being to charge the cost in each case *upon the property most benefited by the improvement*. (Smeltz, &c. v. Giles, &c., *supra*.)

Under the force and operation of this rule, the *quarter-square* being the taxing district, no lot therein should be exempted from its due proportion of the cost of such an improvement if the quarter of which it forms a part *binds on* the improvement. (Boone v. Nevin, 15 KY. LAW REP., 547).

In the Shanks case the alley ran north and south, and was situated entirely within the two-quarters embraced in the east half of the square, or in that part of it east of a line which would be the center of Fifth street if extended through the said territory, and the cost of the construction of the alley was assessed by the court below equally upon all of the ground contained in the four-quarter squares; but this court, following the principle laid down in Washle v. Nehan,

supra, held that the ground in the northwest and southwest quarters ought not to have been charged with any part of the cost. And the reason for so holding was stated in the opinion of the court to be "the palpable injustice and inequality resulting from this assessment," which were said to be "so glaring as to emphasize the importance of giving some elasticity to the general rules which we recognize as governing these matters."

In this case the alley was constructed mostly in the east half of the square, connecting with the alley which was the subject of the litigation in the Shanks case, and running thence, we may say, to the west half of the square, and for a short distance into the southwest quarter, but, as alleged in the answer and shown by the map or diagram accompanying the record, not touching any part of the north-west quarter of the square. The total cost of the construction of the alley amounted to the sum of $1,214.45.

The appellants, H. A. and Mary Dumesnil, own 96,554 square feet of ground in the southwest quarter, and 96,662 square feet of ground in the northwest quarter of the rectangular "square," and the appellant, Henrietta Ormsby, owns 7,569 square feet on the east end of the northwest quarter. As in the Shanks case, the cost of construction was apportioned and assessed upon all of the ground by square feet in each of the four-quarter squares. The appellants having refused to pay the several amounts apportioned to them, this action was brought by the contractor to enforce his statutory lien upon their property, and to subject it to pay the assessments.

It was alleged in the answer that the ground or lot owned by appellant, Henrietta Ormsby, fronting thirty-three and four hundred and eight thousandths (33.408) feet on the south side of Ormsby avenue, excepting a strip off the southern end thereof, and three and four hundred and twenty-five thousandths (3.425) feet wide, lies wholly within the northwest quarter, and that the said strip lies within the southwest quarter of the said "square."

It was further alleged that "no part of the ground in the northwestern quarter of said territory binds on the improvement mentioned in plaintiff's petition, but the whole of said alley, improved as set forth in the petition, lies within the eastern half of said territory, excepting thirty-three and four hundred and eight thousandths (33.408) feet off the western end thereof, which thirty-three and four hundred and eight thousandths (33.408) feet of said alley lies wholly within the southwest quarter of said territory."

The amount charged against or assessed upon the ground owned by the appellants, H. A. and Mary Dumesnil, in the southwest quarter is the sum of $290.58; the amount assessed upon their ground in the northwest quarter is the sum of $290.91; and the amount assessed upon the lot of the appellant, Henrietta Ormsby, is the sum of $22.77.

The defense made was that their lots of ground had been charged with greatly more than their proper proportion of the aggregate cost of constructing the alley; and it was claimed in the answer in substance that the ground belonging to the appellants, H. A. and Mary Dumesnil, in the northwest quarter of said territory, ought to have been charged with no part of the cost of said improvement; that no more than thirty-three and four hundred and eight thousandths (33.408) feet of the alley extended into the southwest quarter, and their ground in said quarter ought to have been charged with no more than a proportionate part of the cost of constructing that part of the alley; and that the lot belonging to the appellant, Henrietta Ormsby, ought not to have been assessed for the cost of

any part of the alley that lay within the eastern half of the said territory.

A demurrer was filed to the answer and was sustained by the court, and, the appellants failing to plead further, judgment was rendered enforcing the contractor's lien on the several lots of ground belonging to the appellants for the respective amounts above specified. Exceptions having been duly taken, that judgment is before us for revision.

The contention here is upon the claims set up in the answer, which have been stated, and, the averments of the answer relative to the situation or location of the ground of the appellants respectively with reference to the alley having been admitted by the demurrer, must be taken as true, viz: That *no part* of the ground in the northwest quarter of the said "square" *binds on* the alley, but that the whole of the said alley lies within the eastern half of the "square," excepting thirty-three and four hundred and eight thousandths (33.408) feet taken off the west end of the alley, which number of feet of the alley lies wholly within the southwest quarter of said "square."

The learned chancellor, in his opinion, while feeling bound by what he regarded as the current of decisions in this State on the question to hold that "the whole square in the taxing district" except where "the *entire improvement* is in one-fourth of the square," strongly intimated that he held a different view of what the rule should be. The judgment, accordingly, seems to have been based on the idea that under decisions heretofore rendered in such cases *the whole square* is the *taxing district*. We do not understand that to be the statutory rule, nor the rule established by the decisions of this court in such cases as this. The statutory rule is that each subdivision of territory in the city, bounded on all sides by principal streets, shall be deemed a square, and that the original construction of public ways shall be made at the cost of the owners of lots *in each fourth of a square* binding upon or contiguous to the improvement, to be equally apportioned according to the number of square feet owned by them respectively, with an exception with reference to corner lots. This court has never undertaken to change this rule, nor can it be done except by legislative power, but in applying it the object has been in all cases as far as possible to secure equality of burden, recognizing the principle that "all municipal assessments are based on the ground that the property assessed is benefited by the improvement for which the assessment is made." (Preston v. Roberts, &c., 12 Bush, 587.)

With reference to improvements in the interior of a square this principle was recognized in the case of Smeltz, &c. v. Giles, &c., *supra*, in which the improvement, consisting of an alley, extended through the square, and the division thus made of the square was unequal, yet the lots assessed were contiguous to the alley, and as such were held subject to assessment for the cost of its construction.

The case of Washle, &c. v. Nehan, was another case of an alley constructed in the interior of a square, and wholly within one of the quarters of the square, and the court held that the owners of lots in another quarter of the square were not liable to assessment for constructing or improving the alley because the quarter in which their lots were did not touch the alley.

In quoting the provisions of the charter of the city prescribing the rule for apportioning the cost of such improvements, which were substantially as we have stated therein, the court used the following language: "The object of the Legislature in thus localizing taxation

for such purposes is to require each improvement to be made at the cost of those presumed to be specially and directly benefited by it, and to prevent arbitrary and unequal assessments without equivalent advantages. And according to the only reasonable construction of the acts, and the one heretofore uniformly given by this court, the relative location of the fourths of squares and not of the lots determines what property is liable to assessment for each improvement."

In the Shanks case the cases of Washle v. Nehan and Smeltz v. Giles were referred to and quoted from and commented on with approval. But in neither of the cases referred to was the precise question raised that is raised in this case—that is, as to the apportionment of the cost of an alley, as in this case, constructed from or through one quarter into another quarter of a square, and whether the whole cost of construction should in every case be equally apportioned to and assessed upon the ground embraced in each of such quarters of the square without reference to the length or extension of the alley in each of them. The established rule is that the assessments should be made upon the facts exis ing at the time the improvements are made, and not with reference to what the facts may be in the future. (Preston v. Roberts and Beck v. Obst, *supra.*)

And applying the principles stated and recognized in the cases we have referred to we hold that the ground of the appellants in this case is liable to assessment for their ratable proportion of the cost of the construction of no more than that part of the alley upon which the fourth of the square embracing their ground binds, and that the apportionment and assessment as made in this case against the ground of the appellants and enforced in the judgment of the court below was erroneous. This will secure, as nearly as may be, equality of burden in accordance with the spirit of the statutory rule of apportionment of cost of each improvement.

The judgment is, therefore, reversed and the cause remanded, with directions to overrule the demurrer to the answer, and for further proceedings consistent with this opinion.

HUTCHESON V. WILSON.

(*Filed September* 23, 1896—*Not to be reported.*)

Settlement of partnership—Judgment supported by evidence.—In this action upon certain promissory notes in which the defendant pleaded that the notes sued on grew out of certain partnership transactions between him and plaintiff, and that upon a settlement of the partnership he would be entitled to a greater sum than the amount of the claims sued on, the plaintiff replying that there had been a settlement of the partnership affairs and that the amount due him was as claimed in the petition, the evidence is sufficient to support the judgment in favor of plaintiff for the amount of the notes sued on.

Craddock & Sandidge for appellant.

Wilbur F. Browder for appellee.

Appeal from Logan Circuit Court.

Opinion of the court by Judge Paynter.

This action was brought by Wilson against Hutcheson on two notes, one of which was for $150.25, executed by Hutcheson to Wil-

son, and the other was for $533.10, executed by Wilson and Hutcheson to G. W. Davidson. Wilson paid Davidson, and seeks to recover one-half of the amount of the note and interest from his co-obligor Hutcheson.

Hutcheson filed an answer, in which he alleged that he and Wilson, etc., were partners in certain enterprises for certain years; that the notes were executed growing out of such partnership transactions; that there had been only partial settlements of the partnership matters; that he was entitled to compensation for his services, inasmuch as they were more valuable to the partnership business than those rendered by his partner; that his partners had drawn out certain sums not accounted for in settlements, and he claimed that he was entitled to be allowed a sum greater in amount than the claim asserted by Wilson against him.

Wilson pleaded there had been a settlement of the partnership affairs, and that the amout due him was as claimed in the petition. The cause was transferred to equity, and there tried. The court rendered judgment for the plaintiff on his claims.

The circumstances and facts developed by the record fully sustain the conclusion of the court, therefore, the judgment is affirmed.

COMMONWEALTH V. COMPTON.

(*Filed September* 24, 1896—*Not to be reported.*)

Indictment for perjury. An indictment for perjury must negative the truth of the statements of the defendant alleged to be false: therefore, it being alleged in the indictment in this case that defendant falsely swore that he did not do certain things, it should have been alleged that he did do the acts which he swore he did not do.

W. S. Taylor and J. P. Marrs for appellant.

Appeal from Pike Circuit Court.

Opinion of the court by Judge Guffy.

The grand jury of Pike county returned an indictment against Wm. Compton, charging him with the crime of perjury. The circuit court sustained a demurrer to the indictment and dismissed the prosecution. From that judgment this appeal is prosecuted.

The only question to be decided is as to the sufficiency of the indictment. The indictment reads as follows: "The grand jury of Pike county, in the name and by the authority of the Commonwealth of Kentucky, accuse Wm. Compton of the crime of perjury committed as follows: The said defendant, Wm. Compton, on the 10th day of November, 1895, in the county and circuit aforesaid, did unlawfully, willfully and feloniously and corruptly and knowingly swear and state as a witness in his own behalf in a trial then pending in the Pike Justice Court of Pike county, Ky., before J. M. Miller, a justice of the peace of Pike county, in an action wherein the defendant, Wm. Compton, was plaintiff, and Wm. B. Mitchell and J. C. B. May were defendants, he having first been duly sworn by J. M. Miller, a justice of the peace of Pike county, who was legally authorized to administer an oath, and did then and there while on the witness stand state that he never had called on Mat Damron for an order to Thomas May as pay on his log job with the defendants,

Mitchell and May, and also stated while on the witness stand that he never received from Mat Damron on Thomas May for goods or money as pay on his log job with Mitchell and May, which statements so made and charged by said Compton was knowingly false and untrue, and so known by said Compton, and was material points at issue on said trial against the peace and dignity of the Commonwealth of Kentucky."

R. S. BOOTON,
Commonwealth's Attorney.

It is the well-settled law of this State that an indictment must negative the truth of the statements of the defendant alleged to be false. (Commonwealth v. Kane, 92 Ky., 457; Commonwealth v. Still, 83 Ky., 275.)

The indictment in this case is defective because it fails to show or allege that the defendant did call on Mat Damron for an order to Thos. May as pay on his log job with defendants, Mitchell and May, or in like manner have alleged that he did do the other acts which it is alleged that he swore he did not do.

Judgment affirmed.

COMMONWEALTH V. LEMON.

(*Filed September* 24, 1896—*Not to be reported.*)

Indictment for forgery—An indictment for a common-law felony should allege that the act constituting the offense was done "feloniously," but not so as to a statutory felony unless that word is used in the statute.

Forgery not being a felony at common law, but made so by statute, an indictment for that offense, substantially in the language of the statute, is good, although it does not charge that the act complained of was done feloniously, that word not appearing in the statute.

John L. Grayot and W. S. Taylor for appellant.

Appeal from Crittenden Circuit Court.

Opinion of the court by Judge Guffy.

The grand jury of Crittenden county returned an indictment against Fred Lemon, accusing him of the crime of forgery. The court below sustained a demurrer to the indictment and dismissed the same, and the Commonwealth prosecutes this appeal. The only question to be decided is as to the sufficiency of the indictment. The indictment reads as follows:

"CRITTENDEN CIRCUIT COURT.

"The grand jurors of the county of Crittenden, in the name and by the authority of the Commonwealth of Kentucky, accuse Fred Lemon of the crime of forgery, committed in manner and form as follows, to wit: The said Lemon, in the said county of Crittenden, on the 7th day of August, 1895, and before the finding of this indictment, did, without the knowledge or consent of Thos. R. Simpson, and with the intent to defraud, sign the name of said Thos. R Simpson and the words 'his mark' to a promissory note in words and figures as follows:

"$3.00. "August 7, 1895.
"One day after date I promise to pay to the order of R. F. Lemon three dollars at 8 per cent. interest.
"Value received.
"THOS. R. SIMPSON.
"His X mark.
"No—due—
"Done against the peace and dignity of the Commonwealth of Kentucky. JNO. L. GRAYOT,
"*Commonwealth's Attorney, Fourth Judicial District.*"

It seems from the brief of counsel for appellant that the court below sustained the demurrer because the indictment failed to charge that the forgery was done feloniously.

It is true that this court, in case of Kaelin v. Commonwealth, 84 Ky., 354, held that the indictment in that case was insufficient because it failed to charge that the killing was done feloniously; but in the case of Cundiff v. Commonwealth, 86 Ky., 196, it was held that it was not necessary to the validity of an indictment for a statutory felony to use the word "felonious" unless used in such statute. The indictment in the case at bar was found under section 1185 of the Kentucky Statutes, and is substantially in the language of the statute. At common law forgery was not a felony (Bishop's Criminal Law, volume 2, section 609), hence the decision in Kaelin v. Commonwealth *supra* does not apply to this prosecution.

For the reasons indicated the judgment of the court below is reversed and cause remanded, with directions to overrule the demurrer and for proceedings consistent with this opinion.

LOWRY V. COMMONWEALTH.

(*Filed September* 24, 1896—*Not to be reported.*)

1. Local option—Repeal of statute—Although the local option law of Logan county in force at the time of the adoption of the Constitution has been repealed, in so far as it confers special jurisdiction upon justices of the peace to try offenses thereunder, yet offenses may be tried before the county judge, as provided by section 1073 and the following sections of the Kentucky Statutes.

2. Trial of indictable offense before county judge—Those sections of Kentucky Statutes are not in conflict with section 12 of the Constitution, in so far as they provide for the trial before the county judge of an indictable offense before any indictment has been found in the circuit court. Section 12 of the Constitution applies only to offenses indictable at common law, leaving statutory misdemeanors, for which no infamous punishment is provided, to be tried in such manner as the Legislature shall provide.

3. Repeal of penalties denounced by special laws—The penalties denounced by special prohibitory laws in force at the time of the adoption of the Constitution have not been repealed either by the Constitution or the general local option law enacted pursuant thereto, and are still to be inflicted until the expiration of six years from the adoption of the Constitution.

S. R. Crewdson for appellant.

W. S. Taylor for appellee.

Appeal from Logan Circuit Court.

Opinion of the court by Judge DuRelle.

Under the local option law of Logan county (Acts 1889-90, volume 2, page 92, chapter 549), the appellant was arrested on a warrant charging a violation of the law, and, after an examining trial before the county judge, held to bail for his appearance at the next term of the circuit court, and, in default of bail, committed to the Logan county jail All the steps taken were in accordance with the act. Being unable to give bond, he was brought before the county judge, in accordance with sections 1073-4-5-6, Kentucky Statutes, tried, convicted and fined $100. From that judgment he appealed to the circuit court, where he was again tried, convicted and fined, and has now appealed to this court.

It is urged on behalf of appellant that the county judge had not jurisdiction to try the case and render the judgment appealed from. And in support of this contention the case of McTigue v. Commonwealth, 17 KY. LAW REP., 1418, is relied on as deciding that section 1 of the act of 1890 (the Logan county local option law) has been repealed in so far as it attempts to confer jurisdiction to try offenses under the act upon any court of inferior jurisdiction to the circuit court, and that such offenses can be prosecuted only by indictment in the circuit court of Logan county.

The opinion in the McTigue case does not support this contention. What was there decided was that the general act, passed in conformity with section 142 of the Constitution, providing an "equal and uniform" jurisdiction of justices of the peace throughout the State, operated to repeal any special act, like the one applicable to Logan county, which conferred a jurisdiction upon justices of the peace inconsistent with that general law.

It is further objected that sections 1073 *et seq.*, of the Kentucky Statutes, are in conflict with section 12 of the present Constitution in so far as they provide for the trial before the county judge of an indictable offense before any indictment has been found in the circuit court.

The provision of the statute was enacted for the benefit of the defendant in order to give him a speedy trial if he should be unable to give bail, and it enacts that in such event, when the circuit court is not in session, the case shall be tried by the county judge in all respects as if tried in the circuit court. It is a general law conferring jurisdiction on the county judge. It is not in conflict with section 12 of the Constitution providing that "no person, for an indictable offense, shall be proceeded against criminally by information, except in cases arising in the land or naval forces," etc. That section of the Constitution was taken bodily from the old Constitution, and has been held to apply only to offenses which were indictable at common law. Misdemeanors created by statute, for which no infamous punishment is provided, may be tried in such manner as the Legislature shall provide. (Commonwealth v. Avery, 14 Bush, 625; Williamson v. Commonwealth, 4 B. Mon., 146.)

It is further contended by appellant that this court, in the McTigue case, held that the special act applicable to Logan county is repugnant to the new Constitution and to the general act passed thereunder, and has been repealed thereby, and, if not, that the penalty of the Logan county act has been repealed.

This contention, however, can not be sustained by reference to the opinion in that case. On the contrary it was said in that opinion that, "in localities where the vote is against the sale, the penalties theretofore denounced by special prohibitory laws are still to be inflicted" * * until the expiration of six years after the adoption of the Constitution.

Judgment affirmed.

McTIGUE V. COMMONWEALTH.

(*Filed September* 24, 1896—*Not to be reported.*)

S. R. Crewdson and E. W. Hines for appellant.

W. S. Taylor for appellee.

Appeal from Logan Circuit Court.

Opinion of the court by Judge Guffy.

This appeal involves the same question which was decided by this court March 28, 1896 (17 KY. LAW REP., 1418), in the case of this same appellant against the Commonwealth.

For the reasons given in that opinion the judgment of the court below in this case is reversed and cause remanded, with directions to sustain appellant's motion to dismiss and for proceedings consistent with this opinion.

LOUISVILLE & NASHVILLE R. R. CO. V. COMMONWEALTH.

(*Filed September* 24, 1896—*Not to be reported.*)

1. *Failure to provide water-closet at railroad station—Failure to prove immaterial averment of indictment*—Under an indictment against a railroad company for failing and refusing to provide a suitable privy and water-closet at one of its stations, the indictment alleging that the defendant failed in that regard "on the first day of September, 1895, and for two consecutive months thereafter," it is immaterial that the defendant did in fact build a water-closet before the expiration of two months from the first day of September, 1895. The offense being complete on that day, the allegation that the failure of defendant to perform the required duty continued for two months was surplusage.

2. *Indictment—Surplusage*—No allegation, whether it be necessary or unnecessary, more or less particular, which is descriptive of the identity of what is legally essential to the charge in the indictment, can be rejected as surplusage. But that rule has no application here, for the reason that the averment which there was a failure to prove was not legally essential to the charge, or necessary for the identification of the person or thing described.

J. W. Bryan for appellant.

W. S. Taylor for appellee.

Appeal from Boone Circuit Court.

Opinion of the court by Judge Lewis.

Section 772, Kentucky Statutes, provides that every company operating a railroad in this State shall provide a convenient and suitable waiting room and water-closet at all depots in cities and towns, and at such other stations as the railroad commission may require on its lines, and keep and maintain the same in decent order and repair; and section 793 provides that any company failing to comply with the provision of section 772 shall be guilty of a misdemeanor, and fined for each failure not less than $100 nor more than $500.

Appellant was indicted for failing and refusing to provide a suitable privy and water-closet at its passenger depot in the town of Walton, the particular circumstances of the offense charged being stated as follows:

"That on the 1st day of September, 1895, and for two consecutive months thereafter next before the finding of this indictment, the said company kept a passenger depot and station in the incorporated town of Walton, in said county, * * * and during all the time aforesaid the said company failed, neglected and refused to provide any suitable privy and water-closet, or either, * * * although required by law to do so."

At the trial it was found that, although there was not, on September 1st nor prior to September 24, 1895, a water-closet or privy at said depot, one was actually built on the last-named day; and upon the ground that the allegation of the indictment as to the length of time after the 1st of September before the structure was made was not particularly proved, appellant in the lower court moved for judgment in its favor on the whole case, and now asks reversal of the judgment of conviction.

This court has approved the general rule that "no allegation, whether it be necessary or unnecessary, more or less particular, which is descriptive of the identity of what is legally essential to the charge in the indictment, can be rejected as surplusage." (Clark v. Commonwealth, 16 B. M., 206.)

But in our opinion, though relied upon by counsel, that rule has no application to this case, for appellant having failed and refused, up to and including the first day of September, 1895, to provide at Walton depot a suitable water-closet or privy, as required by the statute, was then guilty completely of the offense charged, and amenable to the full penalty prescribed; consequently, it was not legally essential to the charge nor necessary for the identification of the person or thing described that the Commonwealth either allege or prove that such contumacy continued for two months, or any length of time after that day.

It seems to us as a violation or disobedience of the statute was distinctly and intelligibly alleged and satisfactorily proved, there was no other alternative but to inflict the punishment, as the court below did do.

Judgment affirmed.

COMMONWEALTH V. LEE.

(*Filed September* 25, 1896—*Not to be reported.*)

Indictment for forgery—An indictment under section 1189 of the Kentucky Statutes for forging a check must allege that the bank upon which the check was forged was authorized by law of the United States or a State or of some foreign government. And as the indictment in this case failed to so allege, a motion by defendant in arrest of judgment was properly sustained.

W. S. Taylor for appellant.

Kohn, Baid & Spindle for appellee.

Appeal from Jefferson Circuit Court, Criminal division.

Opinion of the court by Judge Paynter.

The indictment charges the appellee, Charles A. Lee, with having forged a check upon the American National Bank, Louisville, Ky., which purported to be made and signed by one Annie K. Lee, pay-

able to the order of cash, for the sum of $175, and, upon presentation, the bank paid the money called for by it.

The trial resulted in a verdict of guilty, and his punishment was fixed at three years in the penitentiary. Appellee's motion in arrest of judgment was sustained, from which action of the court this appeal is prosecuted.

Section 1189, Kentucky Statutes, reads as follows, to wit: "If any person shall forge, counterfeit a bank bill, or note, or check, or draft upon a bank or the certificate of deposit of money therein of any bank or company authorized by law of the United States or any State of the United States or any foreign government, * * * he shall be confined in the penitentiary not less than two nor more than ten years."

The indictment fails to charge that the bank upon which the check was forged was "*authorized by law of the United States or any State of the United States or any foreign government.*"

There are a number of sections in subdivision 8, chapter 36, Kentucky Statutes, declaring that certain acts shall constitute forgery, among which is section 1189.

To constitute the offense under this section the check must have been forged upon a bank authorized by law of the United States or a State or of some foreign government. It was, therefore, necessary to allege in the indictment the authority under which the bank was doing business.

Section 1, article 10, General Statutes, is in the exact language of section 1189, Kentucky Statutes, under which the indictment was found.

In Rawlins v. Commonwealth, 7 KY. LAW REP., 595, the court held that it was necessary to aver that the bank upon which the check was forged was an authorized one by the laws of the United States or of a State of the United States or some foreign government.

To the same effect is Kennedy v. Commonwealth, 2 Met., 36.

We do not think the indictment charged a public offense, therefore the judgment is affirmed.

CLEMMONS V. COMMONWEALTH.

1. Criminal law—Homicide by one assisting an officer in execution of process —It appearing upon the trial of appellant for murder that he had gone to the home of the deceased to assist a coroner in the execution of a writ of possession, having been summoned by the officer for that purpose, an instruction setting out the duty of appellant to attend the officer and assist in the execution of the writ, and giving him the right to use such force as was necessary or apparently necessary to execute the process and the right to protect himself or the officer from violence or personal injury, was as far as the court could properly go under the proof, there being nothing to show that the appellant shot in defense of the officer.

2. The verdict can not be disturbed upon the ground that it is not sustained by the evidence, it being not only supported by proof—which is all that is required —but by a preponderance of the proof.

(*Filed September* 25, 1896—*Not to be reported.*)

J. B. Marcum and S. H. Patrick for appellant.

W. S. Taylor, J. J. C. Bach and G. W. Fleanor for appellee.

Appeal from Breathitt Circuit Court.

Opinion of the court by Judge Hazelrigg.

Upon an indictment for the murder of Cola Whitaker the appellant was tried, convicted of manslaughter and sentenced to the penitentiary for fifteen years. His grounds for a new trial were that the lower court failed to give the whole law of the case to the jury, and that the verdict was not sustained by but was contrary to the evidence.

It appears that the appellant and his son had started to the town of Jackson, each having, as was his custom, a Winchester rifle, when they were met by the coroner of the county, and required to go back as a *posse* to assist the officer in executing a writ of possession. When they reached the premises they found several persons on the ground, and saw the deceased, who was the son of the defendant in the writ, come out of the house, with a gun in his hand, and lock the door.

The officer proceeded to explain his business, exhibiting his writ, and asked deceased to unlock the door or let him have the key. The deceased refused, and stood a few yards away, with the muzzle of his gun resting on the toe of his shoe. The appellant and his son came up and faced the deceased, with their guns in hand, and probably presented at him. After a few moments delay the officer seized a fence rail and proceeded to break in the door, and, as he did so, the appellant suddenly shot the deceased, who expired in a few minutes.

The proof of a number of witnesses is to the effect that the deceased was making no demonstration whatever with his gun, or otherwise resisting the officer, or threatening the appellant or his son by word or action at the time he was shot.

The appellant and his son, however, testify that the deceased, after slipping a cartridge into his gun, was raising the muzzle toward appellant, when the latter fired the fatal shot. They are contradicted by the other witnesses to the occurrence. The verdict is, therefore, not only supported by proof—which is all that is required—but by a preponderance of it.

The whole law of the case was properly given the jury. There was no proof tending to show that the appellant shot in defense of the officer, and hence, very properly, no instruction was given on that behalf.

An instruction, however, properly set out the duty of the appellant to attend the officer and assist in the execution of the writ, and gave him the right to use such force as was necessary or apparently necessary to execute the process, and the right to protect himself or the officer from violence or personal injury. This is certainly as far as the court could properly go under the proof in this case.

While the State has not shown any motive on the part of the appellant for this killing, the plea of self-defense is overturned by the proof, and the judgment must be affirmed.

PIGG V. COMMONWEALTH.

(*Filed September* 25, 1896—*Not to be reported.*)

1. Failure to keep turnpike in repair— Indictment Instruction —Under an indictment under section 4731 of the Kentucky Statutes for failing to keep a turnpike road in repair it was error to give instruction authorizing the jury to convict if the road became unfit for public travel by reason of obstructions in the road permitted by defendant, for while it was alleged in the indictment that the defendant permitted such obstructions there was no allegation that they caused the road to be unfit for public travel, the allegations being that it was the failure to keep the road in repair that caused it to be unfit for public travel. But even if the proper allegation had been made the instruction would have been improper because the evidence did not authorize it.

2. A road may be in good repair, although so obstructed as to render it unfit for public travel, or may be free from obstructions and yet so out of repair as to render it unfit for public travel.

3. The court properly instructed the jury with reference to the presumption of innocence, and that they should not find defendant guilty if there was a reasonable doubt of his being proved guilty.

4. The evidence did not justify the verdict of guilty.

White & Smith and Riddell & Riddell for appellant.

W. S. Taylor for appellee.

Appeal from Estill Circuit Court.

Opinion of the court by Judge Landes.

The appellant was indicted by the grand jury of Estill county, under section 4731 of the Kentucky Statutes, for the offense of "failing to keep the Richmond and Irvine turnpike road in repair for 90 days and demanding and receiving toll from persons traveling over same, he, the defendant, being the sole owner and controller of said road, and whose duty was to keep same in repair."

The statute reads as follows: "If the road becomes *unfit for public travel*, and so remain for four days, *the company* shall be fined $20 a day for every day it is suffered so to remain, and during which any toll is received or demanded."

The specifications in the indictment are that the appellant "unlawfully failed and refused to keep the said road in repair in this, he permitted said road to become washed and worn in holes and ruts, making same *unlevel*, and by permitting rock, bowlders, logs, sticks, mudholes and other obstructions upon and in said road; also unlawfully failed to keep the culverts and bridges in repair." And then it is alleged that, "by failure of the defendant *to keep said road in repair*, said road became unsafe and dangerous to passengers and vehicles over same."

A demurrer to the indictment was overruled, and, the case being submitted to a jury, under instructions of the court, the defendant was found guilty and a fine of $400 was assessed against him. A motion for a new trial having been made by the appellant and overruled, this appeal is prosecuted from the judgment.

Under the statute a turnpike road may become "unfit for public travel" by being out of repair, or by obstructions to travel, such as rocks, bowlders and the like being permitted to remain on the road; and undoubtedly it is the duty of turnpike companies not only to keep their roads in repair, but also to keep them free from obstructions which materially interfere with public travel; and their right to charge toll is made to depend upon keeping their roads in such a

condition as that they shall be fit for public travel. A turnpike road may be *in good repair* and yet be so obstructed as to be rendered unfit for public travel; and it may be unobstructed and at the same time out of repair and so unfit for public travel. But in this case the offense charged is the failure to keep the road in repair, by reason of which only the charge is made that it became, in substance, unfit for public travel. And, while the specification that obstructions were in the road did not of itself render the indictment fatally defective, it was improper for the court to submit to the jury a state of case upon which the appellant might be found guilty, based upon the charge that the road was obstructed, in the absence of an allegation that the road was thereby rendered unfit for public travel. This state of case was submitted to the jury in the first instruction and was error, as it tended to mislead and confuse the jury to the prejudice of the substantial rights of the appellant; and the more so since there was no evidence whatever upon which to base such an instruction, even if it had been sufficiently charged in the indictment that the obstructions in the road rendered it unfit for public travel.

The court properly instructed the jury with reference to the presumption of the innocence of the appellant, and that they should not find him guilty of the charge if there was a reasonable doubt of his being guilty. We have carefully examined the evidence reported in the bill of exceptions and find that it is very conflicting, the witnesses for the Commonwealth not agreeing that the road was rendered unfit for travel by reason of its being out of repair, while the witnesses for the appellant were positive that the road was in good condition. It is our opinion that the evidence did not justify the verdict that was rendered by the jury.

For the reasons given the judgment of the lower court is reversed and the cause remanded, with directions to set aside the verdict and grant the appellant a new trial, and for proceedings consistent with this opinion.

ARNOLD, &C. V. WISE'S ADM'R, &C.

(*Filed September* 26, 1896—*Not to be reported.*)

Parent and child—Right of child to recover for services—Where a daughter with her son went to her father's home upon the death of his wife and lived with him until his death, a period of seven years, she was not entitled to recover for her services in the absence of a contract to pay, and the circumstances are not such as to authorize the court to infer or presume the existence of such a contract.

O'Neal & Pryor for appellants.

Fairleigh & Straus for appellees.

Appeal from Bullitt Circuit Court.

Opinion of the court by Judge Guffy.

A suit was instituted in the Bullitt Circuit Court for a settlement of the estate of Caleb Wise, deceased.

Millie F. Thompson, a daughter of decedent, filed a claim of more than $1,100 against the estate of decedent for services rendered her father from 1885 to the date of his death in 1892. This claim was

contested by other heirs, and, upon final hearing, the court rendered judgment in appellee Thompson's favor for $400, and from that judgment appellants have appealed.

The contention of appellee is that she rendered the service at the special request of her father, and that the services were worth the amount claimed, and that the facts and circumstances authorize the court to infer a contract to pay for the services.

The contention of appellants is that no contract to pay was made, and that the court was not authorized to infer a contract, and that this case falls within the rule announced in Reynold's adm'r v. Reynolds, 92 Ky., 556. It is also contended that appellee received from her father as much or more than her services were worth.

It may be conceded that the proof on this point is conflicting, and it need not be recited. It does clearly appear that Mrs. Thompson and her son, of about eight or ten years of age, was being boarded by her husband at a good and suitable place, and that her mother died in the spring of 1885, leaving the father alone, and that, at his request, appellee came to his home with her son and lived with him until his death. It also appears that in the fall of 1885 she brought suit for a divorce, and was finally divorced from her husband, but, after some years, was again married to him.

It is evident that she derived some benefit from the products of her father's farm, and seems to have had a reasonably good home, but is not necessary to determine the value of her services nor the extent to which she received remuneration therefor for the reason that, in the absence of a contract to pay her for her services, she can not recover. The facts in this case do not authorize the court to infer or presume a contract to pay.

For the reasons indicated the judgment appealed from is reversed and cause remanded for further proceedings consistent with this opinion.

STONE, AUDITOR V. PFLANZ, SHERIFF.

(*Filed September* 22, 1896.)

1. Compensation of jailers—Report to auditor The compensation which the jailer of Jefferson county receives under sections 356 and 1730 of the Kentucky Statutes for attending upon and furnishing fuel, light and water to the county, quarterly and circuit courts, should be included in the monthly report which he is required by section 1773 of the Kentucky Statutes to make to the auditor, and the Commonwealth is entitled under section 1774 of the Kentucky Statutes to retain 25 per cent. of the fees and compensation so paid into the treasury by the jailer.

3. Furnishing fuel, light and water to county officers The jailer is not required or authorized by sections 356 and 1730 of the Kentucky Statutes or any other statute to furnish fuel, light and water to any of the county or other officers.

W. S. Taylor for appellant.

Carroll & Hagan for appellee.

Appeal from Jefferson Circuit Court, Law and Equity division.

Opinion of the court by Judge Lewis.

This appeal is by S. H. Stone, auditor of public accounts, from a

judgment of the Jefferson Circuit Court, rendered in an agreed case, the controversy being in regard to certain rights and duties of the jailer of that county.

Section 1772, Kentucky Statutes, relating to counties having a population of 75,000 or over, Jefferson being such, is as follows: "The jailer shall * * * receive an annual salary of five thousand dollars; and the number of his deputies, guards and turnkeys, and the salaries allowed to each, shall be fixed by the judge of the county court, the mayor of the city where the jail is located, and the judge of the criminal division of the circuit court; but the annual salary of the chief deputy shall not exceed eighteen hundred dollars, nor shall the annual salary of each of the other deputies, guards or turnkeys exceed twelve hundred dollars, etc."

Section 1773 provides: "The jailer shall, on the first day of each month, make out an itemized statement, subscribed and sworn to by him, showing the expenses of his office, exclusive of salaries, and the amount of such expenses, as well as the amount received the preceding month by such jailer as fees or compensation, or due to him for all services rendered by him in his official capacity, and whether due or paid to him by the State or city or county or United States government, and shall at the same time pay to the auditor the amount so received, etc."

Section 1774 provides: "Upon the receipt of such statement the auditor shall draw his warrant upon the treasurer for an amount not exceeding seventy-five per cent. of the amount of the fees or compensation due to or paid to the jailer for services rendered the preceding month. If the amount so paid is not sufficient to pay the salaries and expenses of the office for the month, the deficit may be made up out of the amount paid in any succeeding month; but in no event shall the amount paid exceed seventy-five per cent. of the amount paid into the treasury by the jailer or credited to him by the auditor, etc."

In addition to proper and fixed fees for imprisoning, keeping, dieting and releasing prisoners, each jailer is, by section 1730, allowed for attending county and quarterly courts, to be paid out of the county levy, per day not exceeding $2; for furnishing fuel and lights to county and quarterly courts a reasonable compensation, not exceeding $2 per day, to be paid out of the county levy.

He is also, by section 356, allowed for each day's attendance upon the circuit court $2; and for furnishing fuel, lights and water to the circuit court not exceeding $2 per day. And the principal questions in this case, submitted to and determined by the court below, is whether the amount received by the jailer of Jefferson county under sections 1730 and 356 should be included in each monthly report he is required by section 1773 to make. And whether the Commonwealth of Kentucky is entitled, in virtue of section 1774, to retain twenty-five per cent. thereof.

Section 1773, in plain and unqualified terms, requires the jailer of a county having a population of 75,000 or over to make out, on the first day of each month, an itemized statement, showing the amount received by him the preceding month as fees or compensation, or due to him for all services rendered by him in his official capacity, *whether due or paid by the State, city, county or United States government, and at the same time pay into the treasury the amount so received;* and in pursuance of the manifest policy of law the auditor, or by his direction the jailer for him, is required by section 1775 to speedily collect the amount found to be due by each monthly statement from the county, city or United States government, as the case may be,

and give to the jailer credit by the amount so collected and paid into the treasury, as well as by the amount due from the State, which latter amount shall be considered as paid to the auditor by the jailer.

As the services required by sections 356 and 1730 are, in meaning of section 1773, unquestionably official services, and compensation therefor is fixed and provided for by statute, it would, in our opinion, be very difficult to make plainer the intention of the Legislature that the jailer shall account for, report and pay the amount thereof into the treasury than is done by the language of section 1773.

Any other construction of that section would be contrary to section 106 of the Constitution, which requires jailers and other officers, in counties having a population of 75,000 or more, to be paid out of the State treasury by salary to be fixed by law, but not to exceed 75 *per centum* of the fees collected by them respectively and paid into the treasury. Besides, to permit the jailer in such case as this to appropriate wholly the fees and compensation received for services rendered under sections 356 and 1730 would enable him to evade section 246 of the Constitution, which provides that no public officer, except the governor, shall receive more than $5,000 per annum as compensation for official services, independent of the compensation of legally authorized deputies and assistants.

We do not see how the statute, as we construe it, does injustice to such county, inasmuch as it is not required to bear any greater or other burden than counties having less population than 75,000.

If such be the proper construction of section 1773, it seems to us to necessarily follow that the Commonwealth is entitled, under section 1774, to retain twenty-five per cent. of the fees and compensation so paid into the treasury by the jailer.

Another question submitted and determined is whether the jailer is authorized, by sections 356 and 1730 to furnish fuel, light, water, etc., to the various officers of Jefferson county, who are now appellees. In our opinion neither of those sections, nor any other statute, authorizes in terms or by reasonable implication the jailer to render such service to any county or other officer.

The judgment of the lower court is, therefore, reversed and cause remanded for proceedings consistent with this opinion.

LOUISVILLE & NASHVILLE R. R. CO. V. COMMONWEALTH.

(*Filed September* 25, 1896.)

Criminal law -Failure of railroad conductor to comply with separate-coach law -A railroad company having set apart separate coaches or compartments in a train for white and colored persons, without discrimination as to quality or accommodations, as required by the statute, it can not be indicted and punished for the act of the conductor or managers of the train in assigning colored passengers to a coach inferior in quality and accommodations to the one set apart by the company for them, and inferior to the one to which white passengers were assigned. For that offense the conductor or those in charge of the train, and not the company, may be indicted and punished. (Kentucky Statutes, section 800.)

H. W. Bruce, W. C. McChord and Jno. McChord for appellants.

W. S. Taylor for appellee.

Appeal from Taylor Circuit Court.

Opinion of the court by Judge Paynter.

By section 795, Kentucky Statutes, any company, person or corporation operating railroad cars or coaches by steam or otherwise on any railroad line or track within the State are required to furnish separate coaches or cars for the travel or transportation of the white and colored passengers on their respective lines of railroad. Each compartment of a coach divided by a good and substantial wooden partition, with a door therein, is deemed a separate coach within the meaning of the statute, but each separate coach or compartment must bear in some conspicuous place appropriate words in plain letters indicating the race for which it is set apart.

Section 796 declares that the person or company operating the road shall make no difference or discrimination in the quality or convenience or accommodations in the cars or coaches or partitions set apart for the white and colored passengers.

Section 797 provides that any company that shall fail or refuse to comply with the provisions of sections 795 and 796 shall be deemed guilty of a misdemeanor, and upon conviction thereof be fined not less than $500 nor more than $1,000 for each offense.

The indictment charges that the railroad company did "unlawfully and willfully, by its agents, employes or those in charge of its train of cars, fail or refuse to furnish a separate coach for white and colored passengers of the same quality, convenience and accommodations in its cars or coaches or partition set apart for white and colored passengers."

On the trial the company was found guilty and fined $500. The train in question was a special, not running on the time of any regular train on the road. It was chartered by South & Hargis to run from Greensburg to Campbellsville. They sold the tickets and collected the fares and directed where the train was to stop, but the train was operated with the company's crew, including the conductor.

At a station some five miles from Campbellsville the train was stopped to receive passengers. Among those who boarded the train were two negroes, Thomas White and his wife, Lula. Smith collected their fare to Campbellsville. White and his wife got in the car which was used by the company for colored passengers on the road, and upon which he had been in the habit of riding. Smith ordered White and his wife to take a car which was attached to the train which appears to have been a mail and tool car, and which does not appear to have had the same conveniences and accommodations of the other cars. At the time in question the compartment in the coach set apart for colored passengers was partly used by white passengers.

It is not contended that the compartment in the coach used for colored passengers was not of the same quality and did not bear the same conveniences and accommodations as those used for carrying white passengers. The offense, if one was committed, consisted in those in charge of the train removing the colored passengers from the compartment in the coach provided by the company for them to the so-called "tool car."

White proves that he was in the compartment for colored passengers when ordered into the tool car. Under the statute a penalty is denounced against persons, companies and corporations operating lines of railroads for the failure to furnish separate cars or coaches or

compartments therein without discrimination in quality, conveniences and accommodations for the travel or transportation of white and colored passengers.

Where the company has furnished the kind of cars or coaches which the law requires, section 799, Kentucky Statutes, imposes the duty on the conductor or manager of the railroad to assign the white and colored passengers to their respective coaches or compartments therein.

Section 800 provides a penalty to be imposed on the conductor or manager for his failure to discharge the duty required of him. This is not a proceeding to recover damages of the company for a wrongful act of its agent or employe. It is a penal prosecution to impose a fine against the company for the alleged violation of a statute. The company can not be fined for an act of those whom it puts in charge of a train because they may have violated a penal statute. The failure to furnish the coaches for the transportation of white and colored passengers of the kind required by the statute is an offense of the company. A failure to assign the white and colored passengers to their respective coaches or compartments is an offense of such conductor or those in charge of the train.

For the offense of the company the conductor can not be convicted and fined. Neither can the company be convicted and fined for the offense of the conductor or those in charge of the trains, as is the result of this prosecution. The court should have told the jury to find for the defendant.

The case is reversed for proceedings in conformity with this opinion.

ANDERSON, &C. V. BATSON.

(*Filed September* 26, 1896—*Not to be reported.*)

1. Sale of married woman's land for taxes—Right to redeem—A married woman has the right under section 21 of article 7, chapter 92 of the General Statutes, to redeem her land sold for taxes at any time within five years from the time notice of the purchase was given to both husband and wife; and no judgment can deprive her of that right.

2. Res judicata—A judgment in favor of the purchaser for the "possession" of a married woman's land sold for taxes leaves both the title and the right to redeem the same as if no judgment had been rendered.

L. T. Hubble for appellants.

W. I. Williams for appellee.

Appeal from Garrard Circuit Court.

Opinion of the court by Judge Guffy.

This appeal is prosecuted by the appellants from a judgment rendered by the Garrard Circuit Court in the action of these appellants against the appellee, R. H. Batson. The material parts of the petition read as follows:

"The plaintiff, Frankie Anderson, states that she is a married woman and the wife of her co-plaintiff, James Anderson; that she is the owner and in possession of a certain house and lot in the city of Lancaster, Kentucky, in that portion of said city known as the Jackman Addition, and bounded as follows, to wit." * * *

The plaintiff states that on the 23d day of March, 1891, T. B. Robinson, then sheriff for Garrard county, Kentucky, wrongfully and without authority of law, sold her said house and lot for taxes due said county and State for the years 1889 and 1890, before the courthouse door in Lancaster, Kentucky, when the defendant, R. H. Batson, became the purchaser of said house and lot at the price of $4.90; that said sheriff did, on the 23d day of March, 1891, without authority of law, execute and deliver to the defendant, R. H. Batson, a certificate of sale, stating: "If not redeemed according to law by said Frankie Anderson, or some one for her, within two years, a deed will be made to said purchaser."

A certified copy of said certificate of sale is filed herewith, referred to and made part of this petition, marked "A," and is as follows: "This is to certify that I, T. B. Robinson, sheriff of Garrard county, Kentucky, in compliance with an act of the General Assembly, approved March 28, 1872, having duly advertised, by posting notices on the courthouse door and in three other public places in said county, for fifteen days previous, as required by law, did, after having demanded payment of the amount of the tax as stated in the tax receipt attached to this certificate, and, having tendered the said receipt, there being no personal property out of which the tax could be made, did offer for sale publicly to the highest bidder, in front of the courthouse door in said county, on the 23rd day of March, 1891, between the hours of 9 o'clock A. M. and 3 o'clock P. M., having notified the delinquent of the levy being made and the day of sale at the time of tendering the tax receipt, the following described property, to wit: One tract of land, situated and lying in said county, in Precinct No. 3; one town lot in the town of Lancaster, Garrard county, Kentucky, valued at $200, for taxes due the State and county for the years 1889 and 1890, and listed in the name of Frankie Anderson (colored) when R. H. Batson became the purchaser at the sum of $4.90 (four dollars & .90), the same was then and there publicly struck off to the said R. H. Batson, and, if not redeemed according to law by said Frankie Anderson (colored), or some one for her, within two years, a deed will be made to said purchaser, if required.

"Given under my hand this 23d day of March, 1891.

"T. B. ROBINSON,
"*Sheriff of Garrard county.*"

Plaintiff alleges that it was the duty of said sheriff, before making said sale, to give her not less than fifteen days written notice, on postal card, notifying her of the time and place of said sale. This notice the sheriff failed to give; at least this plaintiff failed to receive any such notice from said sheriff. Plaintiff then and now lives in the city of Lancaster, and receives her mail at the Lancaster postoffice, and said sheriff well knew that fact.

Plaintiff further alleges and charges that unless the defendant, R. H. Batson, within six months after the sheriff delivered to him his certificate of his purchase, he gave in writing notice of his purchase to both husband and wife, in case the purchase be of the lands of a married woman, he shall forfeit his right to said purchase (in this case the purchase is of the lands of a married woman); and further states that the defendant, Batson, never gave this plaintiff or her co-plaintiff, or either of them, notice in writing within six months after the sheriff delivered to him his certificate of his purchase.

Plaintiff states that by chance she heard that her property had been sold at the courthouse door for taxes and bought by the defend-

ant, Batson, and plaintiff went, on the 28th day of March, 1891, that being Saturday of the same week that said property was sold, to defendant and tendered to him the money for said taxes, interest and cost, and defendant refused to accept the money for said taxes ($4.90), with all legal interest, costs and fees, but defendant demanded the sum of $75 to redeem said property from the defendant. Plaintiff states that she was prepared and willing to pay to the defendant the sum of $4 90 and all legal interest and cost thereon, and the defendant refused to accept the money for said taxes.

Plaintiff further states that said sheriff failed and neglected to demand said taxes of the plaintiff after the same became delinquent, and neglected to collect the same out of the personal property of the plaintiff, as required by law, although the plaintiff had sufficient personal property in said county out of which to collect said taxes.

Plaintiff states that on the 11th day of August, 1893, the defendant filed his petition in equity, in the Garrard Circuit Court, praying for a writ of possession for said house and lot, title to same, and for costs, etc., against this plaintiff, on which a judgment was rendered without defense. Said petition and judgment are referred to as part hereof. Said judgment is as follows:

"GARRARD CIRCUIT COURT.

"R. H. BATSON,
"AGAINST
"FRANKIE ANDERSON. } Judgment.

"This cause was heard upon the pleadings, and it appearing that the parties have been properly summoned, and, failing to answer, it is ordered and adjudged that the plaintiff is entitled to the possession of said house and lot in the town of Lancaster, bounded as follows:

* * * * * * * * * *

"It is further adjudged that the plaintiff is entitled to a writ of possession, to be issued immediately upon his application to the clerk of the Garrard Circuit Court, directed to the sheriff of Garrard county, directing him to put the plaintiff in immediate possession of said property. It is further adjudged that the plaintiff recover his costs herein, and for which *fi. fa.* may issue.

"Plaintiff states that on the —— day of ——, 1894, said writ issued from the clerk's office of the Garrard Circuit Court, but the same has not been executed.

"Plaintiff states that said judgment and writ of possession was obtained wrongfully, and without authority of law, by the defendant. This plaintiff states that on the 21st day of May, 1894, she did, by her attorney, L. F. Hubble, tender to the defendant, Batson, the sum of twenty-four dollars ($24) in good and lawful money, that being the full amount due by this plaintiff to the defendant at that time, and plaintiff, at the same time and place, demanded that the defendant endorse upon his certificate of purchase the word "redeemed," and the defendant failed and refused to accept said money, and refused to endorse the said certificate of sale 'redeemed.'

"Plaintiff is advised and charges that she, being a married woman, has the right to redeem her said house and lot at any time within five years from the reception of the notice required to be given by the defendant in chapter 92, section 21, General Statutes of Kentucky, pages 1078 and 1079, and approved May 17, 18—, and entitled 'Revenue and Taxation,' which notice has not yet been given; that five years from the day of sale, March 23, 1891, will not have ex-

pired until the 23d day of March, 1896, and this plaintiff now has the right to redeem said house and lot. This plaintiff comes now and tenders said $24, in good and lawful money, into court * * and petitions the court to require the defendant to release said certificate of purchase by endorsing upon the record the word 'redeemed,' date and signing same, as required by law.

"Plaintiff states that the cost of the suit in the Garrard Circuit Court in the case of R. H. Batson against Frankie Anderson, amounts to $12.95, and is included in the tender of $24, and this plaintiff ought not to be adjudged to pay said $12.95, the taxation of said cost as made out by W. B. Mason, clerk of the Garrard Circuit Court. Said taxation of cost is filed herewith, referred to and made part of this petition, marked 'D,' etc. * * *

"Plaintiff states that she is an unlettered woman (of color), earns her daily bread by the sweat of her brow over the washtub, and desires to pay her taxes and be protected in all of her rights in her humble cabin home.

"Wherefore, this plaintiff, Frankie Anderson, prays judgment that the sheriff's certificate of sale to this defendant, R. H. Batson, for taxes be set aside and declared null and void, and that plaintiff may be permitted to pay her lawful taxes with 15 *per centum* on the amount thereof, and interest at the rate of 30 per cent. per annum from the date of the sale to May 21, 1894, and the costs of the sale; that the sheriff be enjoined from the execution of said writ of possession; that the cloud cast upon plaintiff's title to said real estate by reason of said tax sale may be removed, and for cost herein expended, and finally prays for all proper and appropriate relief that is just and equitable.

L. F. HUBBLE,
"*Attorney for Plaintiffs.*"

Here follows Batson's petition: "The plaintiff, R. H. Batson, states that on the 23d day of March, 1891, he purchased at sheriff's sale before the courthouse door in Lancaster, Kentucky, a house and lot in Lancaster, Kentucky, Garrard county, Kentucky, located in Lancaster, and bounded as follows: Beginning at a stone corner to lot No. 2, boundary to lot of Baker, of color; thence with line 64½ N. 20 poles to a stone corner to Baker in line of the colored cemetery; thence with said cemetery line S. 28½ W. 108 poles; thence to a stone on lot No. 4; thence with line No. 4 S. 64½ E. 25 poles to the edge of the street, a stone corner to lot No. 4; thence N. 20½ E. 108 feet and 8 inches to beginning, containing one acre, more or less.

"Plaintiff states that said land was sold for cash in hand, and he became the purchaser at the price of $4.90, he being the highest bidder, and no one would take a less amount or would pay a greater sum for said lot. Plaintiff states that said land was advertised by posting advertisements fifteen days before the day of sale, and was also published in a newspaper then published in this, the county of Garrard, for four issues before the day of sale. Publication was once a week in the town of Lancaster, and said paper was a paper of general circulation, and same was published more than fifteen days before the day of sale. Before said sale the sheriff mailed to the defendant a postal card, addressed to his place of residence, notifying him of the time and place of sale. Plaintiff further states that within fifty days after said sale he notified the defendants, Frankie Anderson and James Anderson, in writing, of the purchase of said lot by him of such purchase, and further states that said purchase was made on two years ago, and same has not been redeemed by the

defendant or either of them or any one for them. Plaintiff further states that on the — day of August, 1893, the sheriff of Garrard county, Kentucky, made him a deed to said house and lot, which was duly acknowledged by said sheriff and delivered to plaintiff, and by him delivered to the clerk of Garrard County Court for record, and that said title now vests in him in *fee simple*, and that he is now entitled to the possession of same. Said deed is filed herewith and made part hereof.

"Wherefore, plaintiff prays judgment for the possession of said land, for title to same, for all costs and for all proper and appropriate relief.

R. H. TOMLINSON,
"*Attorney for Plaintiff.*"

The court below sustained a demurrer to the petition, and dismissed the action, and appellants now ask a reversal of that judgment. The chief contention of appellee is that the judgment rendered in the action of appellee against appellants, above set out, is a bar to appellants' right to recover; that the suit of appellants is not a suit to vacate or modify the judgment aforesaid, and if it was a suit for such purpose that appellants have not shown themselves entitled to any modification thereof.

Section 21 of article 7, chapter 92 of the General Statutes, gives to a married woman the right to redeem her land sold for taxes within five years from the time notice of the purchase has been given to both husband and wife.

It is alleged in the petition that no notice was ever given, but that soon after the sale appellants heard that appellee had purchased it, and that she then offered to pay him his bid with all legal interest, and that he refused same and demanded $75. It will be seen from the copy of appellee's petition that he sought to obtain both possession and title, and it appears from the judgment that he only obtained judgment for possession, from which it is evident that the court was of opinion that he was not entitled to anything more, and the question of title and the right to redeem remained the same as if no judgment had been rendered, and it may be observed that no judgment could deprive the married woman of her statutory right to redeem the land, and, if it be conceded that the judgment establishes the regularity of the sale and the giving of the fifty days notice, yet the right to redeem had not expired at the time this suit was brought and the offer made to pay all, if not more than all, appellee had a right to demand.

For the reasons indicated the judgment of the court below is reversed and cause remanded, with directions to overrule the demurrer and to allow appellants to redeem the land by paying the amount of appellee's bid, with the interest and costs allowed by law, and the cost of the suit of appellee against appellants, and also cancel the deed made by the sheriff to appellee, and for proceedings consistent with this opinion.

THE NATIONAL OAK LEATHER CO. V. THE ARMOUR-CUDAHY PACKING CO.

(*Filed September* 29, 1896.)

1. Sale of personal property -Defective goods Counterclaim The purchaser of a car load of hides, when sued for the purchase price, had the right to recover by way of counterclaim the damages he had suffered by reason of the inferior quality of a former shipment of hides from plaintiff, although he had

used the hides after discovering the defects, as he had paid for them before he had received them or had an opportunity of inspection, and the letters of plaintiff, who was a nonresident without property in this State, were such as to justify the conclusion that the claim for damages upon that car load was admitted, and would be paid or allowed on the next settlement between the parties.

2. *Same—Use of goods after discovery of defects*—Defendant was also entitled to recover by way of counterclaim the damages suffered by reason of the inferior condition of the second carload of hides, for the purchase price of which the suit was brought, although he had used them also after discovering the defects, as the plaintiff had refused his offer to surrender all except such a number as was necessary to indemnify him, and he had then used them to prevent their loss. While ordinarily the vendee may not prescribe the conditions on which he will return or surrender the goods, the quality of which he asserts does not satisfy the contract, yet here the original claim was unpaid, as well as other necessary expenses, and defendant had the right to retain enough of the hides to indemnify him for his loss, and, plaintiff having refused his offer to surrender the remainder, there was nothing left for defendant to do but to use them.

Barnett, Miller & Barnett for appellant.

Gibson & Marshall for appellee.

Appeal from Jefferson Circuit Court, Law and Equity division.

Opinion of the court by Judge Hazelrigg.

This suit was brought by the appellee to recover of the appellant a balance alleged to be due on the purchase of a car load of native steer hides, shipped from South Omaha, Nebraska, to the appellant at Louisville, Kentucky.

The defense interposed was that on a former shipment of similar hides, and which had been paid for before opportunity for inspection and in fact before receiving them, the appellant was entitled to some $186 in damages by reason of the hides being inferior in quality to that warranted by the appellee, and further that material defects existed in the hides last shipped, and for which the suit had been brought, to the damage of appellant in the sum of $282, and that on an adjustment of accounts the appellee owed appellant $117.30. Upon a trial of the issues found by the pleadings the court, without the intervention of a jury, found for the appellant in the sum of its counterclaim, but subsequently reversed its ruling and entered judgment for the appellee in the total sum claimed.

This latter finding, however, was not because of a lack of proof showing the inferior quality of the hides, for of the first car the court said: "When the car reached the city of Louisville, while the hides were being fleshed and were inspected and examined by the defendants, it was found that 1 of said hides was that of a work ox, worth 2 cents per pound less than the price charged; that 8 were hides of bulls, worth 2¾ cents per pound less than charged; that 12 were branded and worth 1 cent per pound less than charged; that 264 were badly cut and worth 1 cent per pound less than the price charged, and that said defects lessened the value of the car load of said hides by the sum of $186.40."

And of the second car the court said: "Said hides were examined and inspected by defendant, and 358 of them were found unnecessarily dirty, long haired, of inferior quality and under weight."

But the court finally denied the relief sought by the counterclaim, and to which the defendant had shown itself entitled by the proof,

on the ground that "the defendant, by using the hides, accepted them," and it could not, therefore, recover for defects alleged to have been found before they were used.

This is clearly the general doctrine, but in this case the appellant had paid the purchase price for the first car load of hides on the faith of the appellees's warranty. The hides were received in the early part of July, 1889, and in due course went into the beam-house early in August. While in here the defects were noted. They could not have been discovered before in the ordinary run of the business. Notice of the defects was at once forwarded to appellee and damages demanded. The appellee responded in effect admitting the inferior condition of the hides and promising a better showing on the second car load.

It said: "We had much reason to be dissatisfied with the take-off of our hides, and we have discharged the man who has been in charge of it. We have now one of the best men, etc."

The claim for reclamation was not denied, and while there is no express promise to allow it, such a promise is easily inferable. In a few days, however, the second car arrived, and the hides were found in worse condition than the first. After a further correspondence and the payment of a considerable sum for expense of preserving the hides so that they might be of some value to whomsoever might finally get them, the appellant agreed to deliver to the Ohio Falls Oak Leather Co., at the direction of the appellee, all the hides except eighty, which it proposed to reserve to pay damages. This offer was refused. Finally, all plans of adjustment failing, and the appellee at no time tending or offering to make good the admitted damages accruing to the appellant, and it becoming manifest that the hides were about to spoil, the appellant sent to the appellee the price of the hides as stipulated in the contract, less its claim for damages as stated, and proceeded to use them in order to save them.

Keeping in mind that the vendor was a nonresident and without property in the State, we are at a loss to see what the appellant could have done in this case other that what it did do. Certainly it was not required to reject the first car load and look to the nonresident vendor to pay back the purchase price. Moreover, as we have seen, it was a most natural conclusion from the letters of the appellee that the claim for damages on that car load was admitted and would be paid or allowed on the next settlement between the parties.

When sued for the price of the second load we perceive no reason why this admitted claim should not be allowed. As to the second load it may be conceded that ordinarily the vendee may not prescribe conditions on which he will return or surrender the goods, the quality of which, he asserts, do not satisfy the contract, but here the original claim was unpaid and other necessary expenses had been incurred, and certainly the vendee might at least retain the eighty hides as indemnity for his loss. When he offered the balance to appellee the offer was refused, and we think no law required him then to let the whole or any part of his indemnity get out of its control or go to ruin.

The first judgment ought not to have been set aside, and the judgment appealed from is reversed to the end that the original judgment may be re-entered.

GARR, SCOTT & CO. V. LYON, &C.

SAME V. SAME.

(*Filed September* 29, 1896.)

1. Levy of general attachment in action to enforce mortgage lien on personal property—In an action by appellants to enforce a mortgage lien on personal property, the mortgage expressly providing that the mortgagees might retain the possession of and use the property, the mortgagor could not be lawfully deprived of this right before judgment in the action ascertaining the amount the plaintiffs were entitled to recover, and subjecting the property to the satisfaction of the judgment, and, therefore, the plaintiffs had no right to have a general attachment levied on the property and have it sold under order of the county judge, and the court properly quashed or discharged the levy and set aside the sale. The plaintiff was not entitled to a specific attachment, none of the grounds therefor being alleged.

2. Discharge of attachment—Although the mortgaged property was not subject to the general attachment, that constituted no reason for discharging the attachment, the grounds therefor not being controverted and no party in interest having moved for the discharge; but there can be no reversal on account of the error of the court in discharging the attachment, as it does not appear that the defendant was prejudiced thereby.

3. Action for recovery of personal property—Damages for detention—In an action by the debtor to recover this mortgaged property wrongfully taken under the attachment, and to recover damages for its taking and detention, he was not entitled to recover damages for the taking, but only for the detention of the property. In such an action damages are not recoverable for the mere trespass committed in the unlawful seizure of the property (Civil Code, section 388), nor was the debtor entitled to recover damages for the detention of the property beyond the period when his right to the possession terminated, which was upon the rendition of the judgment directing the commissioner to sell the property to satisfy the claim of the mortgagees. It was, therefore, error to instruct the jury that he might recover damages for the taking of the property and for the detention up to the date of their verdict. The right to recover the property was not contested, and, therefore, that question is not presented.

4. Same—The court having, at the instance of appellants, credited the original judgment in their favor by the amount of the subsequent judgment against them for the value of the property, they can not complain that the court did not also credit their judgment by the amount of the damages assessed against them for the taking and detention of the property, as the attorney who brought the action to recover the damages was, if they were properly assessed and recovered, entitled to a lien thereon for his fee, which equaled that amount.

S. H. Bush for appellants.

Montgomery & Barry and L. A. Faurest for appellees.

Appeal from Hardin Circuit Court.

Opinion of the court by Judge Landes.

These two cases were by agreement heard in this court together. The first is an appeal from the judgment of the Hardin Circuit Court, rendered in an action brought by the appellants against the appellee to recover on two notes, for $200 each, executed by the appellee for a separator, fixtures and appurtenances, which were secured by a mortgage on the same property, a yoke of oxen and a small parcel of land in Breckinridge county, and to subject the mortgaged property to the payment of the notes.

At the commencement of the action a general attachment was sued

out by the appellants on the ground that the appellee had no property in the county of Hardin, or in the State of Kentucky, subject to execution, or not enough thereof to satisfy the claims sued on, and that the claims would be endangered by delay in obtaining judgment and return of no property found.

The writ of attachment was placed in the hands of the sheriff, and was levied upon the personal property embraced in the mortgage, which was sold by a special commissioner under an order of the county judge of Hardin county, made upon due notice, at the instance of the appellants, and the sale was duly reported by the commissioner.

It was expressly provided in the mortgage that the appellee might hold and use the personal property in Hardin, Breckinridge and Meade counties.

Without attempting to give in detail all of the steps that were taken in the action, it is sufficient for the purposes of this case to say that there was no defense to the action, and that the grounds of the attachment were not controverted, but the court below, on the motion of the appellee, quashed or "discharged the levy" of the attachment, and "set aside the sale of the attached property," made in pursuance of the order of the county judge above recited, for the reason, as it appears, that the property covered by the mortgage to secure the debt sued on was not subject to and could not be taken under the general attachment sued out in the action.

Afterwards, the cause being submitted, the court rendered a judgment in favor of the appellants for their debt, and subjected the mortgaged personal property, described in the judgment as a "separater, 10,642, on wagon, with folding stacker, belts and usual appurtenances; also one yoke of oxen, about six years old;" and directed that it should be sold for that purpose by a special commissioner appointed in the judgment, and the court, "on its own motion, discharged the attachment herein." This action of the court discharging the attachment, and the order previously made by the court "discharging the levy and sale" of the same property under the same attachment, were excepted to by the appellants, and are here urged as error by counsel.

Since under the mortgage, as we have seen, the appellee had the right to retain the possession of and to use the personal property embraced in it, he could not be lawfully deprived of this right before judgment in the action ascertaining the amount the appellants were entitled to recover, and subjecting the property to the satisfaction of the judgment, except in the manner provided by law.

Undoubtedly the appellants had the right, if proper grounds existed and if it were necessary to secure their whole debt, to sue out a general attachment, but we hold that the property mortgaged to secure their debt could not be levied on, nor could the appellee be lawfully deprived of the possession or use of it under a general attachment.

Ample provision is made for cases of this kind by section 249 of the Civil Code, which provides that "in an action to enforce a mortgage of or lien upon personal property, * * * if it satisfactorily appear from a verified petition or from affidavits or the proofs in the cause that the plaintiff has a just claim, and that the property is about to be sold, concealed or removed from the State; or if the plaintiff state on oath that he has reasonable cause to believe, and does believe, that, unless prevented by the court, the property will be sold, concealed or removed from the State, an attachment may be granted against the property."

The existence of none of the grounds for the specific attachment allowed by this section of the Code were made to appear, and, consequently, no reason was shown why the property should be taken from the possession of appellee at the time the attachment was sued out. The court below, therefore, properly quashed the levy and set aside the sale of this property made under the general attachment; but as the appellants had the right to sue out a general attachment the court erred in discharging the attachment when the grounds of it were not controverted and no party in interest had moved for the discharge. The attachment ought to have been sustained. (Civil Code, section 261.)

The appellants, however, have not shown and the record does not discover that their substantial rights were prejudiced by this erroneous action of the court, and the judgment can not, therefore, be reversed on account of it.

The second case was an action in the Hardin Circuit Court, brought by the appellee against the appellants, to recover the separator and the yoke of oxen, upon which the attachment in the first case was levied and which were described in the mortgage and judgment in that case, and therein subjected and directed to be sold to pay the appellants' claim, together with damages for the taking and detention of said property.

This property, as we have seen, was taken from the possession of the appellee under the said general attachment, and was sold by order of the county judge, and the levy and sale discharged and set aside by the court below.

The judgment of the court directing the sale of this property to satisfy the claim of the appellants was rendered on the 6th day of December, 1893, and the action for the recovery of the property and damages for taking and detaining it was commenced on the 6th day of February, 1894. The jury, under what may be termed a peremptory instruction, found a verdict for the appellee, fixing the value of the separator at $275, and the value of the yoke of oxen at $50, or $25 for each ox, and assessed the damages at $180, and the court adjudged that the appellee recover of the appellants the separator and the yoke of oxen, if to be had; and, if not to be had, the value of each, as fixed by the jury, and $180 damages, and costs.

This judgment the appellants moved the court to "set-off" against their judgment rendered against the appellee in the first case, but the attorney for the appellees objected to this motion and asserted his lien on the judgment for his fee in the case, for which he had a written contract.

The court, upon hearing these motions, adjudged that "Gaar, Scott & Co. have a prior lien upon the oxen and separator for their judgment against said Lyon, and that" the attorney, "James Montgomery, has a prior lien upon the $180 adjudged as damages for the amount of his fees agreed to be paid by W. N. Lyon herein adjudged to amount in value for more than said amount of $180."

It was accordingly ordered that the judgment of the appellants against the appellee be credited with $325, the value of the separator and yoke of oxen as fixed by the jury, as of date the 14th day of November, 1894, and that the appellants pay to the attorney the said sum of $180, the amount fixed as damages by the jury, all of which was duly excepted to by the appellants. The court having overruled the appellants' motion for a new trial, this appeal is prosecuted to reverse that judgment.

The court below, at the instance of the appellants, having directed their judgment in the first case to be credited with the amount of

the judgment recovered against them by the appellee in the second case for the value of the property sued for as fixed by the jury, the appellants are in no attitude to complain of the refusal of the court to credit their judgment with the further sum of $180 damages fixed for the taking and detenion of the said property if the said damages were properly assessed and recovered. Unquestionably the attorney, under his contract exhibited in the record, and under the statute in such cases, had a lien upon the amount recovered in the action, and we are not prepared to say that under the contract referred to the amount of the damages, if properly assessed, was greater than ought to have been allowed to the attorney for his services in the case, or that the court below erred in allowing to the attorney a prior lien thereon for his fee. But the material question arises upon the exception taken by the appellants to the instruction of the court under which the damages were assessed.

Counsel for the appellants made no question in the court below as to the right of the appellee to recover the property, and that question is not before us. Indeed it appears from the record that the right to recover it was conceded by counsel for the appellants, the only question made being as to the time to which damages were recoverable. The court, in the instruction given and excepted to, after telling the jury that the property in controversy belonged to the appellee at the time it was seized under the attachment, that the taking and selling it by the appellants was wrongful, and that they should find for the appellee the said property and fix its value, further told them that they should find for the appellee such actual damages as they believed from the evidence the appellees had sustained "by reason of the unlawful taking and detention of the property *up to this time*"—that is, up to the date of the trial, which was November 13, 1894.

This instruction was erroneous so far as it allowed the recovery of damages in the action *for the taking* of the property, and so far as it attempted to fix the time to which damages for the detention of the property might be recovered.

Conceding that the appellees had the right to the possession of the property at and after the time it was taken from them under the general attachment, that right did not extend beyond the date of the judgment subjecting the property to sale for the payment of the claim of the appellants, which was the 6th day of December, 1893. For, if the property was then or afterwards in the possession of the appellees, or whether it was in their possession or not, it was subject to the right and duty of the special commissioner, who was appointed and directed by the judgment of the court to sell it, to take it into his own possession. It follows from this that the damages for the detention of the property were not recoverable for any period beyond the time when the appellee's right to the possession of the property terminated. And in this action damages were not recoverable for the mere trespass committed in the unlawful seizure of the property. (Civil Code, section 388.)

For the reasons given the judgment in the first case is affirmed, and the judgment in the second case is also affirmed, except for the recovery of the $180 damages, and that part of the judgment is reversed and the cause remanded, with directions to award the appellants a new trial as to the damages for the detention of the property which was in controversy in the action, and for further proceedings consistent with this opinion.

The court delivered the following response overruling a petition for rehearing October 13, 1896:

Per curiam. Upon a review of the records in these cases the court adheres to the opinion which has been delivered.

Section 249 of the Civil Code, providing a remedy by specific attachment in an action to enforce a mortgage or lien upon personal property, was not intended to be cumulative or in addition to the remedy afforded by an ordinary or general attachment in respect of the specific property embraced in the mortgage or covered by the lien sought to be enforced. It was intended to enable the mortgagor or lien-holder to secure the property, under the conditions named in the section, so that his rights acquired in the transaction by which the lien was created in it may be enforced without regard to its being subject or not subject to execution or attachment for debt.

Property not subject to execution may be mortgaged by the owner of it, and yet be exempt from execution or general attachment for debt. So that, as held in the opinion, the remedy provided by the section is ample and complete, and, being specific, is exclusive, in respect of the mortgaged property, of all other remedies.

As regards the measure of damages, counsel have stated the rule correctly in the case of conversion of personal property. But this was not a case of conversion. The original petition was, in effect, an action to recover damages for trespass in unlawfully taking the property. But the amended petition changed the action so as to make it an action for the recovery of the property and damages for the detention of it. This was done without objection on the part of counsel for the appellants, who conceded, as stated in the opinion, that the appellees were entitled to recover it. So that the only question as to damages was the time to which a recovery might be had. And for the reason that, by the express provisions of the mortgage, the appellee had the right to retain and use the property, the opinion holds that the damages for the detention of the property could be estimated only to the date of the judgment subjecting it to sale to enforce the liens. In such a case damages for detention, but not for taking the property, are recoverable by the plaintiff as provided in section 388 of the Civil Code.

As regards the right of set-off, the opinion does not hold that it did not exist. But, under the statute, it is held that the attorney for the plaintiffs (appellees here) had a lien in the judgment on the amount recovered to secure his fee under his contract, and this we think is well settled. (Kentucky Statutes, section 107; Robertson v. Shutt, 9 Bush, 659.)

The petition for rehearing and modification of the opinion is overruled.

BANNON V. CLARK COUNTY CEMENT CO.

(Filed September 30, 1896—Not to be reported.)

Refusal of instruction including hearsay evidence Hearsay testimony having been admitted without objection or exception, and no motion having been made to exclude it when it was disclosed that it was based on what others had said, the action of the court in refusing to give an instruction telling the jury not to consider it was not a reversible error, if error at all.

Lane & Burnett for appellant.

Phelps & Thum, O'Neal, Phelps, Pryor and Selligman for appellee.

Appeal from Jefferson Circuit Court, Law and Equity division.

Opinion of the court by Judge Guffy.

The appellant instituted this action in the Jefferson Circuit Court, Law and Equity division, against the appellee, seeking to recover damage by reason of the failure of appellee to furnish the kind and quality of cement that appellant had purchased of appellee, and which, as he alleged, it had agreed to furnish.

Appellee denied the agreement or contract set up, but admitted selling cement to appellant, and pleaded a counterclaim and set-off against appellant for $2,050.22, due for cement sold to appellant. A trial resulted in a verdict and judgment in favor of appellee for $1,486.34, and appellant's motion for a new trial having been overruled he prosecutes this appeal.

The evidence in the case was conflicting, and it was the province of the jury to weigh and determine the facts, but appellant earnestly insists that the court erred in refusing to give the following instruction, viz: "The court instructs the jury that they must exclude from their consideration and disregard all the testimony of the witness, Kreigsharber, as to what others told him was the cause of rejecting the cement in question."

It appears in the testimony of said witness that he had detailed as facts what he had merely heard from others. Such testimony was incompetent, and would doubtless have been excluded from the consideration of the jury if appellant had moved the court to do so at the time that it was shown that the testimony was only based upon what other persons had said, but no such motion was then made. We do not think that the failure of the court to give the instruction asked at the time it was offered was such an error, if error at all, as to authorize a reversal of the judgment appealed from. Appellant does not insist that the instructions given are erroneous.

Judgment affirmed with damages.

ILLINOIS CENTRAL R. R. CO. V. HILLIARD.

(*Filed September* 30, 1896—*Not to be reported.*)

1. *Injury to conductor of train through negligence of car inspector*—Where the conductor of a freight train was injured by the giving way of a round of a ladder attached to one of the cars, which was caused by a defective bolt, the company was liable for the injury if it knew of the unsound condition of the ladder, or could, by the exercise of ordinary care, have known it in time to remedy the defect, unless the conductor himself knew or, by exercising ordinary care, could have known the ladder was in such condition, and the court properly so instructed the jury in an action by the conductor against the company to recover for the injury.

2. *Fellow servants*—The conductor and the car inspector were not fellow servants in the sense of being upon a common footing and agents of each other, and the court properly refused to instruct the jury that the conductor could not recover for the negligence of the car inspector unless that negligence was gross negligence.

3. *Same*—There is a difference in the degree and character of examination of cars required of a car inspector, who is employed for that special purpose, and that required of a conductor, who can not reasonably be expected to make

such close examination as to discover a latent defect; and as the evidence in this case shows the bolt which held the defective round of the ladder was so rusted and worn that the tap slipped off when plaintiff grasped the round. the jury had the right to conclude the inspector could and would, by the exercise of ordinary care, have discovered the defect, and that the conductor could not have discovered it by the exercise of the degree of care required of him.

Wm. Lindsay and Geo. L. Husbands for appellant.

Thos. G. Poore, Thos. E. Moss and Thos. H. Hines for appellee.

Appeal from Hickman Circuit Court.

Opinion of the court by Judge Lewis.

E. V. Hilliard was employed as conductor of a freight train of appellant, the Illinois Central Railroad Co., which left Mounds Station of that State October 5, 1893, going southward, but just before reaching Clinton, Kentucky, the train, moving at about the rate of five miles per hour, broke apart, and Hilliard, being on the top of the cars, thereupon started to descend to the ground on a ladder fixed at the end of one of the cars, when a round thereof as he grasped it gave way, in consequence of which he fell and one of his hands was so crushed by a wheel as to necessitate amputation.

It is not contended that he was, under the circumstances, out of his proper place or negligent, or outside his line of duty in attempting to descend in the manner and time that he did so; nor is there dispute about his fall and injury resulting from insecure fastening of the round which he had to take hold of in order to descend. The questions, therefore, are whether the railroad company was guilty of actionable negligence, and if, or although it was, whether Hilliard as conductor was guilty of such contributory negligence as that but for it the fall and injury would not have occurred, and those questions involve an inquiry as to the respective and relative duties of the two parties.

As the lower court instructed the jury, it was the duty of the company to provide and keep in good and safe condition the ladders attached to the several cars; and, as it further instructed, if at the time plaintiff was hurt the ladder in question was in an unsafe condition and defendant knew it, or by the use of ordinary care could have known it in time to put the same in a safe condition, and the injury resulted from such condition of the ladder, then plaintiff was entitled to recover, unless plaintiff knew, or by exercising ordinary care could have known, the ladder was in such condition.

Defendant asked but the court refused to give the following instruction: "That the car inspector of the defendant and the plaintiff as conductor of the freight train upon which the accident happened were fellow servants, engaged in the same line of service as to the inspection of the cars in said train, and, though the jury may believe from the evidence that said inspectors were guilty of negligence in the inspection of said cars, yet they can not find for plaintiff unless they believe said negligence was gross negligence."

That instruction was properly refused because abstract and misleading. In the first place the person employed at Mound Station to inspect each car of a train and ascertain if it is in a safe condition was not a fellow servant of plaintiff in the sense of being upon a common footing and agents of each other. They acted in different spheres, and neither could or was required to know whether the other was properly doing his duty. In the second place it would

have been improper to require the jury to believe the inspector was guilty of gross negligence. The simple inquiry was, as they had been instructed, whether the company, through its inspector, used ordinary care in examining the cars so as to ascertain whether the ladders attached to each were in a safe condition; for it was the legal duty of the company to guard against every source of danger they could, by the exercise of that kind and degree of care, foresee and prevent; and while a railroad company can not be required to insure the safety of a train, it is bound to make a reasonable, proper and careful examination of each car.

The evidence in this case shows that the bolt which held the defective round of the ladder was so rusted and worn that the tap slipped off when the plaintiff grasped the round. And the jury might have reasonably concluded that the inspector could and would, by using the proper and reasonable care, have discovered the fact, and having failed to do so legal liability of the company was fixed.

On the other hand the conductor, while required to examine the condition of a train before taking charge of it, could not be reasonably required or expected to make such close and minute axamination as to discover a latent defect. If the ladder had been detached or out of place it would have been plaintiff's duty to have discovered it. There is plainly a difference in the degree and character of examination of the cars required of the inspector who is employed for that special purpose and that required of a conductor. If there was not there would be no use for an inspector.

Perceiving no error of law on the trial of this action, the judgment is affirmed.

ANDERSON V. TRIMBLE.

(*Filed October* 1, 1896—*Not to be reported.*)

Usury—Res Judicata—In this action in which the plaintiff seeks to recover the amount paid by her in satisfaction of a judgment rendered against her in favor of a bank upon a negotiable note which she had executed to defendant, and which he had discounted to the bank, the ground upon which recovery is sought being that the note upon which that judgment was rendered was usurious, the fact that in the action in which that judgment was rendered the plaintiff here was denied the right to recover against the defendant here the usury she now seeks to recover because no such cause of action was set up in her cross petition, and also it seems because she had not then paid the usury, although judgment was rendered against her for it, does not make that judgment a bar to this action. And plaintiff is entitled to recover the usury thus paid, as the record in the former suit shows the existence of the usury, if indeed the opinion expressed by the Superior Court upon appeal in that case that the note was usurious is not conclusive upon the parties. But plaintiff is not entitled to recover the cost included in the judgment in favor of the bank, as it was her legal duty to pay the note to the bank without cost.

J. J. Cornelison for appellant.

Wood & Son for appellee.

Appeal from Montgomery Circuit Court.

Opinion of the court by Judge Guffy.

It appears from this record that appellant executed to appellee two notes for $1,339.95 each in February, 1881, one due in one year and

the other in two years, upon which she made sundry payments, and on the 29th of August, 1888, she claims that there was only $1,125.22 due thereon, but that appellee Trimble, by charging her with usurious interest, claimed she owed him $1,846.50, and that she, on that date, paid him $1,500 and executed to him her note for $356.90, due in four months, which note was endorsed by Trimble to the Exchange Bank of Kentucky, where it was made payable. It was not met at maturity, and appellant executed her note to said Trimble for $387.30, due in five months, and Trimble endorsed it to said bank.

This note was not paid, and the bank brought suit upon it. The appellant answered and denied that the bank was the owner of the note, and alleged that Trimble was the owner thereof. She also set up the facts aforesaid, claiming that the note was wholly usurious and without consideration. She also made her answer a cross petition against Trimble, and sought to recover of him the $374.78 overpaid him August 29, 1888.

The court in that suit rendered judgment against appellant for the sum claimed, and also rendered judgment against Trimble in appellant's favor for $169.35. From that judgment appellant appealed to the Superior Court, and Trimble prosecuted a cross appeal. The Superior Court affirmed the judgment in favor of the bank against appellant, and reversed the judgment in appellant's favor against Trimble.

The Superior Court, in the opinion, said: "Unquestionably Trimble's plea of the statute of limitation was a complete defense, and the judgment for $169.35 against him on the cross petition was not authorized by the pleadings. Counsel argue the case here as if the appellant's claim against Trimble was for usury contained in the note sued on. But that is not the cause of the action set up in the cross petition, nor do we see well how it could be conceding that the note is wholly usurious, and we think that the proof clearly shows that it is. The appellant can have no cause of action until she has paid. She has not paid that usury, and though a judgment has been rendered against her she may never pay it."

On the 19th of September, 1893, the appellant brought suit against the appellee, Trimble. In her petition is recited in substance a history of her dealings with appellee, including the execution of the note of $387.30, the litigation hereinbefore stated also alleging that her land had been sold under execution on the 20th of June, 1892, in satisfaction of the said judgment, which, with interest and cost, then amounted, as alleged, to $501.68, for which sum judgment was asked.

Appellee's answer may be considered a denial of the usury. He also pleaded the statute of limitation; also pleaded the aforesaid suit of the bank against appellant, and the proceeding and judgment of the Superior Court aforesaid in bar of appellant's claim. Upon hearing the court dismissed appellant's petition, and her motion for a new trial having been overruled she prosecutes this appeal.

Appellant's cause of action for the recovery of the money sued for did not accrue until she paid it, and it clearly appears that she had paid it within less than a year before the institution of this suit. It is also manifest from the opinion of the Superior Court that the cause of action or claim now sued on was not included in the former suit, hence that suit is no bar to this one.

The record of the former suit aforesaid is made part of this, and the facts found by the court below show that the $387.30 was wholly usurious, if, indeed, the opinion of the Superior Court is not abso-

lutely conclusive on the parties as to that question. It, therefore, follows that appellant was entitled to recover, but she is not entitled to recover the $501.68 claimed, a considerable part thereof being cost recovered against her. It was her legal duty to have paid the note to the bank without cost, but she is entitled to recover the sum of $387.30, with 6 per cent. per annum, from the 15th of November, 1889.

For the reasons given the judgment of the court below is reversed and cause remanded, with directions to award the appellant a new trial and for proceedings consistent with this opinion.

PERKINS, &C. V. SMITH.

(*Filed October* 1, 1896—*Not to be reported.*)

Joint tenants—Purchase of outstanding title—The general rule is that one tenant in common or one joint tenant can not buy in an outstanding title for his own exclusive benefit. Such a purchase will inure to the benefit of the other tenant; the purchaser, however, being entitled to contribution. And especially will the rule be enforced if the tenants stand in some confidential relation toward each other.

Where a life estate in land conveyed by a father to his son and daughter jointly was subsequently taken under execution for the father's debts, a purchase by the daughter's husband from the execution purchaser inured to the benefit of the son, and in this action by him for a division of the land between himself and his sister he was properly charged with one-half the amount paid to the execution purchaser, and his sister's husband was properly charged with one-half the rents received by him after the purchase.

David R. Murray and Murray & Duncan for appellants.

W. S. Morrison for appellee.

Appeal from Hancock Circuit Court.

Opinion of the court by Judge Hazelrigg.

The general rule is that one tenant in common or one joint tenant can not buy in an outstanding title for his own exclusive benefit. Such a purchase will enure to the benefit of the other tenant, the purchaser, however, being entitled to contribution. And especially will the rule be enforced if the tenants stand in some confidential relation toward each other. (Venable, &c. v. Beauchamp, 3 Dana, 323; Vanhorne v. Fonda, 5 Johnson's Ch'y Rep., 407.)

In this case one J. G. Smith was the owner for life of some 114 acres of land, and for the recited consideration of $500 conveyed it to his son, W. L. Smith, the present appellee, and to his daughter, Louisiana Perkins, wife of appellant, T. J. Perkins. The grantees took possession and held jointly thereafter.

Later on a creditor of the grantor, ignoring this conveyance as a fraud against him, had the estate sold under execution and one Fraize bought it and obtained a sheriff's deed therefor. Appellant, T. J. Perkins, with full knowledge of the joint ownership of his wife and appellee, then bought from Fraize, paying the execution debt, interest and costs, and thereafter claimed to own the entire interest. This suit was, therefore, instituted by appellee for a division of the land between himself and his sister, Louisiana. The court adjudged the division and adjusted the accounts between the parties, charging

the appellee with one-half the Fraize purchase money, and the appellant with one-half the rents he had received after the Fraize purchase.

This judgment is in accordance with the principles announced above, and is, therefore, affirmed.

EDMUNDS V. COMMONWEALTH.

(*Filed October* 2, 1896—*Not to be reported.*)

There being evidence which tends to show the defendant's guilt in this case, this court can not reverse the judgment on the ground that the verdict is not supported by the evidence.

Boles & Duff and George T. Duff for appellant.

W. S. Taylor for appellee.

Appeal from Barren Circuit Court.

Opinion of the court by Judge Lewis.

It is not contended there was nor do we perceive in the record of this case any error of law that occurred during the trial, but reversal is asked upon the only ground that the verdict is not supported by the evidence.

This court can not set aside the verdict of a jury on any case merely because we may believe it was not determined according to the weight of the evidence or may not be supported by sufficient evidence. We can interfere only where there is no evidence in support of it.

In this case there was evidence tending to show appellant's guilt, and there is no alternative for this court but to affirm the judgment of conviction, which is done.

ISERT, &C. V. DAVIS.

(*Filed October* 6, 1896—*Not to be reported*.)

The court below having proceeded in this case according to the intimation and direction of this court upon a former appeal, the judgment rendered will not be disturbed.

Phelps & Thum for appellants.

Maxwell Davis for appellee.

Appeal from Jefferson Circuit Court, Common Pleas division.

Opinion of the court by Judge Guffy.

The appellee, Davis, instituted suit in the Jefferson Circuit Court to remove a cloud from his title to a certain lot in Louisville, Ky., and to quiet his title thereto. The court adjudged in his favor, but J. G. Hunt, &c., prosecuted an appeal to this court and the judgment was reversed. The opinion is reported in 17 KY. LAW REP., 686.

The opinion, *supra*, intimated that such proceedings might be

had, proof taken and conditions complied with as would authorize the chancellor to elect for the infant appellee to accept the sale of the lot already made under a former judgment not appealed from.

Upon return of the cause it seems that amended pleadings were filed and proof taken showing that the sale was beneficial to the infant, and the proper bond executed and a judicious investment of the proceeds had been made. Thereupon the chancellor elected for the infant to accept the sale, and adjudged that he had no further right or title in or to said lot; and from that judgment the infant and others prosecute this appeal.

It seems that the court below has proceeded according to the intimation and directions contained in the former opinion, and the judgment is, therefore, affirmed.

BOWMAN, &C. V. HUMPHREY, &C.

(*Filed October* 6, 1896—*Not to be reported.*)

1. Acceptance of forged note in renewal of genuine note—Right of action on original—Where the principal in a genuine note induced the payee to accept in renewal thereof a note which was a forgery as to the sureties, the payee, being ignorant of the forgery at the time he surrendered the original note and accepted the new note in its stead, still had a right of action against the sureties upon the original note; and the holder in this action against the sureties setting up the facts as to the forgery, and the false representations by which he was induced to surrender the original note, had the right to recover thereon.

2. Limitation—As the original note was executed September 30, 1884, due in twelve months, this suit thereon, brought September 23, 1892, was not barred by limitation as to the sureties.

3. Assignment of forged note—Liability of assignor—The forged note having passed upon the death of the payee to his executor, who afterwards received it as distributee in the distribution of the estate, his assignment of the forged note passed to his assignee the claim which the testator had against the sureties upon the original note. And it is immaterial whether the legal or only an equitable titled passed, as both assignor and assignee are parties to the suit. And if it were true that the assignor was released from liability upon his contract of assignment the right to maintain the action would not be thereby impaired.

4. Same—The renewal note being a forgery, the assignor was not released from liability upon his contract of assignment by the failure of the assignee to prosecute the makers of the note with diligence.

George S. Fulton and John A. Fulton for appellants.

John S. Kelley for appellees.

Appeal from Nelson Circuit Court.

Opinion of the court by Judge Guffy.

It is substantially alleged in the petition in this action that one T. O. Crozier and the appellants executed to William Johnson their note for $1,200 September 30, 1884, due in twelve months, with interest from date, no part of which had been paid except some interest set out in the petition; and that on the 30th of September, 1886, said Crozier delivered to said decedent a note in renewal of the first-named note, with the names of the appellants signed thereto, which note amounted, principal and interest, to $1,257.20, and represented

to decedent that appellants had signed said note; that said William Johnson died June 4, 1888, and that appellee Johnson was his executor, and, in the distribution of the estate, appellant Johnson became the owner of the last-named note, which said Crozier in like manner, as before stated in regard to the first, pretended to renew, with the names of the appellees thereon, purporting to be their note executed to appellant Johnson, for $1,306.20, dated June 23, 1888, due one day after date, some interest having been paid on the other named renewal note, and afterwards appellant assigned same to appellee Humphrey.

It is also alleged that no part of the original debt had been paid except $86.80, accrued interest at the time of the first renewal, and $81.71 paid as interest on the first forged note, from September 30, 1886, to October 29, 1887. Judgment was prayed for $1,200, with interest from the 30th of September, 1884. Proper allegations as to the false representation and the forgery of appellants' names were made.

Appellants demurred to the petition, which demurred was overruled. Thereupon appellants answered, and in the first paragraph thereof the statute of limitation is pleaded, and a denial of the execution of the note mentioned in the petition, but say that they did, as sureties for said Crozier, execute a note for $1,200 to Wm. Johnson, but the note so signed was executed and bore date more than eight years prior to the institution of this suit, and matured more than seven years prior to the institution of this suit, exclusive of the time which elapsed between the date of the death of William Johnson and the qualification of his executor, Ben Johnson.

In the second paragraph of the answer the appellants denied the right of appellees, or either of them singly or jointly, to maintain this action, for the reason that the appellant, Johnson, had no interest in the notes at all, because released by the failure of Humphrey to use diligence in the collection of the assigned note; also denied that either of appellees ever had any interest in the original note; that there never, at any time, existed any privity of contract between them and either of the appellants; also denied knowledge or information of the execution of the two alleged forged notes, or of any representations concerning same, and averred that they were induced by Crozier to believe that he had paid off the genuine note, otherwise they would have compelled the collection of the note.

The third paragraph sets up the fact that appellee Humphrey brought suit against appellants on the last-named note, and that they pleaded *non est factum*, which was traversed by Humphrey, and, upon issue joined, judgment was rendered in favor of appellants, and that suit is relied on as a bar to this action.

Appellees demurred to the second and third paragraphs of the answer, which demurrer was sustained by the court, and upon final hearing judgment was rendered in favor of plaintiffs for the amount of the original note, with interest from the 30th of September, 1884, subject to the credits aforesaid, and to reverse that judgment this appeal is prosecuted.

It is insisted by counsel for appellants that the proof does not show that the forged notes were in fact renewals of the original note.

It may be conceded that the direct proof on that point is not beyond reasonable doubt, but the execution of the genuine note on the 30th of September, 1884, due in twelve months, seems to be clearly established, and there is no plea nor evidence that it was ever paid or settled except the fact that it is not produced by appellees, except what is shown by the renewal notes, if they show anything.

This action was instituted September 28, 1892, hence the cause of action on the original note was not barred by the seven years' statute, even if we assume that an executor was immediately appointed, but appellants also insist that the court erred in sustaining the demurrer to the second and third paragraphs of the answer.

It is manifest that whatever claim William Johnson had against appellants passed to Ben Johnson, first as executor and next as distributee or heir, and that he sold and assigned same to appellee Humphrey, and it is immaterial whether the legal or only an equitable title vested in Humphrey, as both Humphrey and Johnson are parties to the suit.

If it was true that Johnson was released from liability to Humphrey on the assignment, the right to novation in the action would not be thereby impaired, but the opinion in Ware v. McCormack, 96 Ky., 139, determines that appellants' contention in that respect is erroneous.

Appellants quote from the opinion of this court, in National Bank of Covington v. Gaines, &c., 87 Ky., 602, and insist that it sustains the third paragraph of the answer, but it will be seen by an examination of the opinion that the question there decided was essentially different from the question in the case at bar. The creditors in that case had not pleaded nor relied on the first note, but complained because a recovery was denied on the forged note, contending that the mere fact that the defendants owed the original debt authorized a recovery.

It seems to us that the case of Stratton v. McMachin, 84 Ky., 641, conclusively establishes appellee's right to recover in this case. In that case it appears that the plaintiff had sued on the forged note and been defeated, and afterwards brought suit on the first note, which had been delivered up to the principal upon the delivery of the forged note, and this court held that he was entitled to recover.

The judgment of the court below is affirmed.

SCHAMBERG, &C. V. FARMER, ADM'R.

(*Filed October 7, 1896—Not to be reported.*)

1. Lease granting right to operate oil and gas wells—Validity of.—A lease granting to the lessees for a sufficient consideration the sole right to drill and operate oil and gas wells on a tract of land for a period of fifteen years, and providing for an absolute forfeiture of the lease in the event the lessees shall fail to complete a test well within twelve months, and also giving them the right, after the conditions have arisen requiring them to pay rent, to elect to cancel the leases by nonpayment of rent, was not void for want of mutuality, and, therefore, constituted an incumbrance on the land.

2. Incumbrance—Vendor and vendee—The owner of the land having sold it after executing the lease, in an action by him to recover the purchase price the vendees can not claim a reduction on account of the incumbrance referred to without alleging facts showing that the incumbrance still exists. The general statement that the lessees have fulfilled the conditions of the lease and that the incumbrance still exists is not sufficient, as it is but a conclusion of the pleader.

W. S. Harkins and Connolly & Connolly for appellants.

A. J. Auxier and Nat. J. Auxier for appellee.

Appeal from Pike Circuit Court.

Opinion of the court by Judge Landes.

This was an action in the Pike Circuit Court in the name of the appellee against the appellants, on a note executed by the latter to the former for the balance of purchase money for a tract of land that was sold and conveyed and the possession thereof delivered by Benjamin Mead in his lifetime to appellant Schamberg, by deed of general warranty, dated May 18, 1893. Schamberg afterwards sold the land to appellant Hopson.

The defense was based upon the fact that, previous to the sale and conveyance of the land to Schamberg, the said Benjamin Mead had executed an instrument of writing, which was recorded in the clerk's office of Pike county, by which he leased or granted to G. H. Demich and L. H. Gormley, for a sufficient consideration, the sole right to drill and operate oil and gas wells on the same tract of land for the period of fifteen years, which it was claimed was an incumbrance on the land, and a breach of the covenant of warranty in the deed from Mead to Schamberg, and naturally reduced the value of the land; and it was alleged that Mead in his lifetime was insolvent, and that his estate after his death was insolvent, by reason of which fact, which was not denied by the appellee, it was claimed that the appellants had the right to have the amount of the said note for purchase money reduced. This claim was controverted by the appellee.

The said lease was made a part of the record, and contained among other things in substance the following provision, viz: That the lessees were bound to commence operations under the lease and complete one well on the land within two years after finding oil in paying quantities in one of the test wells which they were to bore in the neighborhood, or thereafter pay as rent for the land "ten cents per acre yearly in advance until such well is completed or until" the lessees "elect to cancel their lease by nonpayment of said rent;" and that the lessees should complete one or more of such test wells within twelve months from the date of the lease, and that "a failure so to do" should "work the absolute forfeiture of this lease."

The court below on final hearing gave judgment against the appellants on the note, and decreed the sale of the land to satisfy the judgment as prayed for in the petition, and the case is before us on appeal from that judgment.

We do not concur in the contention of counsel for the appellee that the lease was invalid for the want of mutuality, and for that reason it created no incumbrance on the land.

It was a valid contract, and created an encumbrance; but defense having been made on the ground that the encumbrance was still existing, it devolved upon the appellants to properly allege it and prove it if denied. Provisions were made in the lease, which we have quoted, for a termination of it by the lessees by electing not to pay rent for the land, when the conditions existed requiring them to pay rent, and for a forfeiture of it by the failure of the lessees to complete one of the test wells stipulated for within twelve months from the date of the lease.

The facts of the case affecting the lease in such a way as either to put an end to or to prolong its existence must have been within the knowledge of the appellants, one of whom, at least, was in possession of the land; and if, under the facts, the lease was still in force, in order to avail themselves of it as a defense to the action it devolved on the appellants to allege the facts and to prove them, if denied by the appellee.

The general statement made in their pleading that the lessees had fulfilled the conditions of the lease, and that the encumbrance still existed, was not sufficient, as it was but a conclusion of the pleader. Besides, the general statement that the conditions had been fulfilled being denied, no proof was introduced to sustain it; and so the record contains nothing upon which the court below would have been justified in granting any relief to the appellants against the note sued on.

Finding no error, the judgment is affirmed with damages.

CHEEK V. COMMONWEALTH.

SAME V. SAME.

(*Filed October* 7, 1896.)

1. *Keeping disorderly house*—One who permits persons, however evil disposed, to frequent a house under his control and do only lawful acts is not guilty of keeping a disorderly house.

2. *Betting on horse race—Indictment* One who bets on a horse race is guilty of the offense created by section 1977 of the Kentucky Statutes, which provides for the punishment of any person who "shall engage in any hazard or game on which money or property is bet, won or lost," for while a horse race is not a "game," yet to engage in a wager of any kind is a "hazard" within the meaning of the statute; therefore, an indictment for keeping a disorderly house, which charges that the defendant permitted evil-disposed persons to habitually frequent certain rooms under his control "and habitually engage in betting, winning and losing money on horse races," is good.

Morton & Darnall for appellant.

W. S. Taylor for appellee.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Hazelrigg.

These two indictments charge the appellant with the offense of keeping a disorderly house by suffering, procuring and permitting divers evil-disposed parsons to habitually frequent certain rooms under his control, and there to be and remain and habitually engage in betting, winning and losing money and other property on horse races to the common nuisance and annoyance of the good citizens of the Commonwealth, etc.

Demurrers were filed and overruled. A judgment was thereupon rendered for $500 in each case, from which these appeals are prosecuted.

If to engage in betting, winning and losing money and property on horse races is an unlawful act, the rulings of the court and demurrers are correct. If not such an act, then the indictments are insufficient, as it would not be keeping a disorderly house under the terms of the indictment and within the meaning of the law, if persons, however "evil disposed" they might be, were permitted to frequent a house and do only lawful acts.

Is it, therefore, unlawful to bet on a horse race? The statute, supposed to cover the subject, is as follows: "If any person or persons shall engage in any hazard or game on which money or property is bet, won or lost, such person or persons shall be subject to a fine of

not less than $20 nor more than $100." (Section 1977, Kentucky Statutes.)

While a horse race has been held in some of the States to be "a game or gambling device," manifestly the word "game" used in our statute was not meant to embrace such a race, and the sole question to be considered is what is meant by a "hazard."

It seems to us beyond question that to engage in a wager of any kind is a hazard within the meaning of those words as they are used in the statute.

A and B may play a game of cards for amusement, and if C and D stand by and bet on the game the players may be innocent but the by-standers are guilty, not because they engage in the game but because they engage in a hazard on which money is bet.

Those who enter the horses for the race and the riders may be ever so innocent and will be unless they engage in betting on the race, although they actually engage in the race, but the by-stander is guilty without engaging in the race if he engages in the hazard of betting on the result.

Such was the construction of this court of a similar statute in Cheek v. Commonwealth, 79 Ky., 359, and while the language of the former statute is somewhat different from the present one the latter is not less comprehensive.

The judgments must be affirmed.

COX V. JOHNSON, &c.

(*Filed October* 8, 1896—*Not to be reported.*)

Vendor and vendee—Purchase of outstanding title—In this action to recover the purchase price of land the court properly refused to allow the defendant credit for the amount which he had paid out in the purchase of an outstanding title, as the proof is satisfactory that defendant purchased with knowledge of that claim and agreed to risk it. And if it be suggested that parol proof should not be allowed to defeat a recovery for breach of warranty it is sufficient to say that no breach was shown, as there had not been any judicial decision establishing the validity of the outstanding title, and so far as this record shows there never would have been any such decision.

Walter S. Harkins, Connelley & Connelley, Carson & Robinson and Cochran & Son for appellant.

Auxier & Auxier and Stewart & Stewart for appellees.

Appeal from Pike Circuit Court.

Opinion of the court by Judge Guffy.

The appellant, Geo. Cox, by his agent, Samuels, purchased of appellee Johnson a parcel of land, composed of several tracts, for which he was to pay $3 per acre when the same was surveyed and the number of acres ascertained. Appellee was then in jail in default of bail, and at that time executed bond for conveyance and appellant deposited for him with the trustee of the jury fund $1,500 as bail. The land sold was found to be 1,033 acres. Johnson executed and delivered a deed to appellant, which was accepted, but appellant failed and refused to pay the residue of the purchase money, and finally brought suit for damages

Appellee also sued to recover the balance of the purchase money

and to enforce his lien on the land. The suits were consolidated and heard together.

Appellant relied upon several defenses in the nature of payments and counterclaims, which need not be noticed, as they were all decided in his favor except the claim for damages for fraud and the $500 claimed to have been paid by him to Gillum and wife to extinguish their claim to part of the land bought by appellant. The claim for damages was disallowed by the court, and that judgment was clearly in accordance with the law and facts, and is really not now complained of here.

It was claimed by Johnson that the land was really worth $6 per acre and that he and his wife were to be permitted to occupy the land free of rent during their lives, but that question was decided against appellee and is not here for revision.

It seems that appellee at some time before the sale to appellant had conveyed a portion, perhaps 186 acres, of the land in question to his daughter, Mary E. Johnson (now Gillum), and that shortly before her marriage she executed to him a bond for reconveyance of the land to him. He also claimed that she was to have paid certain sums to May, and for which a lien was retained on the land, and that she failed to pay same, and that appellee paid same or arranged for the payment thereof, and that appellant Cox was well aware of the conveyance to said Gillum, and bought the land with the agreement and contract to risk that claim. Appellant denied the agreement and assumed that Gillum's title was good and bought the same and paid, as alleged by him, $500 therefor and claimed credit therefor on the purchase money due for the land.

The court below denied the credit and rendered judgment in appellee's favor for the amount found to be due and adjudged a sale of the land to pay the same, and from that judgment this appeal is prosecuted.

It does not appear that Gillum could have held the 186 acres, but it is not necessary to determine that question, nor is it necessary to pass upon the right of appellant to purchase such an outstanding claim and obtain credit therefor, because the proof is satisfactory as to the knowledge of appellant touching the title to the 186 acres, and it seems to be clearly proven that he agreed to risk that title and claim, and that testimony is strengthened by the evidence that the whole tract was sold for much less than its market value at the time.

If it be suggested that parol proof should not be allowed to defeat a recovery for breach of warranty it is sufficient to say that no breach was shown, and there had not been any judicial decision establishing Gillum's right to the 186 acres, and so far as this record shows there never would have been any such decision.

The judgment of the court below is quite as favorable to appellant as he was entitled to, and that judgment is affirmed with damages.

COMER V. SHELTON, &C.

(*Filed October* 8, 1896—*Not to be reported.*)

Reward—Peremptory instruction—In this contest between appellant on the one side and appellees on the other as to which was entitled to a reward offered by a county court for the arrest and conviction of certain offenders, the court did not err in giving a peremptory instruction to find for appellees, there being no testimony which would have authorized a judgment in appellant's favor.

W. L. Porter for appellant.

Thomas H. Hines and A. W. Scott for appellees.

Appeal from Monroe Circuit Court.

Opinion of the court by Judge Guffy.

In 1887 the courthouse and clerk's office in Monroe county were burned, and, it being manifest that the burning was caused by robbers and incendiaries, the county court offered a reward of $300 for the arrest and conviction of the guilty parties, or $100 each. Millard and two Reeves were arrested, tried and convicted of the offense charged.

In 1893 the appellees, Shelton and Myers, brought suit for the recovery of the sum of $300. The county answered, averring its willingness to pay the sum to the proper parties. The appellant, Comer was made a party to the suit upon his own petition and claimed the $300, alleging that he had procured the arrest and conviction of the guilty parties aforesaid.

At the conclusion of the evidence of both appellees and appellant the court, on motion of appellees, gave a peremptory instruction to find for the appellees, which was accordingly done, and judgment rendered in their favor; and, appellant's motion for a new trial being overruled, he prosecutes this appeal, and insists that the court erred in giving the peremptory instruction, and also erred in refusing the instruction asked by him, which was in substance that, if the jury believed from the evidence that Comer procured the arrest and conviction of the accused, the jury should find for him.

Several witnesses were examined, including the parties to the suit, but we deem it unnecessary to recite the testimony or to discuss the various questions of law referred to in the briefs on file for the reason that it seems to us that there was no testimony introduced that authorized a judgment in appellant's favor.

Judgment affirmed, with damages.

DOYLE V. COMMONWEALTH.

(*Filed October* 8, 1896—*Not to be reported.*)

1. Practice in criminal cases—Absence of accused from courtroom—While the accused had the constitutional right to be present during the whole time of his trial upon a charge of felony, yet he will not be heard to complain that he was not in the courtroom at the very minute the Commonwealth's Attorney began his argument to the jury, as his counsel did not call the attention of the court to the fact that he was not present, and it is manifest he could not have been prejudiced by what the Commonwealth's Attorney said in the brief period of his absence, being not more than five minutes.

2. Instruction as to manslaughter and self-defense The words "not in his necessary self-defense" were out of place in an instruction defining the conditions in which the jury was authorized to find the accused guilty of murder, and also out of place in an instruction relating to manslaughter, but as the court in a separate instruction set out every circumstance and condition necessary to constitute a correct instruction as to the law of self-defense the jury could not have been misled.

3. Same—It was not improper for the court to instruct the jury that in order to reduce the crime charged to manslaughter they must believe the accused killed deceased not only without previous malice, but in sudden heat of pas-

sion, "superinduced by considerable provocation, such as a blow or other trespass to the person at the hand of deceased," the expression "considerable provocation" being explained by the words which follow.

R. T. Lightfoot, E. H. Puryear and H. G. Harris for appellant.

W. S. Taylor for appellee.

Appeal from McCracken Circuit Court.

Opinion of the court by Judge Lewis.

Appellant was indicted, tried and convicted for the murder of William Ryan, his punishment being fixed at confinement in the penitentiary for life.

The homicide occurred in a caboose standing in the yard of the Chesapeake, Ohio & Southwestern R. R. Co. at Paducah, and was the outcome of a game of "craps," in which accused and deceased had been engaged. The evidence shows the former had won from the latter fifty cents by using loaded dice, and, upon the fact being discovered by deceased, he demanded the return of his money, and thereupon was shot and killed.

There is no question of the dice being loaded, for deceased paid accused ten cents for one of them, and then broke it, ascertaining thereby that it contained lead.

There is evidence tending to show appellant committed the deed without being at the time in danger, real or apparent, of loosing his own life or suffering great bodily harm at the hands of deceased. On the other hand accused testifies, and is supported by other testimony, that at the time of shooting deceased had a hammer in his hand, and was advancing upon or threatening to strike with it.

Whether appellant was guilty of murder or manslaughter, or was excusable for the deed upon the ground of self-defense and apparent necessity, are questions of fact submitted to and determined by the jury; and, as they are exclusive judges of the facts in criminal cases and there was evidence tending to show appellant guilty of murder, we are not authorized to disturb their verdict unless errors of law occurred on the trial prejudicial to his substantial rights.

Except alleged error of the court in giving and refusing instructions, the only one complained of is that the Commonwealth's attorney had proceeded for from two to five minutes in his closing argument before appellant had been brought from the jail, where he was confined during a recess, into court and in the presence of the jury.

Appellant had a constitutional right to be present during the whole time of the trial, and if, when the Commonwealth's attorney commenced his argument, counsel had suggested he (appellant) was not present, doubtless the court would have suspended proceedings until his arrival; but lying in wait to take advantage of every trivial oversight or error on the part of a Commonwealth's attorney or trial court can not avail an accused person in this court, if he had in other respects a fair and impartial trial. What was said by the Commonwealth's attorney during the brief period of appellant's absence from the court manifestly did not nor could have prejudiced his rights or interests because it did not pertain to the merits of the case.

It is objected in argument that the court, in instruction No. 1, which defines "murder" and sets forth conditions in which the jury is authorized to find accused guilty of that degree of homicide, the

words "not in his necessary self-defense" are improperly used. The same words are used, and the same objection is made to the use of them in the second instruction, relating to manslaughter.

The words in question need not have been put in either instruction, because rather out of place and proper connection; but as the full and correct meaning of "necessary self-defense" was stated in another and separate instruction, they could not have been misinformed by or have mislead the jury as to the condition in which appellant was excusable, if at all, upon grounds of self-defense and apparent necessity, for in that instruction, being No. 5, every circumstance and condition this court has heretofore decided necessary to constitute a correct instruction as to the law of self-defense were fully stated.

It is further objected that in instruction No. 2 the jury was told that, in order to reduce the crime charged to manslaughter, it was required that accused not only killed deceased without previous malice, but in sudden heat of passion, "superinduced by considerable provocation, such as a blow, assault or other trespass to the person at the hands of William Ryan."

Use of the term "considerable" has been by this court condemned as misleading and improper unless it be by the trial court explained; but in the instruction now under consideration the word was qualified and explained by the addition of the words "such as a blow, assault or other trespass to the person at hands of William Ryan." And no other or less provocation can at the common law reduce a homicide from murder to manslaughter.

There being apparent to us no error of law which occurred on the trial prejudicial to the substantial rights of appellant, the judgment is affirmed.

The Kentucky Law Reporter.

EDITOR:
WALTER G. CHAPMAN, ... Frankfort, Ky.

VOL. 18. JANUARY 15, 1897. No. 14

KENTUCKY COURT OF APPEALS.

LOUISVILLE SOUTHERN R. R. CO. v. HOOE.

(*Filed April 23, 1896—Not to be reported.*)

1. Appeals—Reversible error—While neither party can rely for reversal upon an erroneous decision made at the instance or on the motion of the adverse party unless he objected to the motion or offer of the adverse party, and then excepted to the decision, yet when the court acts upon its own motion an exception alone is sufficient; and where neither party asked any specific instructions, but each requested the court to give the law to the jury, instructions given under this request must be regarded as given by the court on its own motion, and an exception alone was sufficient.

2. Obstruction by railroad—Damages—To entitle a lot owner to recover on account of the obstruction caused by the location and operation of a railroad along the street in front of his property the obstruction must amount to substantial interference with the use of his property. In this case the space or pavement and street between the property and the track being from twenty to thirty feet wide, thus leaving plenty of room for vehicles to pass without inconvenience, there is not such obstruction as will authorize a recovery.

3. Same—Smoke and cinders—There may be a recovery by the abutting lot owner on account of smoke and cinders, if the air is permeated with such dense volumes of it as to interfere with the comfortable enjoyment of the property; but a casual annoyance from that source from an occasional gust of wind will not authorize a recovery.

4. Same—Ringing of bells—The constant or unreasonable ringing of bells or blowing of whistles, to the great annoyance of those living along the road, may give a cause for action.

5. Same—Shaking of windows along the line of the railroad—If, as testified by plaintiff, "the trains shook her windows and caused the plastering to drop off and crack in many places," she may recover special damages therefor, as such is not the ordinary result of running trains along the streets of towns and cities.

6. Same—Diminution in value of abutting property—As the diminution in value of plaintiff's property arises in the opinion of her witnesses from "the location" of the road on the street upon which her property fronts, this of itself furnishes no ground of complaint.

Bullitt & Shield and C. A. Hardin for appellant.

Bell & Bell for appellee.

Appeal from Mercer Circuit Court.

Opinion of the court by Judge Hazelrigg.

Since June, 1888, the appellant, under legislative and municipal authority, has operated a railroad along the center of Factory street, in Harrodsburg, and appellee has owned for many years a lot on which is situated two houses on the southwest corner of said street and Chiles street. One of the houses fronts on Factory and Chiles streets, and the other entirely on Factory street.

This is a suit by the owner of the property against the railway company for damages arising out of the location and operation of the road, the particular elements of injury relied on being the obstruction of the ingress and egress to and from the property, the throwing of sparks, cinders, smoke and soot thereon, the unusual noises of the engines and trains, and the damage to the walls and ceilings of the houses.

Upon the trial of the case, and after instructions to the jury in which these elements are enumerated and made the basis for recovery, a verdict resulted for the appellees for the sum of $1,500, and from this the company has appealed.

The bill of exceptions shows that upon the conclusion of the testimony neither side asked any specific instructions, but each requested the court to give the law to the jury. Thereupon the court gave the instructions and each party excepted to them.

For the appellee it is insisted at the threshold of the case that as no objection was taken, as well as an exception saved by the appellant, it can not complain of these instructions. Such is not the law. The rule as stated in Loving v. Warren County, 14 Bush, 320, and Branson v. Commonwealth, 92 Ky., 330, is that neither party can rely for reversal upon an erroneous decision made at the instance or on the motion of the adverse party, unless he objected to the motion or offer of the adverse party at the time it was made, and then excepted to the decision. But where the court acts upon his own motion an exception alone is sufficient. The court here gave the instructions on his own motion. The fact that the parties asked the court to give the law or the whole law of the case does not make the instruction one asked for by either party.

As we have seen, one of the elements of damage submitted by the instructions was the obstruction of the appellee's passage to and from her property, and yet when we look to the proof we find that the rails of the track are on a level with the street, and not nearer to the property than some thirty or forty feet, and from the walls of the house to the pavement the distance is about eight feet, leaving from twenty to thirty feet for pavement and street. Within this space it is manifest from the proof there is plenty of room for vehicles to pass without inconvenience and without even crossing the track and touching the rails. There is, therefore, no such obstruction here as will authorize a recovery. On this question the authorities are uniform and conclusive. (Lexington & Ohio R. R. v. Applegate, 8 Dana, 289; Louisville & Frankfort R. R. v. Brown, 17 B. M., 772; Newport, &c., Bridge Co. v. Foote, 9 Bush, 264; E. L. R. R. v. Combs, 10 Bush, 382; L. & N. R. R. Co. v. Orr, 91 Ky., 116.)

The obstruction must consist of a substantial interference with the use of the property. So with respect to smoke, etc. If the air is permeated with such dense volumes of it as to interfere with the comfortable enjoyment of the property an action will lie. A casual

annoyance from that source from an occasional gust of wind is an unavoidable evil consequent upon life in a city in proximity to railroads, factories, mills, etc. Here the trains pass only five or six times a day, and the proof is quite meagre showing any injury whatever. Certainly none not easily prevented by a prudent operation of the road. When the wind was in the right direction it is said smoke would float towards and into the houses, but with slight trouble it was kept out. There is no proof showing such an unreasonable noise from the moving trains as would interfere with the enjoyment of the property.

The ringing of bells and blowing of whistles are necessary to some extent for the safety of the public, but to do this constantly or unreasonably to the great annoyance of those living along the road may give a cause of action. The testimony of the appellee, though not supported by other testimony, is "that the trains shook her windows and caused the plastering to drop off and crack in many places," and if so she may recover special damages therefor. Such is not the ordinary result of running trains along the streets of towns and cities. If it were, there could be no such railroads operated without constant outlay for repairs to adjacent buildings.

The diminution in the value of the appellee's property arises, in the opinion of her witnesses, by reason of "the *location* of the road on Factory street," and this of itself furnishes no ground of complaint.

For the reasons indicated the judgment is reversed for proceedings consistent with this opinion.

The court delivered the following response to petition for rehearing December 19, 1896:

What we mean to decide in this case, and we attempted to so express ourselves in the original opinion, is that from the proof then before us there had been no substantial and, therefore, no actionable interference with the appellee's ingress and egress to and from her property, as such interference is required to exist before recovery can be had under the numerous decisions of this court; that this was also true as to the smoke and noise from the trains. These, in the form they appeared to exist from the proof, were incidents of city life and not substantial injuries.

There is proof, however, of special damage to the plastering, etc., of the appellee's house. Upon these principles the court below, upon a retrial of the case, will conform the instructions to suit the proof that may then be offered.

Petition overruled.

HOKE V. RICHIE, JUDGE.

(*Filed September* 26, 1896—*Not to be reported.*)

Officers—Appointment to fill vacancy—Term of office—Under the statute which provides that the inspector of illuminating oils for Jefferson county, who is appointed by the county judge, "shall remain in office for four years, unless removed by the court for misconduct," the term of office is four years, and where an appointee dies in office one who is apppointed to fill the vacancy holds only for the unexpired term, although it is stated in the order of appointment that he is appointed for four years. The peculiar language of the statute must yield to the general legislative purpose prevalent in this State.

C. B. Seymour and James T. A. Baker for appellant.

Augustus E. Willson for appellee.

Appeal from Jefferson Circuit Court, Common Pleas division.

Opinion of the court by Judge Lewis.

Section 2204, Kentucky Statutes, provides: "Judges of the county court of each county of this State may appoint an inspector in their respective counties to carry out the provisions of this law. The inspector shall remain in office for four years, unless removed by the court for misconduct, negligence or incompetency, and shall take an oath faithfully and to the best of his ability to discharge the duties of his office. An inspector may appoint an assistant or deputy, who may perform, under his direction and for such time as he may designate, any and all the duties of an inspector under this act."

That section is under chapter 71, the title of which is "Inspection," comprehending peculiar duties, fees and penalty for the violation of their duties by inspectors of various articles of commerce mentioned therein, and under article 3 of that chapter, the title of which is "Inspector of Illuminating Oils."

As appears from the statement of his petition in this case, appellant, McClure S Hoke, was, by W. B. Hoke, then judge of the Jefferson County Court, November 13, 1893, appointed for the term of four years inspector of oils for that county, and this is an action by him instituted in the Jefferson Circuit Court for a writ of prohibition restraining Chas. G. Richie, now judge of the Jefferson Circuit Court, from trying and eventually removing him from said office for alleged misconduct, negligence and incompetency.

As defined by section 479, Civil Code, "the writ of prohibition is an order of the circuit court to an inferior court of limited jurisdiction prohibiting it from proceeding in a matter out of its jurisdiction."

It is plain power is given by the statute to the county court of each county to remove for misconduct, negligence or incompetency an inspector of illuminating oils, or any other inspector authorized by chapter 71 to be appointed by the judge of that court. Consequently, if that statute be valid, the Jefferson County Court is not proceeding out of its jurisdiction in the matter of trying and removing appellant from the office in question if, in its judgment, he be guilty of misconduct, negligence or incompetency."

Section 107 of the Constitution provides: "The General Assembly may provide for the election or appointment, for a term not exceeding four years, of such other county or district, ministerial and executive officers as may from time to time be necessary."

As the Legislature is by that section unquestionably invested with power to provide the mode of filling, fix the term and prescribe the duties of such officers, it necessarily follows it may, in its discretion, not only discontinue them altogether, but determine the manner and by what tribunal an incumbent may be removed.

In our opinion the Jefferson County Court has jurisdiction to try the question of removing and by judgment to remove appellant from said office.

Therefore, the judgment of the Jefferson Circuit Court denying the writ of prohibition was proper and is affirmed.

DAVIS V. DAY'S ADM'X, &C.

(*Filed October* 9, 1896.)

1. Appellate practice--Partial transcript—Schedule--Where the appellant and the appellee each files a schedule calling for certain parts of the record, it is the duty of the clerk to make a single transcript of such parts of the record as are called for by the two schedules, accompanying it with a single certificate; and appellant must pay the cost of the transcript as a whole if he obtains it to file for the purposes of his appellee. But if the appellant obtains and files a transcript of only such parts of the record as were called for by his schedule, and this partial transcript is apparently sufficient for the purposes of the appeal, the court will not, upon motion of appellee, dismiss the appeal, as appellant takes the risk, since the court will, on final hearing, affirm the judgment if the partial transcript is found not to be sufficient. Or if other parts of the record are shown to be pertinent a rule may be awarded.

2. Same--The appellant, in order to protect himself from having to pay for unnecessary parts of the record, which may be ordered by appellee, may apply to the judge of the court rendering the judgment and obtain a schedule for only necessary parts of the record. Or if necessary parts of the record are copied at the instance of the appellee, he will be liable for the costs resulting therefrom.

Maxwell Davis and Otto Wehle for appellant.

C. B. Seymour and Anton Kutzleb for appellees.

Appeal from Jefferson Circuit Court, Chancery division.

Opinion of the court by Judge Hazelrigg.

This case is out on a motion by the appellee to dismiss the appeal because the appellant failed to file the transcript within the time provided by law, and on the further motion (the first failing) to affirm as a delay case.

It appears from the transcript before us, and which embraces a part only of the entire record, that upon the rendition of the judgment below the appellant filed a copy of it in the office of the clerk of the Court of Appeals, and was granted an appeal from so much thereof as allowed appellee, as administratrix, $300 as a preferred claim for the fee of her attorney in her suit to settle the estate of her deceased husband.

It appears, as may be stated here, that her husband died intestate, heavily indebted, and leaving no personal estate beyond the statutory exemptions. His real estate was encumbered by a mortgage to the appellant and others for more than its value; hence if the fee of the attorney for the administratrix is to be allowed as a preferred claim its payment falls on the lien holders.

After filing this copy here the appellant, desiring to file a transcript of a part only of the record, filed in the office of the clerk of the inferior court a schedule of such portions as he desired copied and gave notice as required by law (Civil Code, section 737, subsection 7*a*). Thereupon, and within the time fixed by the succeeding subsection of the Code, the appellee, Day, filed in the same office a schedule of such parts of the record as she desired copied.

The clerk appears to have copied and delivered to appellant the transcript which his schedule called for, and this the appellant has filed here within the time allowed. He also copied the parts of the record called for in the schedule of the appellee, but neither party being willing to pay for it, it remains in his office. Hence this motion to dismiss.

Manifestly it was the duty of the clerk below to have made a single transcript of such parts of the record as were called for by the two schedules accompanying it with a single certificate.

Subsection 12, section 737, provides that "at the close of the transcript the clerk shall certify in substance that it contains a true and complete copy of the record, or of such parts thereof as he may have been required to copy, according to the truth, and shall append an index, referring consecutively to the pages on which the copy of each pleading or other separate part of the record commences, and describing briefly the exhibits, if any."

Clearly, by the language "such parts thereof as he may have been required to copy according to the truth," is meant such parts as have been "required" by both parties, if in truth they both required parts of the record. A single transcript is contemplated and a single certificate.

Had this been done the appellant must have paid the cost of the transcript as a whole before obtaining it to file for the purposes of his appeal. In this case, however, we have seen that the appellant in fact obtained a transcript of such parts of the record as he directed to be made, and this partial record apparently is sufficiently complete to present the single legal question involved on the appeal. Whether it is or not the appellant takes the risk. On final hearing if it is thought to be otherwise, the judgment will be affirmed.

To the objection that under this construction an appellee may, by filing his schedule, require the appellant to pay for parts of the record foreign to the issues raised on the appeal, it is sufficient to say that an application to the judge of the court rendering the judgment may be made and a schedule obtained for only necessary parts of the record.

The provision for such a schedule does not seem to have been repealed, subsection 1 of section 737 directing that "the clerk of the court rendering a judgment shall copy the entire record, or parts thereof, according to the directions of the judge of the court or of the parties to the appeal, etc.;" or, if unnecessary parts of the record are copied at the instance of an appellee, he will be liable for the costs resulting therefrom.

We have seen that the appellant is here with a record which is apparently sufficient for the purposes of this appeal. At any rate nothing now appears to the contrary. If other parts of the record are shown to be pertinent, a rule may be awarded. The motion to dismiss is, therefore, overruled,

As the question raised on the merits of the appeal seems not to have been determined heretofore by this court, the motion to affirm as a delay case is likewise overruled.

HOPKINS, &C. V. SWIFT, &C.

(*Filed October* 9, 1896.)

1. *Common schools—Contested election of trustee* The county school superintendent has no authority to determine a contested election for school trustee, and jurisdiction to do so can not be conferred upon him by consent or agreement of the parties interested. The jurisdiction to determine such a contest is in the county board of contest created by section 1534 of the Kentucky Statutes.

2. *Same—Appointment by county superintendent*—When there is a tie vote in a race for school trustee, and that fact is certified to the county superintendent,

there is a vacancy which he may fill by appointment. But as no such state of facts was certified to the county superintendent in this case, and he was mistaken in supposing that there was a tie vote, no vacancy existed and an appointment made by the county superintendent to fill the supposed vacancy was void.

3. Same—In a regular contest the county superintendent may recognize a trustee "among the contestants" until the dispute is settled. But in this case there was no regular contest, and the person appointed was not one of the contestants.

4. Right of voter to change vote after it has been recorded—In cases of *viva voce* voting, as in an election for school trustee, where a vote has been recorded and the voter has left the table and other votes have been cast, the voter can not then have the record of his vote changed upon the ground that by inadvertence or mistake he called the name of a candidate for whom he did not intend to vote.

W. B. Keys and Thomas P. Cook for appellants.

L. C. Linn, jr., for appellee.

Appeal from Calloway Circuit Court.

Opinion of the court by Judge Landes.

On the first Saturday in June, 1895, an election was held in White Common School District No. 34, of the county of Calloway, for the purpose of choosing a trustee for the common school of the district for the term fixed by law.

It appears that due notice of the election had been given; that it was held at the district schoolhouse, and that it was held and conducted in all respects as prescribed by the statute. (Kentucky Statutes, section 4434.)

The appellant, Elias Hopkins, and William Lee, residents of the district and duly qualified, were the only candidates for the office, and at the close of the polls it was ascertained by the judge of the election that 25 votes were cast for the appellant and 23 for the said William Lee, and, the appellant having received a majority of the votes cast, the judges of the election, as required by the statute, issued and gave him a certificate of election, and reported to the county superintendent, in writing, within the time required by the statute, the fact that the appellant was elected.

After receiving the certificate, and in due time, the appellant, Hopkins, qualified by taking the oaths required by law before a justice of the peace of the county, and forwarded to the county superintendent a certificate of his qualification, signed by the justice.

A few days after the election complaint was made to the county superintendent by the appellee, J. H. Swift, who was the chairman of the trustees for the said district, that the appellant, Hopkins, was not lawfully elected, and, at his instance, the county superintendent undertook to investigate the case and to ascertain whether or not the appellant, Hopkins, was properly elected, and entitled to the office.

It is to be observed that William Lee, who was the competitor of Hopkins for the office at the election, made no complaint, and did not propose to contest the election, and did not authorize anyone to contest it for him, and that there was no written notice of contest. Besides, it does not appear from the record that the appellant, Hopkins, was, either in person or by attorney, a party or that he consented to this investigation, although he was present a part of the time during which it was in progress.

But a great many witnesses were examined before the county superintendent, and their testimony related mainly to the vote of one W. L. Clayton, which was cast at the election, recorded on the poll book, and counted for the appellant Hopkins; and this was the basis of the complaint, it being claimed that Clayton's vote ought to have been recorded and counted for Lee instead of for Hopkins. The testimony was in substance that when Clayton offered to vote his name was entered in the poll book by direction of the judge, and, when asked by the judge for whom he wished to vote, his answer was that he would vote for appellant Hopkins, and his vote was accordingly so recorded by the clerk; that he at once left the table where the officers of the election were taking the votes, but remained in the room a few feet from the table, and that two other voters presented themselves, and their votes were given and recorded; that after the lapse of several minutes Clayton went up to the table on which the poll book was lying, and, pointing to the poll book which showed that his vote was recorded for Hopkins, said to the judge that he wanted it changed from Hopkins to Lee, as he intended to vote, and had in fact voted, for the latter and not for the former, and requested the judge to change it, but that the judge refused to change it or permit it to be changed.

Several of the witnesses stated, and the proof seems conclusive, that when asked for whom he would vote, Clayton answered: "Hopkins is a poor man, and I am a poor man, and I will vote for Hopkins."

At the conclusion of the examination of the witnesses the county superintendent decided that the vote of Clayton ought to have been changed by the officers of the election, as requested by him, and that if the change had been made there would have been a tie vote between Hopkins and Lee, and, assuming that there was a vacancy in the office, proceeded at once to appoint and qualify the appellee, T. P. Tarry, to fill the vacancy.

The decision of the county superintendent was made on the 6th day of June, 1895. On the 8th day of July following, in pursuance of a call of appellee Swift, as the chairman of the board of trustees, a meeting of the trustees was held at the district schoolhouse for the purpose of employing a teacher for the district school for the school year. That meeting was attended by appellants Hopkins and T. P. Jones, one of the trustees, and appellees Swift and Tarry, the latter claiming to be a trustee by virtue of the appointment made by the county superintendent to fill the vacancy supposed to exist as above stated.

At that meeting appellants Jones and Hopkins, being a majority of the trustees, if Hopkins was lawfully in office, by written contract employed appellant, Ellen Keys, to teach the school for five months, and appellees Swift and Tarry, who constituted a majority of the trustees, if Tarry was lawfully appointed and in office, by a similar contract employed appellee, M. T. Morris, as the teacher. This being the situation of affairs, the appellants commenced this action in the Calloway Circuit Court, in which they asserted the right of appellant Hopkins to the office of trustee, and the right of appellant, Ellen Keys, under her aforesaid contract, to teach the district school, which rights, they alleged, were being invaded and intruded upon, and of which they were being deprived by the appellees, and praying that the appellees be enjoined and restrained from interfering with them in the exercise of the rights claimed by them in the premises.

Motion was made on notice by the appellants for a temporary in-

junction, issue was joined upon the answer, denying the rights claimed, and setting up the claim of appellee Tarry to be the lawful trustee under the appointment made by the county superintendent, and the claim of appellee Morris to have a valid contract to teach the district school upon the facts detailed above, and the case was submitted to the court and heard upon oral testimony.

Upon the hearing the lower court adjudged in substance that the officers of the election had the lawful right and ought to have changed the vote of Clayton from Hopkins to Lee, and that "said change would have resulted in a tie, and thereby caused a vacancy;" and, further, that the county superintendent had the lawful right to appoint a trustee for the district, "as the officers of said election failed to cast the deciding vote;" and that the appointment of appellee Tarry as trustee by the county superintendent, and his acts as trustee under the said appointment, were valid. The injunction prayed for was accordingly denied and the petition dismissed, and that judgment is before us on this appeal.

The facts brought out in the testimony given on the trial of the case in the court below, relative to the vote of Clayton at the election for trustee, was substantially as above stated, and, as it appears from the record, do not differ materially from the facts detailed by the witnesses in the hearing of the case before the county superintendent, and, after a careful investigation of the case as it is presented in the record before us, we have not been able to find that the judgment appealed from has anything, either in the facts or the law, to sustain it.

It appears that the statute regulating such election was literally complied with, and that, upon the votes as cast and recorded, the appellant Hopkins received a majority of the votes.

It further appears that he received a certificate of his election in due form, and that he qualified by taking the oath required, and entered upon the discharge of his duties as trustee. He thus became an officer in fact, with all of the evidence of his right to the office that was required by the law, and could not be deprived of his right except in the manner prescribed by law.

The only method of contesting such elections is that provided by sections 1534 and 1535 of the Kentucky Statutes, which provide a board for determining the contested election of any officer elective by the voters of a county "or any district therein, except members of the General Assembly," and prescribe the steps or method of procedure. This board is known as the county board of contest, and has jurisdiction in respect of common school districts as well as of other districts in a county.

There is no statute under which a county superintendent has the authority to determine any such contest, and jurisdiction to determine a contested election of a district trustee can not be conferred by consent or agreement of the parties interested. So that in this case it is immaterial whether the appellant, Hopkins, and his defeated competitor, Lee, were before the county superintendent or whether they were parties to the proceeding before him, or whether they consented that he might determine the question of the right of Hopkins to the office or not. In either case and in any event the county superintendent was without jurisdiction or authority over the question, and the proceedings before him and his finding, or so-called "judgment," were void and of no force whatever in law. There was no vacancy in the office of trustee which he was empowered to fill. A vacancy in office is defined by the statute to be "such as exists where there is an unexpired part of a term of office without

a lawful incumbent therein, or when the person elected or appointed to an office fails to qualify according to law, or where there has been no election to fill the office at the time appointed by law. It applies whether the vacancy is occasioned by death, resignation, removal from the State, county or district, or otherwise." (Kentucky Statutes, section 1521.) If there had been a tie vote between appellant, Hopkins, and his competitor, Lee, and it had been so certified to the county superintendent, then, under section 4434, as well as under the section quoted from, there would have been a vacancy which the county superintendent could have filled by appointment. If there had been a regular contest, the county superintendent was "empowered to recognize a trustee *among the contestants*" until the dispute was settled. (Kentucky Statutes, section 4436.) So that none of the conditions existed upon which, under the different provisions of the statute, a vacancy existed at the time he appointed the appellee, Tarry, as trustee, and the appointment was, therefore, without authority and void, and conferred no lawful authority upon Tarry to act in the office of trustee, which, as we have seen, was held and filled by the appellant, Hopkins, who was in possession of the requisite evidence showing his right to it.

But if the county superintendent had the power and authority, under the statute, to determine the question as to the right of the appellant, Hopkins, to the office in question, and if the case was properly before him for adjudication, the ground upon which he ascertained and adjudged that Hopkins was not elected and that there was a vacancy in the office was not such as would have authorized such a judgment. For, when Clayton cast his vote for Hopkins and it was so recorded, and after he left the table where his vote was taken and other votes were cast and recorded after he voted, as was the case here, he had no right to have his vote changed from Hopkins to Lee, even though he intended to vote for Lee in the first place and by mistake or inadvertence called it out for Hopkins instead of Lee, and it would not have been proper for the officers of the election to change his vote as they were requested by him to do. Counsel have referred to no authority for changing the vote under the circumstances named, and, so far as we are advised, the precise question has never been directly before this court.

Cases have arisen where the right to change a vote that has been cast and recorded has been based upon the alleged fraud or mistake of the officers of the election, and this court has held that, where fraud or mistake on the part of the officers of election in the record of the vote was clearly established, it should be changed to conform to the intention of the voter. The principles upon which this court has acted in cases of this class are well illustrated in the cases of Newcum v. Kirtley, 13 B. Mon., 515; Anderson v. Winfree, 85 Ky., 597; Cowan v. Brown, 93 Ky., 156.

In the case of Anderson v. Winfree it was held that, in the case of *viva voce* voting, if it can be made to appear by the evidence, without doubt, that the vote of a person, cast for one candidate, *was, by mistake of the clerk*, recorded for another, the vote ought to be changed to accord with the intention of the voter. And in Cowan v. Brown the court said: "Though the evidence in such case may be entirely satisfactory that a mistake was made, it does not necessarily follow it was committed by the clerk, for the voter may himself have inadvertently called or presented to the officer of election the name of the candidate he did not really intend to vote for, and, if so, the record ought not to be changed."

This is the correct principle in cases of this kind, and applies

directly to this case, conceding the fact to be that Clayton did intend to vote for Lee, but, by his own mistake or inadvertence, called the name of Hopkins as the candidate he wished to vote for. Any other rule would be likely to produce confusion and uncertainty in all elections of the kind.

We do not think that it would be proper for us here to pass upon any question arising upon the claims of the persons who were employed to teach the school in district No. 34, arising upon their several contracts, which may be the subject of future litigation.

But, for the reasons given, the judgment of the court below is reversed and the cause remanded, with directions that a judgment be entered declaring the right of the appellant, Hopkins, to the office of trustee in common school district No. 34, of Calloway county, and enjoining the appellees and each of them from interfering with him in the discharge of his duties as such trustee, and also enjoining appellee, Tarry, from exercising or attempting to exercise the duties of trustee in said district, and for further proceedings consistent with this opinion.

GRAY V. OVERBY, &C.

(*Filed October* 10, 1896—*Not to be reported.*)

Turnpike roads—Personal liability of officers of company to contractor. - Judgment having been rendered against a turnpike road company in favor of a contractor for balahce due him upon contract price for the construction of the road, the officers of the company, who were directed by the judgment to pay to plaintiff in satisfaction thereof all subscription money, are personally liable to him for the amount of subscriptions which they subsequently collected and applied to the payment of attorneys' fees and other purposes. And it was the duty of the attorney for the company, with notice of the direction in the judgment, to pay to plaintiff a subscription collected by him, after deducting the costs of making the particular collection; and having retained the amount upon his general account against the company for legal services, the plaintiff is entitled to judgment against him therefor.

W. G. Dearing for appellant.

Appeal from Fleming Circuit Court.

Opinion of the court by Judge Lewis.

In 1883 the Crainstown and Elizaville Turnpike Company made a contract with John Gray for the construction of its road at the price of $5,500, to be paid for in subscription by the county of Fleming, where the road is, and by individual subscription. He complied fully with his contract, but the company failed to pay him fully the price agreed upon. And he thereupon instituted an action for recovery of the balance due, in which there was, at the November term, 1886, of the court, a judgment rendered in his favor for $2,132.40, to be, however, credited by $1,000 in the hands of the sheriff and $500 in the hands of appellee Hern, treasurer of the company, directed paid to him. There was still a balance due of about $584, for which an execution was issued April 14, 1891, but returned "no property found."

It appears that one J. C. Hurst had made a subscription towards building the road of $250, to be paid, however, in work. But, failing to do the work, an action was instituted by the company against

him which was, June 1, 1886, compromised and judgment rendered in favor of the company for $210.

In addition to that sum the treasurer had collected from subscribers and had in his hands the sum of $133.

It appears that, instead of paying over to Gray the proceeds of amount collected of J. C. Hurst, in pursuance of the judgment against him, the president and directors of the company permitted its attorney, G. A. Cassidy, to apply the amount to pay his fees against the company and to pay costs as well in the action instituted by Gray against the company as in its action against Hurst.

This action was instituted by Gray, April 15, 1891, against Overby and others, president and directors, J. M. Hern, treasurer, and G. A. Cassidy to recover of them indidually the two sums mentioned.

By the judgment of December, 1886, in the suit of Gray against the Crainstown and Elizaville Turnpike Company its officers were expressly directed and required to pay over to plaintiff all subscription money, and they might have been compelled by rule, if one had been applied for, to pay into court for his benefit, not only the sum of $— then in the hands of Hern, treasurer, but also the sum of $210, less the amount of Cassidy's fee and costs of that particular action.

The rights of parties to that action being thus adjudicated and determined, we do not see why the officers of the company, who have been not only derelict in discharge of their trust, but also disregarded the judgment of court, may not be in this action held individually liable. Cassidy, as attorney, brought the action for the company against Hurst and also defended the action of Gray against it. He was, therefore, cognizant of the duties devolved, by judgment of court, upon his client, and having, as its agent, collected the judgment against Hurst, it was his duty, as their attorney as well as an officer of the court, to do with the money collected what the court had directed they should do with it—that is pay it to Gray.

It seems to us Gray has a cause of action against the officers of that company for both sums, less fees and costs in the suit of the company against Hurst, and also against Cassidy for that part of the sum of $210 which, as indicated, ought to have been paid to Gray.

The judgment dismissing the action is reversed and cause remanded for further proceedings consistent with this opinion.

EXCHANGE BANK OF KENTUCKY V. GAITSKILL, &C.

(*Filed October* 10, 1896—*Not to be reported.*)

Deceit in sale of bank stock—Damages.—In this action against a bank to recover damages on account of a false statement published by the officers of the bank as to its condition, whereby plaintiff was induced to purchase from another certain shares of the bank, the petition, alleging that the officers knew the statement to be false when they published it, stated a cause of action, and the court properly instructed the jury that the measure of damages was the difference between the value of the stock if the statement had been true and its actual value at the time of the purchase.

A. B. White and Tyler & Apperson for appellant.

A. T. Wood & Son for appellees.

Appeal from Montgomery Circuit Court.

Opinion of the court by Judge Guffy.

It is substantially alleged in the first paragraph of the petition in this case that the plaintiff, Maggie A. Gaitskill, through her husband and agent, did on February 20, 1884, purchase of the appellant, the Exchange Bank of Kentucky, three shares of the par value of $100 each of the capital stock of said bank at the agreed price of $120 per share, and accrued interest on same from January 1, 1884, amounting to $4.27, and amounting in all to $364.27; that at the time of the purchase of said stock W. W. Thompson was the cashier of said bank and the agent to sell said stock, and that he represented that said bank was declaring a dividend of 5 per cent. semi-annually on its capital stock, and that it had accumulated a surplus of $1,500, and that its assets were good and solvent, and that if its affairs were wound up it would pay to each stockholder $120 per share, and that appellee relied on said statement of Thompson in purchasing the stock, which statement was false and untrue, and was known by Thompson and the officers of said bank to be false and untrue to the extent of more than $50,000.

It is further alleged that on the 31st day of December, 1883, said bank published a statement in card form of its condition, which statement was false to the extent of more than $50,000. Averments were also made showing in what respect the statements were false, and charging that the shares were not worth more than $30 each, and that the bank officers and Thompson knew that the statements were false, and that it was their duty to know the condition of the bank.

In the second paragraph of the petition it is substantially alleged that the female plaintiff, through the agency aforesaid, on the 1st day of June, 1886, purchased of D. S. Lockridge ten shares of the capital stock of said bank at the agreed price of $120 per share, with accrued interest from 1st day of January, 1886, to June 1, 1886, amounting to $30, making a total of $1,230 paid to said Lockridge; that on the — day of January, 1886, the said bank caused to be published in the *Sentinel Democrat* and also in card form the condition of said bank at the close of business December 31, 1885, showing the resources of the bank to be $228,420.89, giving the items thereof.

It is alleged that in the purchase of said stock from Lockridge plaintiff relied on said report as being true and purchased on the full faith that said report gave a true statement of the condition of the bank, and that said report was false and untrue to the amount of over $50,000. The petition then goes on to show in what respect the statement was untrue, and asks judgment for $900. A demurrer to the second paragraph of the petition was filed and overruled. The answer may be considered a traverse of the material allegations of the petition except as to the publication of 1886. Appellant also pleaded the statute of limitation. At the conclusion of the testimony the court, on motion of appellant, instructed the jury that they could not find anything for plaintiff on account of the sale made to them by Thompson. Appellant also asked for a peremptory instruction to the jury to find for the defendant, which was refused. A trial resulted in a verdict and judgment for plaintiff for $430, and defendant's motion for a new trial having been overruled it has appealed. The plaintiff also prosecutes a cross appeal. The defendant complains of the instruction given, and also complains of the refusal of the court to give those asked for by it, and also claims that the court erred in the admission and rejection of testimony.

The instructions given are in substance that if the jury believe

from the evidence that the published statement of the bank in January, 1886, was relied on by plaintiff in making the purchase of the ten shares of stock, and that the statement was false in a material degree and so continued until June 1, 1886, then the jury should find for plaintiff, and that the measure of damages is the difference in value of the stock, if said statement had been true, and its actual value at the time of purchase.

It seems to us that the whole law of the case was correctly given by the court, hence it was not error to refuse the instruction offered by appellant. The rulings of the court in respect to the admission and rejection of testimony are not erroneous. The instruction given that the jury could not find for plaintiff any damage on account of the purchase made from Thompson under the proof in this case was properly given.

Perceiving no error to the prejudice of the substantial rights of either plaintiffs or defendant, the judgment of the court below is affirmed on the original and on the cross appeal.

DOTSON V. STRATTON, &C.

(*Filed October* 10, 1896—*Not to be reported.*)

1. *School trustee—Failure to file certificate of qualification—Forfeiture of office*—The failure of one who has been elected school trustee to return the certificate of his qualification to the county superintendent within the time required by section 4436 of the Kentucky Statutes does not work a forfeiture of his office. While the county superintendent is authorized to declare the office vacant for such failure, yet he may still recognize the trustee as such if he has in fact taken the oath, and, if he does so, no vacancy exists.

2. *Same*—Even if the failure to return the certificate worked a forfeiture the predecessor of the trustee, who had thus forfeited his office, would have no authority to act unless appointed by the county superintendent to fill the vacancy.

W. S. Harkins for appellant.

James Gobel for appellees.

Appeal from Floyd Circuit Court.

Opinion of the court by Judge Guffy.

The appellant, Lelia Dotson, instituted suit in the Floyd Circuit Court against the appellees, Hiram Stratton, Wm. Courtney and Edward Harris.

The substance of the allegations of the petition is that appellant was legally employed by M. S. Layne and C. W. Smith to teach the common school in district 49 in Floyd county, and that appellees, Courtney and Stratton, are claiming to have employed Harris to teach the school, and that they are interfering, or likely to do so, with her in her occupation, and she sought to have them perpetually enjoined from so doing, and also asked and obtained a temporary injunction. The appellees demurred, and also answered and denied the material averments of the petition, and upon final hearing the court dissolved the injunction and dismissed the petition, holding that appellant had no cause of action, and appellant asks a reversal of the judgment.

The principal issue involved in the case was as to whether or not

Smith was a trustee at the time that he and Layne employed appellant to teach the school.

The principal facts disclosed by the record are in substance that Smith had been trustee prior to June, 1894, and that at the June election Stratton was duly elected, obtained his certificate and was sworn in as trustee by a notary public, but failed to send a certificate of that fact to the county superintendent before the 4th day of July, 1894. At or about that time Smith informed the county superintendent that Stratton refused to act as trustee. The superintendent then gave to Smith a certificate, which in substance showed that he should be trustee unless Stratton within a specified time satisfied him that the certificate had been sent before a certain date. Stratton appeared before the county superintendent and made his excuse for failure to send the certificate. Thereupon the superintendent notified Smith that the appointment or writing given to him was null and void, and thereupon the superintendent recognized Stratton as the trustee, this being about the 6th day of July. Layne, Courtney and Stratton, it is claimed, had one meeting for the purpose of selecting a teacher but did not employ one. Afterwards Courtney and Stratton employed Harris, and gave notice that the school would commence at a certain time, but before that day, viz, the 12th day of July, Layne and Smith employed appellant to teach the school and she proceeded to commence that day. Soon after this the county superintendent notified Smith to appear before him to show cause why he was claiming to exercise the office of trustee. Smith appeared, a trial was had and the superintendent held that Smith had no authority to act as trustee, and that he had none at the time appellant was employed. An appeal was taken to the State superintendent of public instruction, who affirmed the decision of the county superintendent.

It is not seriously contended that the paper given to Smith July 5 1894, invested him with the office of trustee, but appellant contends that by reason of Stratton's having failed to qualify as required by law Smith was still the lawful trustee under the law providing that he should hold until his successor was elected and qualified.

In this case, however, there is no question but what his successor was elected and took the oaths of office (at least the latter seems to have been proven and the former is not questioned), but it seems that the certificate of the oath was not sent to the superindendent as required by law, but in such cases section 4436, Kentucky Statutes, seems to authorize the superintendent to declare the office vacant, or he can still recognize the trustee as such if he has in fact taken the oath, and it seems clear that the superintendent did so recognize Stratton, and that Smith was notified of that fact before the attempted employment of the appellant, and that decision was affirmed by the superintendent of public instruction as before stated. If it was true that Stratton had forfeited his office by failure to return the certificate as required by section 4414 of Kentucky Statutes the result would be that the office would be vacant, but the section *supra* does not say that upon failure to return the certificate that the party forfeits his office or that it becomes vacant, but even if the office was vacant Smith could not legally act as trustee unless he had been appointed by the county superintendent, which was not done. It is not necessary to decide any other question presented by counsel.

For the reasons indicated the judgment of the court below is affirmed.

GERNERT BROS. LUMBER CO. v. RAPIER & CO.

(*Filed October* 14, 1896—*Not to be reported.*)

1. *Response to rule Failure to reply Burden of proof* Upon a report filed by a receiver showing a balance due by appellant upon lumber purchased by it from the receiver, the report setting out the written contract under which the purchase was made, the court having awarded a rule against appellant to show cause, if any it could, why it should not pay into court the alleged balance, and appellant having responded, setting up a change of contract by which a different place of delivery was agreed upon and a different mode of measuring and culling the timber, and alleging that it had paid for all the lumber received under the contract, the court properly held that the burden was upon appellant; and even if a reply was necessary, the appellant having objected to appellee's offer to file a reply can not now complain that none was filed.

2. *Same* In the absence of the evidence heard the court must presume that it authorized the judgment rendered.

George S. Fulton and E. E. McKay for appellant.

C. T. Atkinson for appellees.

Appeal from Nelson Circuit Court.

Opinion of the court by Judge Guffy.

This appeal is prosecuted by Gernert Bros. Lumber Co. from a judgment rendered by the Nelson Circuit Court.

It appears that John A. Fulton was by said court appointed a receiver to take charge of the assets of the firm of T. H. Ellis, agent, and authorized to dispose of and manage the same, and in the discharge of that trust he sold a large lot of lumber to appellant, and his report to court reported the same and filed the written contract, showing the places of delivery, price, etc., and his report also showed appellant owed a balance of $180.80. Thereupon a rule was issued against appellant to show cause, if any it could, why it should not pay said sum into court.

Appellant appeared and pleaded, and set out an additional or change of contract, by which a different place of delivery was agreed upon, a different manner of measuring and culling the lumber, and that they had complied with the contract and paid for all the lumber received.

Plaintiff offered to file a reply, but appellant objected, and the court refused to permit it to be filed, holding that it was unnecessary; that the burden was on appellant, and the cause was submitted and evidence and argument heard, and the court adjudged the response insufficient and not sustained by the evidence, and adjudged that appellant pay said sum into court by the 18th day of the term of court then in session. From that judgment this appeal is prosecuted.

The question of the jurisdiction of the court to hear and determine the controversy in the manner presented need not be determined upon this appeal for the reason that that question was not made in the court below, nor, do we think that the court erred in holding that the burden of proof was upon appellant, and if a reply was necessary the plaintiff had offered to file it, and manifestly the refusal of the court to allow it to be filed was not because it was not verified.

There is no bill of exceptions or transcript of the evidence heard before us. It therefore follows that this court must presume that the evidence heard fully authorized the judgment rendered, which judgment is affirmed.

GERMAN-AMERICAN INSURANCE CO. V. NORRIS, &C.

(*Filed October* 14, 1896.)

1. *Fire insurance -Failure to furnish certificate of loss* -Under a policy of fire insurance which provides that the insured shall, if required, furnish a certificate of the nearest magistrate or notary public as to the loss, the failure to furnish the certificate when required is not a bar to a recovery on the policy. Besides, the required certificate was furnished in the case before the trial.

2. *Concealment of attempted burning* -The failure of the insured to disclose the fact that there had been an attempt to burn the insured property does not authorize a forfeiture of the policy unless he was asked about that matter. Besides, the agent of the company was aware of the attempted burning, and notice to him was notice to the company.

3. *Denial of liabilty of company*--If the general agent of the company denied the debt and refused to pay, as the jury was authorized to find from the evidence, the insured was not required to furnish proofs of loss.

B. F. Buckner for appellant.

Bullitt & Shield for appellees.

Appeal from Jefferson Circuit Court, Common Pleas division.

Opinion of the court by Judge Guffy.

This appeal is prosecuted from a judgment of the Jefferson Circuit Court, Common Pleas division, rendered in the suit of M. T. Norris, &c., against the appellant, German-American Insurance Co. The suit was to recover $2,500, the amount of a policy issued by the appellant to appellee, Mary V. Norris, on a house then being built in Warwick Villa, Jefferson county, and which was destroyed by fire in December, 1892. The appellant resisted a recovery on five different grounds:

1st. That the amount of the loss was not $2,500.

2d. That the appellee had not furnished the appellant with the proofs of loss required by the policy.

3d. That it had required a certificate of the nearest magistrate, to the effect that he had investigated the circumstances and believed that the appellees had honestly sustained the loss claimed, and that the certificate has not been furnished, and made like complaint of appellees' failure to furnish bills, items and specifications, etc., of the building as required by the policy and demanded by appellant.

4th. That there had been an attempt by some one to burn the property insured before the policy was issued, which fact was not communicated to appellant.

Appellees' contention in substance is that the appellant denied their claim, hence they were not required by law to furnish anything, but that they did in fact give the notice, furnish the proofs, bills, specifications, etc., required by the policy, and that the same was accepted as sufficient, and that they furnished the magistrate's certificate as soon as it could be obtained, and that it was furnished before the institution of the suit of appellees' assignees (who were the real owners of the policy) had been instituted. They also claim that the agent of appellant knew of the burning that had happened, and that it was not known that anyone had set fire to the building or attempted to do so.

The policy contains, among other things, the following: "Within sixty days after the fire, unless such time is extended in writing by this company, the insured shall render a statement to this company,

signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all encumbrances thereon; and shall furnish, if required, verified plans and specifications of any building, fixtures or machinery destroyed or damaged; and shall also, if required, furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify."

The policy also provides that it should be void if the insured has concealed or misrepresented any material facts or circumstances concerning the insurance or the subject thereof.

We think that it clearly appears that notice of the loss and the proofs were furnished as required by the policy, and the bills and specifications of material, etc., were also furnished or well known to the appellant.

Appellant insists very earnestly that the failure to furnish the certificate of the magistrate when required is a bar to appellees' right to recover, but we do not think that the policy, when fairly read and construed, constitutes a bar to recovery. It could not be used as evidence against the appellant, and, as there is no law by which the insured could compel a magistrate to act in the matter, it is not reasonable that parties would undertake to procure the certificate of an officer when there was no law by which he could be required to certify at all.

Such a requirement should not be enforced. It could be of no real benefit to appellant, but only an inconvenience to the appellee; but the required certificate was furnished in this case before the trial, and before the filing of the suit of appellees' assignees which suit was consolidated with this suit.

It is also contended that the policy is void by reason of the concealment of the attempt to burn the building, known to appellees and not communicated to appellant. We do not think that any attempt to burn the house has been sufficiently shown to authorize a forfeiture of the policy, nor are we inclined to hold that it was the duty of appellees to disclose such an attempt unless asked about it; and, besides, it is quite reasonable to suppose, from the facts and circumstances proven in the case, that Holland was well aware of all the facts and circumstances in regard to the burning or attempted burning, and whatever may be said as to the extent of his agency, it is clear that notice to him was in law notice to appellant. Holland was the man who really made the trade with appellees delivered the policy and collected the premium and was in the habit of doing such business for the company. His name was endorsed on the policy.

It is in proof that Strong, a confessed agent of the appellant company, looked at the proof and said it would do. It is true he denied so stating. It is also in proof that Thomas, the general and supreme agent for Kentucky and Tennessee, in substance denied the debt and refused to pay; and, if that be true, appellees were not required to furnish proof or other papers; and it was for the jury to determine as to the truth of the conflicting statements of the witnesses.

Appellant also complains of the failure of the court to give instructions asked, including a peremptory instruction to find for defendant, and also insists that those given by the court are erroneous.

The instructions given are as follows:

"No. 1. The court instructs the jury that they should find for the plaintiffs in the sum of $2,500, with interest from the 7th day of April, 1893, unless they shall believe from the evidence that the defendant did not, within sixty days after the loss complained of in the petition, deny liability under the policy sued on, and that the plaintiffs failed, within sixty days after the loss, to furnish to the defendant, or to its agents, sufficient proofs of said loss, or that an attempt had been made to burn the house in question before the policy sued on was issued, and that this fact was unknown to the agent of the defendant when he solicited plaintiffs to insure; and that plaintiffs, or either of them, concealed that fact from said agent for the purpose of obtaining insurance.

"No. 2. But if they shall believe from the evidence that, within sixty days after the loss complained of, the defendant denied that it was liable under the policy sued on, then it was not necessary for the plaintiffs to furnish the defendant with proofs of loss.

"No. 3. If the plaintiffs did not, within sixty days after the said loss, furnish to the defendant sufficient proof thereof, then the law is for the defendant, and so the jury should find, unless the defendant demanded other and further proof that it was within the power of plaintiffs to furnish and plaintiffs did furnish the further proof demanded within a reasonable time after the same was demanded.

"No. 4. If the jury shall believe from the evidence that an attempt was made to burn the house in question before the policy of insurance sued on herein was issued, and that plaintiffs knew thereof, and that the agent of the defendant, who solicited the insurance (Holland), did not know of the said attempt when the policy was issued, and the plaintiffs concealed that fact from him for the purpose of obtaining insurance, then the law is for the defendant, and so the jury should find."

It seems to us that the foregoing instructions are as favorable to appellant as it was entitled to, and that those asked for by it were properly refused, nor do we think that the court erred in the admission or rejection of testimony.

It may be that some courts of last resort have announced some rules of law not exactly in accord with this opinion, but this decision is in accord with the former decisions of this court and is supported by reason and by the fundamental principles of equity. (Howard Ins. Co. v. Owens' adm'r, &c., 14 R., 881; Phœnix Ins. Co. v. Speers, &c., 87 Ky., 285; Kenton Ins. Co. v. Wigginton, 89 Ky., 330; Same v. Downs, &c., 90 Ky., 230.)

It may be remarked in passing that it nowhere appears that appellant was in any respect injured or damaged by any of the alleged failures of appellees to furnish any of the proofs, certificate, bills or specifications complained of, and it was the province of the jury to weigh the testimony and render a verdict accordingly; and, no erroneous ruling of the court to the prejudice of appellant's substantial rights having occurred, the judgment of the court below must be affirmed.

MILLER'S GD'N V. MILLER'S TRUSTEE.

(*Filed October* 14, 1896.)

Construction of devise—Where a testator devised land to his two sons for life, remainder to their children, and provided that a legacy to his daughter

should be a charge upon "the property" devised to his sons, and that the "devise" to one of the sons should be subject to a charge for a certain sum in favor of the other, declaring in another part of the will that it was made a charge on "his land," these sums were a lien upon the property itself, and not merely upon the life estate of the sons.

C. H. Breck for appellant.

J. A. Sullivan for appellee.

Appeal from Madison Circuit Court.

Opinion of the court by Judge Guffy.

This appeal is prosecuted to reverse the judgment of the Madison Circuit Court, rendered in the consolidated actions of appellee Parkes, trustee of M. M. Miller, and R. W. Miller, trustee of Jno. C. Miller, against the appellants and others.

It appears that M. M. Miller and John C. Miller had made assignments to the said trustees for the benefit of creditors, and the suits were brought for settlement of the trusts. M. Malcolm Miller, the father of the said M. M. and John C. Miller and of Mrs. Lackey, had by his will devised two tracts of land, one each to the sons for life, with remainder to their children, and also devised $3,015 to his daughter, Mrs. Lackey, and provided that if the undivided part of his estate was not sufficient to pay said $3,015 that it should be a charge upon the property devised to the sons. He also bequeathed to his son, Jno. C. Miller, $537.85, which M. M. Miller was required to pay, and the same was made a charge upon the land devised to him. The two sons were made trustees of Mrs. Lackey. M. M. Miller alone qualified as trustee.

The court below adjudged that the devisees had a lien on the lands aforesaid for the payment of the said sums of money so devised as aforesaid, and adjudged a sale of enough of the fee simple title of the land to pay same, and the sale has been made. The lands were rented out for a term by the trustees aforesaid and about $2,000 realized therefrom.

The contention of appellant is that only the life estate of the devisees in the land devised was subject to sale to satisfy the cash devises aforesaid, and that the rents aforesaid should be first applied to the payment of the lien claims aforesaid.

It is not claimed that any of the personal property willed to the sons is now on hand. The correctness of the judgment of the court below depends upon the intent of the testator, and that intent must be gathered from the will. The material parts of the will are as follows:

"2d. I have heretofore advanced to my daughter, Virginia M. Lackey, in cash, the sum of fourteen hundred and eighty-five dollars ($1,485), and I have purchased for her use and comfort a house and lot, situated on Sixth street in Lexington, which she has used since the 2d day of May, 1874, at the price of thirty-five hundred dollars ($3,500). The title to this property is still in my name, and I make this disposition of same. I hereby devise that property, with all the rights belonging to same, and fifty shares of the capital stock of the Farmers National Bank of Richmond, Kentucky, and an additional sum of three thousand and fifteen dollars ($3,015) to my two sons, Malcolm M. Miller and John C. Miller, in trust, upon the following terms and conditions, and for the following purposes: The said M. M. and J. C. Miller shall attend to said property, keep it

safe and productive, and shall pay over the amount net rents and profits of same to Virginia M. Lackey during her natural life for her support and maintenance, and at her death they will turn over same to her children then living, and to the descendants of those who are dead, if any such survive her; but in the event of her death without leaving issue surviving her, or in the event of the death of herself and children without issue, then said property shall revert to my sons, Malcolm M. and John C. Miller, equally, and to their descendants, if they shall die leaving issue before that time. If John C. Miller should die before that time without issue his portion shall descend and belong to Malcom M. Miller and his children equally. * * * I authorize the said trustees, at any time they think proper, with the consent of the beneficiary, Virginia M. Lackey, to change the investment of this property into other property, to be held under similar trusts and conditions, and in the event of their falure or refusal to accept this trust then I request the judge of the Madison Circuit Court to appoint a trustee in their place, requiring bond for the faithful performance of this duty. Should the residue of my estate be insufficient to fully pay up the three thousand and fifteen dollars ($3,015), devised in this paragraph to Virginia M. Lackey, then I make the payment of same a charge upon the property hereinafter devised to Malcom M. and J. C. Miller.

"3rd. I hereby devise to my son, Malcom M. Miller, during his natural life, the following portion of my farm, situated in Madison county, Kentucky, upon which I now reside, all of which is situated on the west side of Hart's Fork Creek, and upon which is situated the dwellinghouse and other building. Said lot is bounded as follows:

* * * * * * * * * * *

"This devise to M. M. Miller is made subject to a charge for the sum of five hundred and thirty-seven dollars and eighty-five cents ($537.85) in favor of John C. Miller, said sum being to equalize said John C. Miller with Malcom M. Miller, and same shall be due and payable one year after the probation of this will, although I have only given to M. M. Miller a life estate in the property, yet I give him the right and power to sell and convey same upon the expressed condition that the proceeds shall be invested in other good property to be held under the same limitation and condition, and I also empower said Malcom M. Miller to dispose of same to his children by last will and testament in unequal portions, if he shall so desire, but in the event of his failure to do so then at his death said property shall descend and belong to his legal heirs in equal portions.

"4th. I hereby devise to my son, John C. Miller, during his natural life, the residue of my tract of land upon which I now reside, containing three hundred and sixty (360) acres, more or less, as follows:

* * * * * * * * * * *

"Said John C. Miller is to have the right and power to sell and convey said property, provided the proceeds are invested in other good property under the same limitation as this, and he shall, in the event of his marriage and having children, have the same power of disposition of same by last will and testament as is given M. M. Miller over the piece devised to him herein; but in the event of the failure of John C. Miller to marry and have children capable of inheriting, then in that event at his death I devise the three hundred and sixty (360) acres of land as follows: One-fourth of same shall de-

scend and belong to my grandson, Wm. M. Miller, jr., son of M. M. Miller, in fee simple, and the remainder three-fourths (¾) shall go to my son, M. M. Miller, and my daughter, Virginia M. Lackey, in equal parts, or to their descendants if either are dead. In the event that either Malcom or Virginia are dead without leaving issue then the whole shall go to the other or his or her children.

"I also devise to John C. Miller five hundred and thirty-seven dollars and eighty-five cents ($537.85) to be paid by Malcom M. Miller, and which I have made a charge on his land.

"5th. I devise to Malcom M. Miller and John C. Miller all the farming utensils and horse and mule stock I may own at my death.

"6th. All the residue of my estate, after the payment of my debts, funeral expenses and cost of administrator, I direct to be equally divided between Virginia, Malcom and John C. Miller, and finally I appoint my son, Malcom M. Miller, executor of this will, and in the event that he needs legal advice in attending to his duties under same I request that he shall consult with friends and attorneys, C. F. & A. R. Burnam, in regard to same.

"Witness my signature this 3d day of November, 1834.

"WM. MALCOM MILLER."

It will be observed that the testator uses the word "property" all the time, and it seems clear that he referred to the real estate when using that term. It will also be seen that he was very precise in making the devises, and particular to make the children equal, or at least make the devises certain. If he had intended that the charges should only be upon the life estate of the sons he would doubtless have so expressed it. Moreover it is not reasonable that he would be more solicitous to preserve the property for his grandchildren than for his own sons. We think it clear that the testator intended to and did give a lien for these devises upon the fee simple title to the lands referred to, and it is a familiar rule of equity that, if A has a lien on two funds and B a lien on one only, as a general rule A will be required to look first to the one that is not in lien to B. The judgment of the court below was quite as favorable to appellants as they were entitled to; nor do we see how appellants could have any claim to the rents derived from the life estate.

Judgment affirmed.

GILBERT V. MOODY & CO.

(*Filed October* 17, 1896—*Not to be reported.*)

Appeal from Knox Circuit Court.

The motion to affirm as a delay case is sustained so far as appellees, Moody & Co., are concerned. However, the judgment appealed from is void so far as it awards damages to John A. Black, as there was no supersedeas as to him on the former appeal.

BOARD OF COUNCILMEN OF CITY OF FRANKFORT V. MASON & FOARD CO.

(*Filed October* 17, 1896.)

1. The capital of a resident corporation is taxable for city purposes, whether or not it is "employed" in the city.

2. Taxation—Pleading—In this action by appellee against appellants to enjoin the collection of taxes the denial by plaintiff in its reply that it "had in the city and subject to taxation the property in the answer mentioned" is not a denial that it owned the property in question, but is merely a denial that it was subject to taxation, which is but a legal conclusion, and, therefore, not good.

3. Assessment of omitted property—Limitation At the time of the enactment of the charter for cities of the third class the owner of property in a city of that class which had theretofore been omitted from assessment, whether by mistake or design, was liable for the taxes thereon, notwithstanding the omission to assess, and, the liability being a subsisting one, was continued by the provision of the charter that all such liabilities should be enforced and the remedies therefor preserved; therefore, the right of a city of the third class to assess such omitted property is not affected by the provisions of the Kentucky Statutes limiting to five years the right to assess omitted property.

4. Same—Burden of proof—In an action to enjoin the collection of taxes the burden is on the plaintiff to show that the property was improperly assessed or that it is not liable for the taxes in question.

Hugh Rodman and W. H. Julian for appellant.

T. L. Edelen for appellees.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Paynter.

This is a proceeding by Mason & Foard Co. to enjoin the board of councilmen of the city of Frankfort from the collection of taxes which the city claims to be due it for the years of 1886, 1887 and 1888.

It is averred by Mason & Foard Co. that it "did list for taxation in each of said years its property and capital *employed* in said city, as herein set out, at its fair cash value, and for each of said years paid the levies made by the defendant city; * * * that the defendants, notwithstanding the facts herein stated, have conspired, confederated and combined, without law or right and against the charter of cities of the third class, to increase the valuation of this plaintiff's property for each of the years 1886, 1887 and 1888, and to collect taxes on such *increased* valuation to the amount of $1,675; that defendants have made what they claim is a new assessment for each of the years 1886, 1887 and 1888."

The answer, among other things, avers that the Mason & Foard Co. is a corporation, with its principal office in the city of Frankfort; that it was only assessed for taxation for the years 1886, 1887 and 1888 on some horses, mules and vehicles, of the value of about $500; that the assessment on which the city was seeking to collect tax for the years named was on property as follows, to wit: 1886, manufactured articles, raw material, machinery, of the value of $50,000; 1887, the same character of property of the value of $45,000; and 1888, like property of the value of $45,000, the value being of the date when the assessment should have been made; that none of the property was assessed for the years named; that no tax has been paid thereon for those years; that in the latter part of 1894, upon the re-

port of the tax collector of the city of Frankfort that the property in question had not been assessed for the years named, the common council of the city referred the matter to its finance committee for investigation and report. Upon the report of this committee to the council the assessment was made, and the tax collector proceeded to collect the taxes due under the assessment.

Section 12 of the charter of the city of Frankfort, approved March 16, 1869, provides that "the board of councilmen shall have power and authority to assess annually, levy and collect a tax * * * * on all real estate within the limits of said city, and all bank stocks, bridge stocks, manufacturing stocks or any other kind of stocks, money, notes or bonds of cities, towns, corporations or States, choses in action, and *all personal estate of every kind* not exempt by law from execution belonging to citizens of Frankfort, and any capital or other property belonging to any other corporation or citizen of *any other place employed in said city.*" * * *

There can be no contention in this case as to whether the property embraced in the additional assessment was employed in the city because it was, if at all, owned by a resident corporation, and not by a corporation or citizen of another place; therefore, it was immaterial as to whether or not it was employed.

The only denial which Mason & Foard Co. attempts to make that it owned the property assessed is in its reply, which uses language as follows, to wit: "It is not true that on the 10th day of January, 1886, 1887 or 1888, this plaintiff had in the city of Frankfort, and subject to taxation, the property in the answer mentioned."

This is not a denial of the specific allegation of the answer that it owned the property mentioned on the 10th day of January, 1886, 1887 and 1888. The plaintiff may have had the property in the city of Frankfort at the dates mentioned, yet may be under the impression that it was not subject to taxation. It is a question of fact as to whether it owned the property on the dates mentioned. As to whether it is liable to taxation is a question of law.

It seems to us under the plain language of the charter the property in question was liable to taxation if the plaintiff owned it on the dates mentioned. There appears to be no question that the assessment is regular unless the right to make it had been destroyed by the charter of the cities of the third class or by the statute of limitation.

Section 4021, Kentucky Statutes, combines the provisions of section 2, article 1, General Statutes, and part of the act of March 15, 1894, and by the terms of this statute retrospective assessments are limited to five years.

By the terms of section 3403, Kentucky Statutes, the authority to make assessments and to correct improper assessments or irregularity in assessments is confined to such omissions or irregularities occurring during the preceding five years.

Section 3258, Kentucky Statutes, is part of the charter of cities of the third class, and is as follows, to wit: "The repeal of any law by the provisions of this law shall not in anywise be so construed as to affect any right or liability acquired or accrued thereunder by or on the part of the city, or any person or body corporate. This law shall not in any manner affect any right, lien or liability accrued, established or subsisting under and by virtue of previous charters or amendments thereto or ordinances passed thereunder; but such right, lien or liability shall be enforced, and such action or proceeding shall be carried on in all respects as if this law had not taken effect; nor shall this law be in anywise so construed as to affect the

right or liability acquired or accrued under previous charters or amendments thereto or ordinances passed thereunder on the part of the city or any person or body-corporate."

It is not a debatable question that, at the time the charter of the cities of the third class was passed, a claim of the city for taxes, whether the taxpayer's property had been assessed, or when it was liable to assessment, though omitted, was a liability subsisting against such taxpayer, and for such liability a lien existed on his property. The mere fact that a mistake of the assessor or of the taxpayer, or by the design of either or both, property liable to taxation was omitted from the assessment, does not destroy the taxpayer's liability to pay taxes. The liability to pay subsists as much as in a case where the assessment is made. When the tax levy is made the liability accrues.

There is no escape from the conclusion that the General Assembly intended, by section 3258, to preserve that right and also preserved the remedy by declaring that the action or proceeding to enforce it "shall be carried on in all respects as if this law had not taken effect."

It follows that the statute of limitations is not available to defeat the claim of the city for the taxes in question.

It is insisted by counsel for appellee that, in this proceeding to enjoin the collection of tax, the burden is on the city to show that the property on which it is sought to collect tax was omitted from the assessment.

To sustain this contention cases are cited wherein proceedings had been instituted to compel the assessment of property omitted in previous assessments or when direct proceedings were instituted to enforce the collection of taxes.

In a proceeding in the county court to have property assessed which it is claimed was omitted from previous assessments by the authorities whose duty it was to assess it, the court very properly held that in such proceeding the burden was on those complaining to show that the taxpayer owned property subject to taxation which had been omitted in assessments.

Likewise this court has repeatedly held that, in actions to collect tax, the plaintiff must show that the law authorizing the levy and assessment has been strictly complied with.

This is a collateral proceeding. Proper authority made the levy and assessment. That levy and assessment is assailed. The presumption should be indulged that the assessment is correct until the plaintiff shows that it was improperly made, or that it was not the owner of the property, or that, if it was, the same was not liable for the taxes in question.

Upon the return of the case the plaintiff should be permitted to amend its pleadings if it so desires.

Wherefore the case is reversed for proceedings in conformity with this opinion.

O'MEARA V. FIRST NATIONAL BANK OF COVINGTON, BY, &C.

(Filed October 20, 1896—Not to be reported.)

Final order.—An order directing the master commissioner to retain until the further order of the court a certain amount out of an allowance made to appellant as receiver is not a final judgment from which an appeal lies.

Greene Fenley for appellant.

Charles H. Fisk and Jas. P. Tarvin for appellees.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Lewis.

The facts of this case are stated in the opinion this day delivered in the case of assignee of The Keefer Milling Co. v. First National Bank of Covington and others; and it seems to us the order complained of, whereby $175 of the allowance to appellants of $1,000 is directed to be retained by the master commissioner until further order, is not a final judgment or order from which an appeal to this court will lie.

The motion to dismiss this appeal must be, therefore, sustained.

HOKE V. RICHIE.

(*Filed October* 22, 1896.)

1. Jurisdiction of county court to remove inspector of oils—Writ of prohibition Power is given by the statute to the county court of each county to remove for misconduct, negligence or incompetency an inspector of illuminating oils, or any other inspector authorized by chapter 71 of the Kentucky Statutes to be appointed by the judge of that court: therefore, a writ of prohibition does not lie to restrain the county judge from trying and removing such an officer for the causes named.

2. Same—As the Legislature is by section 107 of the Constitution invested with the power to provide the mode of filling any office which it may create under the power thereby conferred, and also to fix the term and prescribe the duties of the officer, it necessarily follows it may, in its discretion, not only discontinue the office altogether, but determine the manner and by what tribunal an incumbent may be removed.

C. B. Seymour, J. T. A. Baker and B H. Young for appellant.

Augustus E. Willson, Robert E. Woods and Charles G. Richie for appellee.

Appeal from Jefferson Circuit Court, Law and Equity division.

Opinion of the court by Judge DuRelle.

Appellant brought suit to prevent by injunction the appointment of a successor in the office held by him of inspector of illuminating oils for Jefferson county.

Prior to 1886 the statute which fixed the duties and emoluments of the office provided for no term of office. The inspector appointed by the county judge was authorized "to remain in office until removed by the court for misconduct, negligence or incompetency." * * * The act of May 15, 1886, provides that "the inspector shall remain in office for four years, unless removed by the court for misconduct." * * *

In July, 1884, J. Fry Lawrence was appointed. In July, 1888, after the passage of the amendatory act, he was reappointed. In July, 1892, he was again appointed. In none of the orders of appointment was any mention made of any term for which he was to hold the office. In November, 1893, he died, and the county judge of Jeffer-

son county thereupon appointed the appellant for four years, and the question for decision is whether this appointment was to fill the unexpired term of J. Fry Lawrence, or whether it was a new term of four years.

The language of the statute is peculiar and lends some force to the argument of appellant's counsel that the vacancy was in the office and not in the term. The cases cited in support of this view, notably the ones from New York, arise in States where the legislative will is in the direction of each officer holding for the full term provided by law, whether selected to fill a vacancy or at the expiration of a full term. Such is not and has not been the legislative tendency in this State. On the contrary all the legislation upon the subject of tenure of those offices for which terms are fixed by law has been in the direction of fixed terms of office, and of filling vacancies therein, whether filled by appointment or election, only until the expiration of the regular term. We have concluded, though with some hesitation, that the apparent purport of the peculiar language of the statute must yield to the general legislative purpose prevalent in this State. We are of opinion, therefore, that in July, 1892, J. Fry Lawrence was appointed for a term of four years, and that the appointment of appellant was for the unexpired part of that term.

Judgment affirmed.

The court delivered the following response to a petition for rehearing December 11, 1896:

The question in this case is, first, whether a term was created in the office of inspector of illuminating oils; and, second, whether the term is so fixed that a vacancy which may occur by death, resignation or removal of the incumbent is a vacancy in the term which may be filled for the remainder thereof, or a vacancy in the office which must be filled by appointment for a full new term.

It may be freely conceded that if the language of the statute were clear and explicit in its meaning, that meaning must prevail, whatever inconveniences may ensue; but where, as in the statute under consideration, the language used is ambiguous, in that it makes no provision for a vacancy caused by death, resignation or removal, we are constrained to consult the general intent of the Constitution and the general legislative tendency.

Undoubtedly it was intended to create a term for this office. Being a county office, the Constitution requires that there shall be a term of office, and that it shall not exceed four years.

The Constitution, section 23 (see section 28, Bill of Rights, Constitution of 1850), provides that the Legislature shall not "create any office the appointment of which shall be for a longer time than a term of years."

And in section 107, identical with article 6, section 10 of the Constitution of 1850, it is provided that "the General Assembly may provide for the election or appointment, for a term not exceeding four years, of such other county or district ministerial officers as may from time to time be necessary."

The statute provides (section 2204, Kentucky Statutes) that "the inspector shall remain in office for four years, unless removed by the court," etc.

The question is whether the words used mean, and were intended by the Legislature to mean, that the inspector's term should be four years from the time when the first inspector might be appointed under the statute, with successive terms of four years each, or

whether on each occasion of a vacancy, however caused, a new full term was to commence at that date. In other words, whether the Legislature intended to create a regular term of office, disconnected from the person of the incumbent, or a personal franchise which attaches to him.

After carefully reconsidering the argument of counsel and the authorities cited we have concluded that the intent of the statute was to designate consecutive periods of four years, following each other in regular order, the one beginning where the other ends.

There is much confusion in the authorities on this question. It is conceded that the apparent weight of authority is against the conclusion we have reached.

Throop on Public Officers says, section 319: "The authorities are not entirely harmonious respecting the duration of the term of an officer elected by the people or appointed by the governor, or some other officer or a board of officers, to fill a vacancy, where the Constitution or the statute has failed to specify the duration of his term or where a provision upon that subject is of doubtful construction; but the weight of the authorities is decidedly in favor of the proposition that a person so chosen holds for a full term, and not merely for the unexpired portion of his predecessor's term." And in section 320 the same author says: "The cases are not harmonious on the question whether, 'in the absence of any constitutional or statutory provision fixing the term of a person appointed to fill a vacancy, he holds for a full term or only until the expiration of his predecessor's term.'"

But an examination of the authorities shows that the decisions in many of them were reached by consideration of the peculiar language of the Constitutions of the various States, and by consulting the constitutional and legislative policy of such States. To illustrate: In New York the Constitution provided for the election of sheriffs "once in every three years, and as often as vacancies shall happen," and that the governor may remove them "at any time within the three years for which they shall be elected;" and it was held under this language that the person elected to fill a vacancy held for three years. (People *ex rel* Galup v. Green, 2 Wend., 266); and under a constitutional provision substantially the same, the same decision was rendered as to the office of surrogate. (People v. Townsend, 102 N. Y., 430.)

In this case it was stated by the court, *arguendo*, that the construction adopted "brings the offices of county judge and surrogate into harmony, with respect to filling vacancies therein, with those of judges of the Court of Appeals and Superior Court, and also with those of sheriffs, county clerks, registers, coroners, district attorneys, and most other elective offices mentioned in the Constitution," thus recognizing the general intent of the Constitution as a factor in arriving at the construction of the act under consideration."

And in Wisconsin (Attorney General, &c. v. Brunst, 3 Wis., 689) the language of the Constitution as to sheriffs and certain other officers was copied from the New York Constitution, and was adopted after the latter had undergone judicial construction in the 2 Wendell case.

It was there reluctantly held that when the Constitution adopted the language of the New York instrument it was to be presumed that such judicial construction was adopted with the particular provision. Said the court: "Were this a new question we should have resisted the conclusion to which we have been impelled more strenuously; and even now it is with some reluctance that we have been

compelled to decide as we do. The argument *ab inconvenienti* can scarcely ever be stronger than in this case, and, did the construction of the Constitution admit of doubt, it ought here to prevail."

Without analyzing in detail the authorities cited it may be said that many if not most of them are decided upon grounds similar to the grounds stated in the cases we have quoted, namely, the language of the Constitution and the constitutional and legislative tendency of the State.

By section 161 of our Constitution it is provided: "The compensation of any city, county, town or municipal officer shall not be changed after his election or appointment or during his term of office; nor shall the term of any such officer be extended beyond the period for which he may have been elected or appointed."

If the contention of appellant were to prevail it would permit the appointing power to extend the terms of his appointees by causing them to resign on the last day of his own term of office and thereupon reappointing them for new terms of four years. We can not believe that the Legislature so intended.

Nor can much weight be given, for the purpose or showing a legislative tendency otherwise, to illustrations of offices, the incumbents of which are removable at will, as commissioners and escheators, or offices in which there are no successors, as notaries public. Section 2008, Kentucky Statutes, which is one of the illustrations given by appellant as to boards of guardians, shows a clear intent on the part of the Legislature to provide for terms of office ending at different periods, so as to have always some member of the board who is experienced in its duties. Another illustration given by appellant is section 2282, which distinctly provides that, in case of a vacancy in the office of trustee of the jury fund, a successor may be appointed for the unexpired term.

Petition for rehearing overruled.

LOUISVILLE & NASHVILLE R. R. CO. V. WADE, BY, &C.

(*Filed September* 18, 1896—*Not to be reported.*)

Railroads Duty to trespassers License to use track -Where a boy walking on a railroad switch was struck and injured by a piece of timber projecting from a freight car passing on the main track the company was not liable for the injury, as it had not licensed the boy or the public generally to use the track in question as a passway, and the facts do not authorize a presumption of license or deduction: nor is there anything to show that the company's agents or servants knew of the dangerous condition of the timber: therefore, in this action againt the company to recover damages for the injury a peremptory instruction asked by defendant should have been given.

J. A. Mitchell, H. W. Bruce and William Lindsay for appellant.

Edward W. Hines and B. F. Procter for appellees.

Appeal from Warren Circuit Court.

Opinion of the court by Judge Guffy.

This appeal is prosecuted by the appellant from a judgment of the Warren Circuit Court, rendered in the suit of appellee against appellant.

It appears that appellee, who was a boy about fourteen years old,

was between the rails of a switch in Woodburn, Ky., and, while so standing or walking, one of appellant's trains of freight cars passed over appellant's main track, and a piece of timber that was on one of the freight cars struck appellant on the head and knocked him down, injuring him to some extent. Gross negligence was charged in the petition.

The defense was that appellee was a trespasser on appellant's track, and that appellant was not aware of the extension of the timber over or beyond the car, nor of appellee's being in danger. Contributory negligence was also pleaded. A trial resulted in a verdict and judgment in appellee's favor for $150. Appellant's motion for a new trial having been overruled, it prosecutes this appeal.

It is the contention of appellant that appellee was a trespasser on its track, and that it had no knowledge of the timber being in a condition to injure any one, hence that the peremptory instruction asked for by appellant should have been given.

Appellee contends that the switch was used as a road or passway by consent of appellant, therefore, appellee was not a trespasser. Other questions are discussed in the briefs, but we deem it unnecessary to notice them.

It is not proven that appellant had licensed appellee or the public generally to use the railroad track in question as a road or passway, nor will the facts proven authorize a presumption of license or dedication. There was no proof introduced to show that appellant's agents or servants knew of the dangerous condition of the timber nor that appellee was in any danger. It results, therefore, that the court erred in refusing the peremptory instruction asked. (Kentucky Central Ry. Co. v. Gastineau's adm'r, 83 Ky., 121; Brown's adm'r v. L. & N. R. R. Co., 17 KY. LAW REP., 148; Hoskins v. L. & N. R. R. Co., 17 KY. LAW REP., 78; McDermott, &c. v. Kentucky Central R. R. Co., 14 KY. LAW REP., 437.)

The judgment of the court below is, therefore, reversed and cause remanded, with directions to set aside the verdict and judgment and award appellant a new trial and for proceedings consistent with this opinion.

HUGHES V. CITY OF LAWRENCEBURG.

(*Filed October* 17, 1896—*Not to be reported.*)

Towns and cities—Liability for loss by fire—Where adjoining property caught fire from a burning station house owned by a city and was destroyed, the fact that the city had built the station house of wood, thus making it more liable to burn than if built of stone or brick, does not make the city liable for the loss; nor does the fact that a prisoner was left in the station house without any one in charge of him or of the house make the city liable, there being no allegation of any fact showing that this had anything to do with starting the fire.

L. C. Willis and W. H. Morgan for appellant.

F. R. Feland for appellee.

Appeal from Anderson Circuit Court.

Opinion of the court by Judge Paynter.

The court sustained a demurred to the petition, and the plaintiff, Hughes, refusing to plead further, his petition was dismissed. This appeal is from that judgment.

It is useless to enter into a discussion of the question as to whether the acts of the council of the city of Lawrenceburg, in erecting the building in question, were legislative or ministerial, or as to whether, under a given state of facts in relation to the erection of the building, the city could be held liable for the destruction of the plaintiff's property, as no facts are alleged which, under any circumstances, could render the city liable.

By the provisions of the charter of the city the council was authorized to erect a station house, in which persons might be confined for fines, drunkenness, safekeeping, etc.

It is substantially alleged in the petition that the council of the city procured a lot on court street that adjoins lots on which there are several small frame buildings occupied by colored people; that the city council had erected on the lot a station house wholly of wood; that because of its location and construction was liable to catch fire, be destroyed, and propably set fire to other property in the neighborhood, of which the city council had notice; that in January, 1893, the city caused one King to be arrested and placed in the station house; that he was left there, without any one being in charge of him or the house; that, on the night of his confinement in the station house, the station house, by means unknown to this plaintiff, caught fire and burned up, and that the plaintiff's property, situated in the neighborhood, caught fire from the burning station house and was destroyed.

By this action Hughes seeks to recover damages for the loss of his property.

The city council was authorized to erect the station house. It could be erected of either stone, brick, metal or wood, in the discretion of the council. The fact that it was built of wood certainly does not render the city liable to one who may have lost his property in consequence of the fire originating in it. There is no averment that it was defectively built, or that the fire resulted from any defect in the construction of the building, nor is there any statement showing that the confinement of King had anything to do with starting the fire. On the contrary the plaintiff states that he has no knowledge as to the origin of the fire.

It may have been the work of an incendiary, the explosion of a lamp, or in some other way wholly disconnected with the material out of which the house was built or the confinement of King therein. If there could be a recovery in the case on the facts as they appear in the petition, then there could be a recovery against any one who might erect a frame building in a town, unfortunately lose it by fire, from the conflagration of which property of others was destroyed. This certainly is not the law.

The judgment is affirmed.

LEHRER V. ELMORE.

(*Filed October* 20, 1896.)

1. Libel—Nothing short of the truth of the matter published constitutes a defense to a suit for libel, the publication being admitted. The fact that defendant believed, and had reasonable grounds to believe, the publication to be true, does not relieve him from liability.

2. Same—A publication in a newspaper headed "Evidently Stolen," in which it was stated that H., having hired a horse to a man who had failed to return

it at the time promised. had concluded that the man hired the horse in order to convert it to his own use, and that H. thought he could identify the fellow "as being a man named Lehrer, who had been in the saloon business at Cairo. and who had his picture printed on an advertising card, one of which he left here last week with a butcher named Yopp," was libelous. the person thus described having had nothing to do with the hiring of the horse; and the fact that the publisher may have received the information from H. does not relieve him from liability.

3. Same- Punitive damages The publisher of a libel is liable for all the damages which the injured party sustained, thereby including not only the injury to his character, but also for the injury to his feelings. and for the mental anguish and suffering caused by the publication, and for such other damages as were the direct or necessary result of such publication; and if the publication was by the publisher known to be false. he is also liable for punitive damages.

In this case the court erred in instructing the jury in limiting the recovery to "such actual damages as will compensate plaintiff for the injury to his character."

4. In contemplation of law malice may exist. although there is no actual intent to injure.

5. A subsequent publication by defendant attempting to rectify the false report did not reliere him from liability.

D. G. Park for appellant.

Robbins & Thomas for appellee.

Appeal from Graves Circuit Court.

Opinion of the court by Judge Guffy.

This action was instituted in the Graves Circuit Court by the appellant against the appellee to recover damage on account of a libelous publication which was published in the Mayfield Mirror, of which paper appellee was owner and publisher. The defendant filed a general demurrer to the petition, which demurrer was properly overruled.

The owner admitted the publication, but denied that it was false, malicious or libelous; denied that he meant to charge that plaintiff had committed the crime of horse stealing, and that he did not charge the appellant with such crime.

The residue of the answer in substance undertakes to say that the facts stated in the publication were furnished by W. L. Hedge, and that he published them as matter of news, and without malice or ill-will towards appellant. The publication complained of is as follows:

"EVIDENTLY STOLEN.

"Mr. W. L. Hedge hired a horse to a man, who said he wanted to go to Pottsville, last Tuesday, and said he would return that night. He did not return as promised, and Mr. Hedge concluded he had hired the horse in order to convert it to his own use. The fellow is a young man, and Mr. Hedge thought he could identify him as being a man named Lehrer, who has been in the saloon business at Cairo, and who had his picture printed on an advertising card, one of which he left here last week with a butcher named Yopp."

There can be no question but what the publication complained of is libelous unless it was true that appellant was the man who had hired the horse, and there is no pretense that he had anything to do with the matter at all, nor is it material whether Hedge gave the

information or not. Upon final trial the appellant recovered a judgment for one cent in damages, and his motion for a new trial having been overruled, he prosecutes this appeal.

The case of Riley v. Lee clearly determines that the publication of the article complained of was libelous. The opinion in that case reviews the authorities, and is an exhaustive discussion of the question. We quote as follows from the opinion: "Also, in reference to publishing such writing without malice as a matter of news, the answer comes back that it is not lawful to bruit thither and yon defamation of a person's character merely to gratify a morbid appetite for such scandal; that nothing short of the truth of the matter published will be heard in justification of the unwarranted liberties thus taken with a person's name; * * * that the press must not be the vehicle of attacks upon the character of a person unless the attack is known to be true. If it is not known to be true, do not publish it." It is, therefore, manifest that the publication in question was libelous, and the demurrer properly overruled.

Appellant relied on several grounds for new trial, but chiefly on erroneous instruction, which is the only ground that need be considered.

The objectionable instruction is the following portion of instruction No. 2: "But they can not award punitive damages as a punishment of defendant, but only such actual damages as will compensate him for the injury to his character."

It seems clear to us that the instruction is erroneous in limiting the recovery to the actual damages or injury to appellant's character. If such was the law, then it would be competent for the defendant to deny that the character of plaintiff had been injured, and the plaintiff, in order to recover, would have to show actual damages.

The law allows the plaintiff damages not only for tarnished reputation, but also for his injured feeling. (5 American & English Ency. of Law, 47, and note 1, and authorities there cited.)

It may be conceded that punitive damages should as a rule not be awarded where the publication was at the time, upon reasonable grounds, believed to be true, but the proof in the case at bar did not warrant the court in taking the question of actual malice from the jury. So far as the plaintiff is concerned the injury to him is the same, whether or not the defendant believed the report true. One definition given of malice by Mr. Webster is "a wanton disregard of the rights or safety of others."

In 2 Bouvier, page 92, note 4, in speaking of torts or the doing of acts injurious to another without a just cause, it is said: "This term, as applied to torts, does not necessarily mean that which must proceed from a spiteful, malignant or revengeful disposition, but a conduct injurious to another, though proceeding from an ill-regulated mind, not sufficiently cautious before it occasions an injury to another. Judged in some cases, it seems not to require any intention in order to make an act malicious. Where a slander has been published, therefore, the proper question for the jury is not whether the intention of the publication was to injure the plaintiff, but whether the tendency of the matter published was so injurious."

It could make no difference to plaintiff whether the defendant believed the libel to be true or not. The injury consists in the publication, not in the intent of the publisher, nor as to his belief or disbelief of the accusation.

It is true that there was proof conducing to show that a man calling himself Ed. Lear had hired a horse of Hedge and failed to return

it, but he had not represented himself as doing business in Cairo, nor had he left his business card, with his picture on it, with Yopp, and the fact that plaintiff had stated his business and left his card with Yopp, instead of authorizing the belief that he was the thief, ought to have raised a doubt as to that fact for the reason that a person intending to steal would not be likely to furnish such complete and ready means of identification.

We think that both reason and authority require that the publisher of a libel should be held liable for all the damages which the injured party sustained, thereby including not only the injury to his character, but also for the injury to his feelings, and for the mental anguish and suffering caused by the publication of the libel, and for such other damages as were the direct or necessary result of such publication; and if the publication was by the publisher known to be false, he would also be liable for punitive damages.

It appears that the libelous article was re-published in a paper in Paducah, where the plaintiff had once resided. He was in business in Cairo, and it would seem from the proof that he was seeking to establish trade in Mayfield, and the publication was so clear and explicit that all persons who knew plaintiff would necessarily know that he was the party accused.

The rule announced herein is not at all unjust nor harsh as to publisher's of newspapers, for they are under no obligation to publish defamatory statements, and if they will steadfastly refuse to do so, unless the statements are true, they will be in no danger of suits for damages, and will also thereby better serve the public, for then the public will know that the publications are entirely trustworthy.

It is an ancient maxim of the law that it is better that ninety and nine guilty persons should escape than that one innocent man should be punished. It is also better that a thousand wrongs or misdeeds should be unpublished than that the character of one innocent person should be injured or his feelings lacerated.

It is true that after the appellant had come to Mayfield to investigate the charge that appellee published another statement, headed "Rectifying a False Report." Said rectification is as follows:

"RECTIFYING A FALSE REPORT.

"Ed. M. Lehrer was over here yesterday from Cairo to straighten a report which in some way connected him in a case of reported horse stealing. It was stated in this paper last issue that W. L. Hedge had hired a horse to a man to ride out to the country, and the horse had not been brought back for several days after the man promised to return it, and Mr. Hedge naturally concluded the fellow had hired the horse with the intention to steal it. He gave his name to Mr. Hedge as Ed. Lehrer, and afterwards Mr. Hedge was talking of the affair to Yopp, the butcher, and mentioned the name of the fellow who had got the horse, whereupon Yopp showed Mr. Hedge a business card, with E. M Lehrer's name and picture on it. Mr. Hedge remarked that it looked like the man who had got the horse. From this the report started connecting the Cairo Ed. Lehrer with the matter. Mr. E. M. Lehrer is doing business at Cairo, and looks like a gentleman, and we presume he stands well in the estimation of his acquaintances. He talked something like suing somebody for damage, but we failed to learn his final conclusion. We hope, however, this statement will set him in the proper light before the people here, and that there will be no further trouble."

But this rectification did not relieve the defendant from liability

for the libelous publication, and perhaps contributed but little, if anything, towards repairing the wrong already inflicted.

For the reasons indicated the judgment of the court below is reversed and cause remanded, with directions to award a new trial and for proceedings consistent with this opinion.

BROOKS-WATERFIELD CO. V. FRISBIE, &C.

(*Filed April* 4, 1896.)

An insolvent debtor will not be allowed to place his earnings beyond the reach of his creditors by conducting business for his wife, who has been empowered to trade as a *feme sole*. And when the wife's estate employed in such a business has been increased by the labor and skill of the husband, the wife herself giving the business no attention, the husband will be regarded as having an interest in such increase, which may be subjected by his creditors, and the fact that the husband engaged to render service at an inadequate price can not change the principle involved.

T. T. Forman and W. S. Cason for appellants.

J. T. Simon for appellees.

Appeal from Harrison Circuit Court.

Opinion of the court by Judge Guffy.

It appears from the record in this case that prior to 1885 the appellee, H. D. Frisbie, was a prosperous business man, in apparent good financial condition, and that, in addition to his individual business, he was in partnership with —— Lake, but that some disease seized a large amount of cattle belonging to him, or the firm of Lake & Frisbie and perhaps some other financial reverses befel him, rendering him, as it seems, unable to pay his debts, and that he made an assignment in 1885, but the firm did not assign.

It also appears that said Frisbie owed about $21,000, and that his assets were about $6,000. About $15,000 of the indebtedness was due to appellee's father-in-law, Judge Day, the other principal creditor being the appellant.

After paying the cost of settling the estate assigned, and also paying the appellee, Mrs. Frisbie, $1,000 for her contingent right of dower in real estate assigned, the estate only paid 18.42 cents to the dollar on the ordinary claims.

Appellant's claim was a debt due from the firm of Frisbie & Lake, and in 1888 it obtained judgment against H. D. Frisbie, surviving partner of said firm, as well as individually, for the sum of $4,872, with interest from the 22d of April, 1886, upon which executions were issued and returned no property found, but it also appears that $988.62 was paid on the judgment by the master commissioner, in case of Lake v. Lake, September 8, 1888; also paid by the master commissioner, as it seems, out of the assets assigned as aforesaid, $1,036.52, January 5, 1889.

In 1887 the appellee, Mrs. Frisbie, was by judgment of the court empowered to do business as a *feme sole*. On the 18th of November, 1892, the appellant instituted this action in the Harrison Circuit Court, seeking to subject certain property conveyed to Mrs. Frisbie to the payment of its said judgment.

It is alleged in the petition that the appellee, Mrs. Frisbie, has the

legal title to certain parcels of valuable real estate, conveyed under the circumstances set out, viz: One parcel or lot in Cynthiana, Ky., on east side of Walnut street, between Pike and Pleasant, conveyed to her by W. H. Hutnan and wife, 23d of March, 1880, which was made to her at the request of her husband, who, out of his own means, paid therefor $1,100 cash in hand.

It is also charged that, after the creation of the debt sued on, H. D. Frisbie, with the fraudulent intent and purpose to cheat, hinder and delay plaintiff in the collection of its debt, and of which purpose appellee, Mrs. Frisbie, had knowledge, did erect on said grounds two double-brick houses—that is, four dwellings—one of which he and his family occupy; another is held and occupied by their tenant, defendant T. B. Smith; another by one Givens, and the fourth by defendant, Moses Levy, at a rental value of about $25 per month each; that said improvements were erected by H. D. Frisbie out of his own means and property as an investment, and not for use of his family, except as to one set of the four dwellings, and cost about $11,000, and are valuable and lasting.

2d. That by deed of 28th of January, 1887, Lewis Day's administrator conveyed to Mrs. Frisbie a lot of ground on the south side of Pike street, fronting on said street, the consideration being $1,560, of which sum H. D. Frisbie paid $527 for the same purpose as before charged, and that Mrs. Frisbie knew of the same and participated in the fraud; that the lot is improved, and rents for about $30 to defendant Musselman.

3d. That on February 17, 1892, T. W. Hedges conveyed to Mrs. Frisbie, in consideration of $1,725, a certain house and lot on the east side of Walnut street, $800 cash paid, the residue on time, which notes were assigned to the defendant national bank; that H. D. Frisbie, out of his own means, erected thereon a large three-story brick storehouse, glass and iron front, at a cost of not less than $8,000. The same charges of fraud are made as to the purchases and improvements.

4th. That upon a lot allotted to Mrs. Frisbie, in settlement of the estate of Lewis Day, H. D. Frisbie, with like fraudulent purpose, erected out of his own means and as an investment, on said lot, a frame warehouse and storehouse at a cost of about $1,000, the same being valuable and lasting, and increasing the rental value from nothing to about $30 per month.

The appellant prays that the various parcels of property be put into the hands of a receiver to be rented out, and the rents paid into court, to be apportioned between the plaintiff and Mrs. Frisbie in proportion to the amounts paid by her and that paid by H. D. Frisbie, including the cost of the improvements, except that he asks a sale of the third tract named, and asks for all proper and general relief.

The answer of appellees may be considered a traverse of all the allegations of the petition, and in effect alleges that all the purchases and payments were made out of and with the means of Mrs. Frisbie. Appellant in its reply traversed the material averments of the answer. The court upon final hearing dismissed plaintiff's petition, and from that judgment this appeal is prosecuted.

It appears that H. D. Frisbie in some way paid or settled all debts against him except appellant's claim. The testimony conduces to show that Mrs. Frisbie constituted her husband her attorney in fact, to do business for her, and that he engaged extensively and very successfully in business.

He engaged in Cincinnati in business under the sign of King's

Royal Germature, and made considerable money, his family then living in Cynthiana, Ky., and finally sold out the business for $12,-500. H. D. Frisbie also conducted a furniture, undertaking and wall paper business, under the name of Frisbie Furniture and Wall Paper Co., for a time. The name of H. D. Frisbie was for a time on the front of the awning in front of the door, but it was taken down, H. D. Frisbie saying it was put there by mistake.

The proof also conduces to show the rental values to be something like the sums alleged in the petition, and that H. D. Frisbie conducted a paying and profitable business, and was the real manager, Mrs. Frisbie rarely, if ever, paying any attention to the business. He also speculated some in South Dakota, and perhaps in Illinois, some or all being profitable.

Mrs. Frisbie does not testify in the case, but the husband does, and from his notion and construction of Mrs. Frisbie's property, including what he claims to have given her before his failure, shows that she had considerable property before she was authorized to trade as a *feme sole*.

The proof conduces to show that all the property claimed by Mrs. Frisbie was, in May, 1893, worth perhaps between $35,000 and $40,-000, with perhaps an indebtedness due from her of $10,000 or $11,-000.

There can be no doubt as to the fact that Mrs. Frisbie received several thousand dollars from her parents, and that about $1,000 was by her folks given to H. D. Frisbie, but which it seems he afterwards undertook to restore to his wife.

We do not deem it necessary to discuss the allegations of fraud made in the petition. It seems clear to us that the increase or accumulation of property and means is chiefly due to the labor and skill and energy of H. D. Frisbie.

In Moran v. Moran, 12 Bush, 303, it is substantially said that all an insolvent husband may be able to earn beyond the exemptions should go to his creditors, yet appellee's contention in this case is that such earnings may legally be given to the wife.

It will not be contended that if the husband had owned property before the creation of plaintiff's debt, or acquired property afterwards, that he could make a gift of the same to his wife and thus defeat the claim of the appellant; and yet if appellee's contention in this case be conceded the same result is reached. The fact that the husband engaged to render service at an inadequate price can not change the principle involved.

It seems to us that appellee, H. D. Frisbie, was at the time of the trial of this case, June 8, 1893, equitably entitled to at least $3,000 interest in the property described in the petition and evidence over and above exemptions, exclusive of the homestead, and that this interest, to the extent of $3,000, should have been subjected to the payment of plaintiff's claim, and that the court erred in dismissing appellant's petition.

The judgment is, therefore, reversed and cause remanded, with directions to adjudge a sale of enough of the property, excluding the homestead, to pay plaintiff $3,000, with interest from June 8, 1893, or to place same in the hands of a receiver, to be rented out until the said sum is paid. The chancellor will adopt the mode by him deemed most equitable, and for further proceedings consistent with this opinion.

HEDGE V. LEHRER.

(*Filed October* 17, 1896—*Not to be reported.*)

1. Libel—In this action for libel, in which the principal defense was that the defendant did not procure the publication to be made, the evidence was sufficient to support a verdict for plaintiff and there was no error in giving or refusing instructions or in admitting or rejecting testimony.

2. A verdict for $100 was not excessive.

3. New trial—The court properly refused a new trial asked upon the ground of newly-discovered evidence as the evidence claimed to have been discovered would at most have been but cumulative, and besides it is doubtful if due diligence had been used by defendant.

Robbins & Thomas for appellant.

D. G. Park for appellee.

Appeal from Graves Circuit Court.

Opinion of the court by Judge Guffy.

This appeal is prosecuted from a judgment rendered in the Graves Circuit Court in the suit of the appellee, Edward M. Lehrer, against the appellant, W. L. Hedge.

The plaintiff alleged in substance that the defendant caused to be published in the *Mayfield Mirror*, a newspaper in Graves county, a certain libelous article, in effect charging that the appellant was guilty of horse stealing. The article was copied in full in the petition.

The principal defense made was that defendant did not procure the publication of the article; that he had no notice and that he had done nothing to injure plaintiff. A trial resulted in a verdict and judgment in appellee's favor for $100.

It is manifest that the publication in question was libelous, and that the petition stated a cause of action. The demurrer of the defendant was, therefore, properly overruled. It is not necessary to state in detail the grounds relied on by appellant for a new trial. It does not seem to us that the verdict is contrary to law, nor does it appear that the damages are excessive, or given under the influence of passion or prejudice, nor did the court err in the admission or rejection of testimony to the prejudice of appellant's substantial rights. Appellant insists that the court erred in giving and refusing instructions, and we have carefully considered those given or asked, those refused and those modified, and find that the instructions given were as favorable, if not more so, to appellant than he was entitled to. The newly-discovered evidence relied on as authorizing a new trial would at most have been but cumulative; and, besides, it is doubtful if due diligence had been used by appellant to learn who were present and heard the conversation, nor would the testimony of Austin had much, if any, bearing on the main point in the case, which was as to whether appellant procured the publication in the paper complained of, and we are of opinion that the jury was authorized to find for plaintiff upon that question from the testimony of appellant and Elmore.

Judgment affirmed.

KEEFER MILLING CO.'S ASS'EE, &c. v. FIRST NATIONAL BANK OF COVINGTON KENTUCKY, &c.

(Filed October 20, 1896—Not to be reported.)

1. Assignment for creditors—Payment by assignee on account—Where an assignee for the benefit of creditors made payments to his attorney on account pending a suit to settle the estate and the allowance finally made to the attorney exceeded the sums thus advanced, the assignee can not be held liable for the amounts thus paid to the attorney in order to cover the loss resulting from the failure to collect a loan made to the attorney out of the assigned estate, the loan being made by a receiver and not by the assignee.

2. Same—The sheriff who, as receiver, made the loan, is not responsible for the failure to collect it if he took the bond therefor in good faith and the surety in the bond was, at date of it, solvent and good for that amount.

James P. Tarvin for appellants.

Chas. H. Fisk for appellees.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Lewis.

The D. Keefer Milling Co., failing in business, undertook to make an assignment for the benefit of creditors, but about the same time the First Natianal Bank of Covington, a creditor, caused an attachment issued and levied upon property of the company, and then commenced litigation between the assignee and attaching creditor to determine whether the deed of assignment was valid and effectual against the attachment lien, which was finally decided by this court in favor of the former.

In the meantime the assignee advanced and paid to James P. Tarvin, one of his attorneys and councellors, as part of his fee, two sums, aggregating $950, and subsequently instituted in the Kenton Circuit Court an action to settle his accounts and transactions, and to distribute the estate among those entitled.

By the judgment in that action allowance to Tarvin as fee for his services was fixed at $2,500, and the assignee was allowed for his services as such $1,800. But it appears that John O'Mara, then sheriff, was appointed a receiver, and by an order of court directed to loan at interest the money in his hands belonging to the assigned estate, and in pursuance of that order loaned to said James P. Tarvin $1,200, one John Siler becoming surety on the bond given therefor. But at date of and prior to the judgment appealed from Siler became insolvent, and, Tarvin being likewise so, no part of that amount was collected and made available, and there was a consequent loss thereof to the estate and creditors.

The sheriff as receiver had previously, and before an order of court had been made authorizing him to do so, loaned to Tarvin the sum of $1,000, but that amount being amply secured was collected and accounted for. The whole amount paid by the assignee, added to the two sums loaned by the sheriff, exceed the amount allowed to Tarvin by $651 without interest.

By the judgment appealed from the master was directed to deduct from the allowance of $1,800 to the assignee said two sums, aggregating $950, paid by him to Tarvin as attorney. The master was also directed to reserve until further order of court $175 out of the allowance of $1,000 to O'Mara, ex-sheriff.

The sums thus to be deducted from the allowance to the assignee

and sheriff respectively were manifestly intended to cover and make up the loss of the $1,200 loaned by the latter to Tarvin, and whether the assignee is properly chargeable with the sum of 950 is the question on the appeal by him in this case.

Notwithstanding the two payments were made by the assignee before the final termination of the litigation, or a formal order of court was entered authorizing him to do so, still as no loss resulted to the estate by reason of such payments we do not see how the assignee can be logically or justly charged therewith. For it is stated in the judgment that the payments were made in good faith, and there is nothing improper or unusual for a client to advance to his attorney money in part satisfaction of his fee. In this case the litigation was reasonably expected, as it turned out, to be protracted, and services of the attorney continuous and arduous; and as the money in the hands of the assignee was then idle and could not be distributed the two payments were certainly not made improvidently or in bad faith. The assignee took the risk, which was manifestly very slight, that the ultimate allowance to Tarvin would be sufficient to cover the two amounts paid him on account, and, as the loss resulted solely from insolvency of Siler, surety in the bond for $1,200, which the assignee was not responsible for nor had anything to do with, he, in our opinion, should not be made to suffer therefor. Nor for that matter should the sheriff be held responsible for noncollection of that bond if he took it in good faith, and Siler was, at the date of it, solvent and good for that amount. But the question as to the liability of the sheriff is not fully before us in this case and is referred to incidentally.

The judgment on appeal of B. F. Graziani, assignee of the Keefer Milling Co., is reversed and cause remanded for further proceedings consistent with this opinion.

GILLS V. COMMONWEALTH.

(*Filed October* 20, 1896—*Not to be reported.*)

1. Homicide in defense of another -Instructions- Upon the trial of appellant under an indictment for murder, his plea being that the killing was done in defense of his brother, it was error in instructing the jury as to manslaughter to tell them that in order to convict they must believe, among other things, that defendant did the killing "not in his necessary or apparently necessary self-defense." The instruction should have embodied the idea that there could be no conviction unless defendant did the killing "not in the necessary or apparently necessary defense of his brother." And this is true, although the court, by a separate instruction attempted to submit to the jury the law as to the right of the accused to take the life of the deceased in defense of his brother.

2. Same- The court in such a case should not restrict the defendant's right to act in defense of another to the existence of actual danger. And an instruction in this case telling the jury in substance that the defendant had the right to do the shooting to avoid danger or "apparent danger" to his brother, should, in order to avoid any doubt as to its meaning, be modified by adding words telling the jury that defendant had the right to act in defense of his brother "if such danger was reasonably apparent to him."

3. Same -Evidence—Proof of what defendant's brother had testified on another occasion could not be received as substantial evidence against defendant, but could only be used for the purpose of contradicting the brother, and the court should have so told the jury.

4. Same -It was improper to permit a witness to testify that the deceased

had said on a day prior to that of the killing that he did not have a knife, as such testimony was not competent to show that deceased did not own a knife or that the knife found by his side after the killing was not his knife.

J. W. Compton for appellant.

W. S. Taylor for appellee.

Appeal from Metcalfe Circuit Court.

Opinion of the court by Judge Paynter.

The accused, Burton Gills, was indicted in the Metcalfe Circuit Court for the murder of Robert Keen. Upon the trial he was found guilty of manslaughter and his punishment fixed at fifteen years in the penitentiary.

The principal witness relied upon by the Commonwealth was one Wm. Scroggy, who testfies that he was at work in his field on the morning of the killing, when the deceased came to him and asked if he had seen Eugene and Burton Gills. Witness then pointed them out to the deceased on the hill in Gills' field. The deceased claimed they owed him and wanted witness to go with him to see them. This witness declined to do, but deceased left and went in the direction of the Gills.

The next thing the witness heard was Keen saying, in an ordinary tone of voice: "Good morning" to the Gills. Keen then demanded his money, and Eugene Gills said: "We do not owe you anything." Then Burton said: "Get out of here, God damn you, or I will kill you." The witness said he then heard two shots, and ran about forty yards out in his field where he could *see* them. He saw the smoke of the pistol, and Burton and Eugene started down the hill. Eugene stopped, went back and threw down something. Witness then said: "I was as much as 500 yards from the place when I saw this."

He said he lived close by and did not go to see the body nor attend the coroner's inquest, nor did he tell anybody as to what he had witnessed until about 4 o'clock in the evening, some six hours afterwards, when he told one Edwards. He did not tell his family at dinner about the occurrence, although he and Keen were good friends—such good friends that he employed counsel to aid in the prosecution of the accused.

To say the least this witness has a most acute hearing to understand what was said in an ordinary tone of voice at a point distant more than 1,500 feet from where he stood, and not even being able to see the parties engaged in the conversation at the time he said he heard it. Still more remarkable is the fact that he allowed his friend's dead body to remain in a field for hours without even going to see it or to give the alarm in the neighborhood that his friend had been slain.

The Commonwealth then introduced Joe Parsons, who proved that he was plowing in a field nearby, when the killing occurred; that he heard two pistol shots about 10 o'clock a. m.; that soon afterwards Burton Gills came through his field crying. When witness asked him what was the matter, Gills told him that he had shot and killed Bob Keen. Witness then asked him why he did so. The accused replied that Keen was trying to kill his brother, Eugene; that Keen was cutting at his brother with a knife and had made two licks at him and on making the third he shot him. This is substantially all the competent testimony offered by the Commonwealth.

The accused, his brother Eugene, and his sister, Ethel Gills, testify that about 9 or 10 o'clock a. m. they heard some shooting up the road. Presently the deceased appeared with his hat in one hand and a pistol in the other, and when he reached the yard fence inquired for Burton and Eugene. He said he had come for his money. The accused told him they did not have it, but that Granville Gills had gone to see if he could get it. The accused then told him if Granville did not get it they would get it from John Pendleton. The deceased then said: "If I kill two or three of you, you will get it up for me." The accused then told him to "stay there and we will go and get it for you." He agreed to stay. Then Burton and Eugene started after the money. They had not gone far when Keen said: "Stop there and I will go with you." He then went to where they were. All started off together, Eugene in front, Keen following him, and Burton behind. To this point in the narative the sister corroborates her brothers.

Eugene and Burton testify that after they had gone to a certain point Keen got mad again and said: "By God I want my money right now." Eugene remarked: "We are going to get it for you." Keen then said: "You didn't do me right in the arbitration, and I intend to have it now or I will kill two or three of you." The deceased then made two strokes at Eugene with a knife, and upon his making the third the accused shot him. Eugene was a cripple and was trying to get out of the way of Keen when he was shot.

Charles Gills, a brother of the accused, testifies he was working in the field, and was in thirty yards of the place when the killing occurred; witnessed it, and testifies to the facts as detailed by his brothers.

The deceased was found with a pistol on his person, and a knife by his side.

Golder and James Jones testify that on the morning of the killing the deceased tried to borrow a gun from Golder Jones. Failing to get a gun, he then asked to borrow a pistol. This being refused, he then awaited his opportunity, and took Jones' pistol. The pistol found on him was the one he took from Jones.

It further appears that on the same morning the deceased bought a box of cartridges, then telling the merchant from whom he bought them that he was going to the house of the Gills.

Another witness also testifies that on the morning of the killing he was traveling on the road that passed Gills'; that he heard some pistol shots immediately before him; saw some smoke; turned the bend of the road and saw the deceased. Deceased asked the witness if he had seen the Gills; then passed on in the direction of their house.

Another witness testifies that he saw the deceased on the morning of the killing on the road going in the direction of the Gills; that he had a pocket knife, with which he was whittling. He inquired of the witness if she had seen the Gills, when he remarked that he had to make a settlement with them, and that they had fooled him long enough.

There was testimony proving that a few days before the killing the deceased had made threats against the life of the Gills.

The defense in the case is predicated upon the claim that the killing was done in defense of the brother.

Instruction No. 1 is the usual one, submitting the question of murder. No. 2 is a manslaughter instruction. It uses the language as follows, to wit: "Not in his necessary or apparently necessary self-defense."

It should have embodied the idea that if the killing was in a sudden affray or sudden heat and passion, and without previous malice, and *not in the necessary or apparently necessary defense of his brother Eugene*. In view of the defense the omission of this language was misleading to the jury.

In instruction No. 4 the court attempts to submit to the jury the law relating to the right of the accused to take the life of the deceased in defense of his brother.

In the Stanley case, 86 Ky., 440, this court held that when one may kill in his own defense because of danger, either real or apparent, another may do so for him.

In that case this court held that instructions which restricted the defendant's right to act in defense of another, to the existence of actual danger to the latter, were erroneous.

Instruction 4 is as follows, to wit: "If the jury believe from the evidence that the defendant, Burton Gills, at the time he did said shooting, believed and had reasonable ground to believe that his brother, Eugene Gills, was in imminent danger of losing his life or suffering great bodily harm at the hands of said Keen, and that he did the shooting solely to avoid or prevent said danger, or *apparent danger*, to his said brother, and in doing so used no more force than then appeared to him to be reasonably necessary to avoid said danger or apparent danger, then the law is for the defendant, and the jury will acquit him."

We suggest, to avoid any doubt as to the meaning of instruction No. 4, that the court add, after the word "Keen," the following words "or that such danger was reasonably apparent to him."

On the trial of the case the Commonwealth was permitted to prove that Eugene Gills testified, on a trial of a writ of *habeas corpus*, sued out by himself, that Keen, at the time he was killed, exclaimed "Oh! Eugene! Oh! Burton!"

On the trial of Burton Gills, proof of what Eugene testified to on another occasion could not be received as substantive evidence against Burton Gills. It could only be used for the purpose of contradicting Eugene Gills, and the court should so have told the jury.

There are many cases of this court that could be cited to sustain the conclusion of the court on this question.

The testimony of W. J. Bagby to the effect that, on Sunday evening previous to the killing, the deceased came to his house to buy some meat; that while in the smokehouse the witness told him to cut it down, and deceased replied that he did not have any knife. This testimony is not competent to prove that deceased did not own a knife or that the knife found by his side was not his knife, or that he did have the knife found by him and attempt to use it, as claimed by the defense.

Such testimony was incompetent and misleading.

Wherefore the judgment is reversed, with directions for further proceedings consistent with this opinion.

DAVIDSON V. MOORE.

(*Filed October* 22, 1896—*Not to be reported.*)

1. Conveyance of timber Under a deed conveying the timber on a tract of land the grantee was not required to promptly remove the timber in order to preserve his right to it. If the grantor had desired it to be removed he could have taken proper steps to compel the grantee to have it done.

2. Same Such a deed was not intended to convey merely the timber then on the land.

3. Adverse possession—The adverse holding relied on by the defendant is not sustained by the evidence, and hence the plea of champerty and of limitation will not avail.

James M. Sebastain and W. H. Holt for appellant.

D. B. Redwine and J. B. Marcum for appellee.

Appeal from Breathitt Circuit Court.

Opinion of the court by Judge Guffy.

This action was instituted in the Breathitt Circuit Court by Wm. Moore against Thos. Sizemore, Jerry Davidson and Allen Davidson. It is substantially alleged in the petition that the plaintiff was the owner of half of the poplar timber on a certain tract of land, and that Allen Davidson owned the other half, and that the other defendants had wrongfully and against the will of plaintiff and Allen Davidson entered upon the land and cut and hauled fifty-seven poplar logs off the land, worth $171.50. He prayed that they be enjoined from further trespass, and for judgment for a division of the said poplar timber between himself and Allen Davidson. Allen Davidson answered and denied the ownership of plaintiff, and claimed to be the owner thereof, and also to be the owner of and in possession of the land; that the deed to said land was in Jerry Davidson, who had been in possession thereof, with title from January, 1874, and that he and his father had owned and claimed the land and timber for more than fifteen years before the commencement of this suit, which adverse holding was open and notorious and known to plaintiff and his vendor.

It is also claimed in the answer that Ackerman and Daniel Davidson at one time, about 1890, did convey the one-half of said timber to plaintiff's vendor, and at that time he only then had a reasonable time to remove same. He also pleaded lapse of time, and the statute of limitation in bar of plaintiff's right to recover, alleging also that the trees were unmarked, and that plaintiff had no right of way over his land to the timber; also pleaded that the sale was champertous, and, therefore, void, and that the other defendant had entered and cut the timber under license from defendant, Allen Davidson.

The reply traversed all the material defenses alleged in the answer. The court, upon final hearing, adjudged in plaintiff's favor, and ordered a division of the timber as prayed for, and from that judgment Allen Davidson has appealed. The adverse holding relied on by appellant is not sustained, hence the plea of limitation and of champerty is not available. Daniel Davidson was the only witness introduced. From his testimony it appears that he once owned the land in contest and only half the poplar timber, bought twenty-one or twenty-two years ago. The other half of the timber belonged to Dan Moore. Witness sold to Jerry Davidson all the land and timber except one-half of the poplar timber. It seems that the witness had received his deed to the land before the clerk's office was burned. It is alleged in the reply that the deed from Ackerman to Daniel Moore, conveying to him said timber, was made before 1873, and was destroyed by fire, and the record of the same, when the county clerk's office was burned in 1873, which averment seems never to have been traversed.

A copy of the deed from Daniel Davidson to Jeremiah Davidson

in 1874 excepts one-half of the poplar timber on the Fields branch. Daniel Davidson and Ackerman conveyed to Daniel Moore the timber in contest. This deed is dated March 12, 1890. In 1891 Daniel Moore conveyed the said timber to plaintiff. It is claimed that Ackerman united in the deed with Davidson to make good the deed burned up, which, from the other proof in the case, seems to be reasonably proven. There is nothing in this record to authorize the assumption that appellee or his vendor was required to promptly remove the timber, and if appellant or his vendor had desired it to be done he could have taken proper steps to have compelled plaintiff to do so. Nor do we think that it was the intention of the grantor to only convey the timber then on the land; and, besides all this, the timber was reserved in the deed to appellant's vendor, and it nowhere appears that appellant bought the timber from his vendor with the land.

It also appears that soon after the defendants commenced to cut the timber plaintiff asserted his right to it. Prior to that time it seems that the timber was allowed to stand and grow upon the land without objection, and doubtless it was doing no one any injury.

The other contention of appellant can not avail and need not be noticed.

The judgment of the court below is fully sustained by the evidence, and is, therefore, affirmed.

SIMPER V. STEIN-VOGELER DRUG CO.

(Filed October 22, 1896—Not to be reported.)

Sale of attached property set aside. Where, in a suit to have a mortgage declared to be a preference and to operate as an assignment under the statute, an attachment was obtained and the property levied on was sold upon the ground that it was of a perishable nature and purchased by plaintiff at an inadequate price, that sale should, upon motion of the mortgagee, have been set aside and the property resold, as the mortgagee was a nonresident and no warning order was made against him until the day the sale took place.

Harvey Meyers for appellant.

Orlando P. Schmidt and W. K. Benton for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Lewis.

In May, 1892, appellant Simper advanced to Chas. W. Wolf $680 to enable him to establish a drug store in Cincinnati, Ohio, and a mortgage was executed and recorded there to secure the repayment of that sum.

Subsequently with the consent of Simper, and as there is evidence tending to show, under an agreement for the re-execution of the mortgage in Kentucky, Wolf removed his stock of drugs, medicines and fixtures to Ludlow, this State, and April 25, 1893, did, in fact, execute a mortgage thereon, which was duly recorded. But May 23, 1893, Bentley, trustee of Samuel Reed Lodge of Masons, No. 478, owner of the storehouse where Wolf had carried on business, procured to be issued and levied a distress warrant on the stock of drugs and property connected therewith to secure the payment of the rent.

May 27, 1893, appellee, the Stein-Vogeler Drug Co., brought an action to recover the amount of a note for $279.71, dated May 20, 1893, and to have judgment that the mortgage of Wolf to Simper, executed April 25, 1893, was made in contemplation of insolvency, and with design to prefer the mortgage creditor. In that action an attachment was obtained and levied on the same property, and in pursuance of an affidavit of plaintiff that a sale would, by reason of the perishable nature and cost of keeping it, be beneficial to the parties, it was, June 20, 1893, under section 218 of the Civil Code, sold, and purchased by plaintiff, the Stein-Vogeler Drug Co., at the price of $300.

Shortly thereafter, and while the property was under the jurisdiction of the court, appellant Simper gave notice to appellee, the Stein Vogeler Drug Co., he would move to set aside the sale and for an order of resale. But before that motion was or could be passed on appellee removed the entire stock of drugs and property connected therewith to Cincinnati, Ohio, and subsequently sold same for $800. We do not now decide whether the mortgage executed in this State April 23, 1893, by Wolfe to Simper was, in the meaning of section 1910, Kentucky Statutes, made in contemplation of insolvency and with design to prefer one or more creditors to the exclusion in whole or in part of others. But we are of opinion that the sale to the Stein-Vogeler Drug Co. ought to have been set aside.

When the action by that company was instituted Simper was a nonresident of this State, and a warning order was not, in fact, made against him until June 20, 1893, the day the sale of the property took place.

There is also evidence tending to show that Simper was, after the sale took place by the Stein-Vogeler Drug Co., induced to believe he would be permitted to assume the bid in its place. But however that may be, this is a case where one party has obtained and profited, not altogether in good faith, by an unconscientious bargain, to the injury of another, who was, by casualty or misfortune, not in a position to protect himself against the wrong or injustice. If the sale had been set aside it is entirely reasonable, in fact demonstrable, the property would have brought at least $800, more than twice as much as it was sold for to the Stein-Vogeler Drug Co., and after deducting the rent due to Samuel Reed Lodge of Masons, amounting to $123.32, and costs and allowances, the balance of that sum would have been left to divide between appellant and appellee. But under the judgment appealed from appellant gets less than one-sixth of his debt, while in addition to that proportion appellee makes a clear profit of $500, which is nearly twice the amount of his original demand.

It appears there was included in the mortgage to Simper various articles of household goods exempt from execution and not included in the public sale made to the Stein-Vogeler Drug Co. There may have been incurred by the latter expenses of removing the drugstore property to Ohio and keeping it before selling it. Whatever may be the amount thereof should be deducted from the sum of $800, and the residue should be apportioned between appellant and appellee according to the amount of their respective demands, though there should, before distribution, be first deducted from the demand of Simper value of the property included in the mortgage exempt from execution.

Wherefore, the judgment is reversed and case remanded for such further orders as may be needed to secure the rights of parties as determined in this opinion.

STEDMAN & BOWMAN V. RICHARDSON.

(*Filed October* 24, 1896.)

Rights of real estate broker to commissions. When property is withdrawn by the owner from the hand of a real estate broker, after his failure to sell within a reasonable time or within the time fixed by the contract, the fact that the owner afterward sells to one whom the broker had attempted to sell does not entitle the broker to his commission, provided the property was withdrawn in good faith and not for the purpose of avoiding the payment of the commission.

Breckinridge & Shelby for appellants.

S. E. Hill for appellee.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Paynter.

As real estate brokers Stedman & Bowman claim they are entitled to recover certain commissions which they claimed they earned in the sale of a house and lot in Lexington, Ky.

The law and the facts were submitted to the court, and the court found the facts to be that "defendant was to pay them a commission of two per cent. upon the selling price for their services in the event that plaintiffs procured a purchaser for said property; that plaintiffs did find O. H. Chenault, and did show him said property with a view to securing him as a purchaser; that Chenault did not buy said property while it was in plaintiffs' hands, but that said property was taken out of plaintiffs' hands upon their failure to make a sale of it, and one day after it had been so withdrawn the defendant negotiated a sale of said property, and did sell it to said Chenault at the price named in the petition. The plaintiffs found Chenault, and but for them the defendant would not have sold to him. The court finds that the defendant and not the plaintiff negotiated the sale to Chenault; the plaintiffs were not the active or moving cause of said sale; they had found the man who became the purchaser and shown him the property, but when it was sold said property was in good faith out of their hands, and they were not negotiating a sale with him at the time it was withdrawn from them."

In the absence of anything appearing to the contrary we assume the finding of facts by the court to be correct.

While the court says that plaintiffs found Chenault, and but for them the defendant would not have sold to him, yet this language must be considered in connection with the balance of the finding of facts in order to determine what the court means. It appears that the brokers called the purchaser's attention to and showed him the property, but the court says it was taken out of their hands upon their failure to make the sale. It also says that it was withdrawn from their hands in good faith, and when no negotiations for the sale were pending.

We must assume that under the terms of the contract the time was limited in which the sale was to be made by the brokers, or that the sale was to be made in a reasonable time by them; that while the plaintiffs had attempted to sell the property to Chenault they had failed to do so within the period fixed by the contract or within a reasonable time, hence the withdrawal was made in good faith.

"It is not necessary that the broker should personally have conducted the negotiation between his principal and the purchaser

or that he should have been present when the bargain was completed, or even that the principal should at the time have known that the purchaser was one found by the broker. It is indispensable, but it is also sufficient, that his efforts were the procuring cause of the sale; that through his agency the purchaser was brought into communication with the seller, although the parties then negotiated in person. His efforts may have been slight, but if they brought about the desired result no more could be asked; and their operations may have been circuitous, but if the purchase was the natural and proximate result of his endeavors, it is sufficient. The law prescribes no particular method of procedure, nor has it any other standard by which to measure exertion in such a case than the result attained." (Mechem on Agency, section 966.)

This is a correct statement of the rule so far as it goes. It is sustained by reason and abundant authority.

The question involved in this case is not covered by the rule stated, but it is whether when the seller in good faith withdraws the property from the hands of the broker, and subsequently sells it to one to whom the broker had made an effort to sell, can the broker claim his commission?

The brokers failed to make the sale before a rightful withdrawal of the property from their hands. It was not withdrawn for the purpose of preventing them from making their commissions. The mere fact that the brokers showed the purchaser the property and failed to consummate a sale before the withdrawal does not entitle them to their commission.

It is said by Mechem on Agency, section 965: "It will be seen from this rule that when the time is limited the performance must be within *that time;* and the broker will not be entitled to commissions because efforts begun within that time bear fruit after its expiration."

To the same effect are the cases of Beauchamp v. Higgins, 20 Mo. App., 514, and Fultz v. Wimer, 34 Kans., 580.

It may be said that perhaps the contract was that the sale was to be consummated only in a reasonable time. Under such a contract the rule is that the broker is entitled to a reasonable time in which to find a purchaser, after which, if he be unsuccessful, the principal may revoke the broker's authority to sell, and not incur any liability, unless it was done to avoid the payment of commissions, while availing himself of the benefits of the broker's efforts by completing the negotiations then pending. Although the seller under such circumstances may subsequently sell to one to whom the brokers made an ineffectual effort to sell, the rule is the same. (Mechem on Agency, section 968; Libbald v. Bethlehem Iron Co., 83 N. Y., 378.)

There is no reason why real estate brokers should not be held to comply with the terms of their contracts unless wrongfully prevented by their principals before demanding their commissions. In the case at bar the withdrawal was in good faith, and when no negotiations were even pending for the sale of the property.

The judgment is affirmed.

The Kentucky Law Reporter.

EDITOR:

WALTER G. CHAPMAN . . . . . Frankfort, Ky.

Vol. 18. FEBRUARY, 1897. No. 15

KENTUCKY COURT OF APPEALS.

McCARTY v. LOUISVILLE BANKING CO., &c.

OWSLEY, &c. v. SAME.

(Filed October 7, 1896.)

1. Negotiable instruments—Notice of infirmity—Burden of proof—Neither a partial nor a total failure of consideration, nor fraud between antecedent parties to a negotiable note put upon the footing of a bill of exchange, is a defense to the title of a bona fide holder thereof who acquired it before maturity for a valuable consideration and without notice of any previous infirmity. And the possession of such a note by an incorporated bank in Kentucky imports that it was acquired by the bank in good faith before its maturity and in the regular course of business, and, therefore, that it was endorsed to and discounted by the bank. And in an action on the note by the bank this presumption can not be overcome, so as to shift the burden on the plaintiff, by mere allegation of anything short of facts, which, if true, would render the note absolutely void from the beginning. And in all cases except where such facts are alleged allegation and proof must be made by defendant of facts that would remove the presumption, such as of fraud in its inception or circumstances raising a strong suspicion of fraud, before the plaintiff can be required to show by testimony when and how he acquired the right to and possession of the note.

2. Same—Where the instrument has been acquired and is held in good faith, the right to it is not affected by bad faith on the part of the endorser, or even by gross negligence of the holder, unless it amounted to bad faith on his part.

3. Same—The statement in negotiable notes that they were executed for the purchase money of certain lots on which a lien was retained was not sufficient to put the bank which discounted them on inquiry, or to charge it with notice of a condition in the deed that the notes were to be returned if certain improvements were not erected by the vendor.

4. Same—The notes not being void, one who acquired them from the payee in good faith for a valuable consideration was under no obligation to hold them for the benefit of the makers in order that their right of defense might be preserved, and, therefore, the fact that he negotiated them to the bank gave the makers no claim of action against him, and their cross petition against him was, therefore, properly dismissed.

C. S. Walker for appellants.

Little & Little and J. D. Atchison for appellees.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Landes.

These two cases involve the same questions, both of fact and of law, and by agreement were heard together in the court below and also in this court.

The trial below was by the court, without the intervention of a jury, and, by request of the defendants, the court stated in writing the conclusions of fact found separately from the conclusions of law. The action in each case was upon a promissory note executed to one R. M. Conway—in one case by the appellants, W. M. McCarty and S. S. McCarty, and in the other by the appellants, E. E. Owsley, W. L. Sloan and Geo. E. Bridges—each note bearing date the 17th day of August, 1892, due one year after date, for the sum of $100, made negotiable at the Citizens Savings Bank of Owensboro, Kentucky, and being for the second deferred installment of the purchase money for a lot, situate in what was designated as the "Mechanicsville Addition to the City of Owensboro," and which was sold and conveyed by the said R. M. Conway and his wife to the appellants. Each of the notes was endorsed by the payee to Edwards & Cruse, a business firm, consisting of Eliza Edwards and James Cruse, and the latter, upon their firm indorsement, negotiated and sold both of the notes before they became due, with others, to the appellee, the Louisville Banking Co., which company discounted them and paid to the firm of Edwards & Cruse the proceeds thereof in money. The notes were afterwards sent by the Louisville Banking Co. to the Bank of Commerce, one of its correspondent banks in the city of Owensboro, for collection for its account, and not being paid when due, and payable upon proper demand, they were each duly protested for nonpayment. The appellee, the Louisville Banking Co., the indorsee of the notes, and the Citizens Savings Bank of Owensboro, Kentucky, at which they were made negotiable and payable, were banks incorporated by special acts of the General Assembly of Kentucky, the former located and doing business in the city of Louisville, and the latter in the city of Owensboro.

The appellees, W. M. and S. S. McCarty and Owsley, Sloan and Bridges, denied in their answers that the notes were endorsed by Edwards & Cruse to, or that they were discounted by, the Louisville Banking Co., before the maturity thereof, for a valuable consideration, or for any consideration, and they also denied that the company was the owner or holder of the notes; they alleged that the notes, with other notes, were executed by them to Conway for the purchase money they had each promised to pay him for the separate lots of ground sold and conveyed to them by Conway, situated in the Mechanicsville Addition to the City of Owensboro, which were parts of a parcel of ground that was purchased by Conway from J. Z. Moore and others, trustees; that the purchase money therefor had never been fully paid by Conway, and that there was a lien on the ground for the balance thereof, "which the entire property was not sufficient to pay."

They alleged that it was expressly understood and agreed between them and Conway, and so expressed in the separate deeds by which he conveyed the lots to them, that Conway "was to erect, equip and operate a cotton mill on the said Mechanics-

ville Addition to Owensboro, and if said factory was not built, the said notes executed by defendants were to be returned to them."

The deed referred to is exhibited in each case, and contains the following clause, viz.: "It is expressly understood and agreed, by and between the parties hereto, that said R. M. Conway, party of the first part, binds himself to erect, equip and operate a cotton mill, with $50,000 capital. If said factory is not built, the notes hereby executed and money hereby paid are to be returned to the party of the second part."

They stated that the consideration of the notes was this agreement on the part of Conway, and, alleging that the cotton mill had not been erected, equipped or operated on the said premises by Conway, or by any one else, they charged that the notes were "without any consideration, which was known to plaintiffs at the time it pretends to have purchased them."

They further alleged that the Louisville Banking Co. was either not the holder or the owner of the notes sued on, or that it discounted the notes with notice that they were "without consideration," and that the alleged lien existed on the land of which their lots were parts, and that one of said facts, but they did not know which of them, was true. They charged that the said Edwards & Cruse knew of the existence of the facts pleaded as substantially detailed above, and that, "knowing the infirmity in said note and other defects * * * mentioned," he made an arrangement with the Louisville Banking Co., whereby the company was to hold the notes as its own, when, in fact, it had not discounted them, in order to deprive them of the benefit of their defenses thereto, and that said arrangement was made "with the plaintiff bank with the fraudulent purpose and intent to cheat these defendants," and that "the said plaintiff bank * * * had notice of said fraudulent intent and purpose on the part of Edwards & Cruse at the time it made the arrangement whereby it got possession of this and other notes of the same nature." Each of these answers was made a cross petition against Edwards & Cruse, against whom judgment was prayed for any sum that might be adjudged against them in favor of the Louisville Banking Co. But the defendants to the cross petition filed a demurrer thereto, which was sustained by the court. To each answer the Louisville Banking Co. replied, specifically denying every allegation, charging it with knowledge or notice of any fact stated as a defense against the notes at the time the notes were discounted by it, and also the allegations of notice or knowledge of the alleged fraudulent intent or purpose of Edwards & Cruse in disposing of the notes to it, and stated that it purchased the notes sued on in good faith, for a valuable consideration, before their maturity, and having no notice or knowledge of any defense thereto."

The court, after hearing the evidence, rendered judgment in favor of the Louisville Banking Co., the plaintiff in each action, against the appellants, and having overruled their motion for a new trial in each case the judgments are before us by appeal.

The finding of the court on the facts was, in substance, that the notes sued on were negotiated and indorsed to the plaintiff, the Louisville Banking Co., before they matured, for a valuable consideration in each case, and that they were discounted by the company in good faith, without notice or knowledge of any infirmity in the notes, or of any matters set up by the makers of the notes as a defense against the notes and upon the facts found the court found the law to be that by reason of the negotiations of the notes to the company they were placed upon the footing

of foreign bills of exchange, and that they were not subject to any of the defenses sought to be made in the actions.

Many errors are specified in the grounds for new trial, but most of them, if they were committed, were trivial, and did not affect the substantial merits of the cases.

The specifications that are chiefly relied on by counsel for the appellants relate, first, to the action of the court in determining that the burden of proof rested upon the defendants; and, second, to the finding of the court on the evidence that the plaintiff, the Louisville Banking Co., "discounted the notes in good faith, having no knowledge or notice of any infirmity therein or of the matters set up as a defense to the notes;" and, third, to the order sustaining the demurrer of Edwards & Cruse to the cross petition against them.

Upon the question of the burden of proof it is the opinion of the court that the court below ruled correctly. Under the statute a promissory note which is made negotiable and payable at a bank incorporated under any law of this State, or organized in this State under and law of the United States, and which has been endorsed to any discounted by the bank at which it is made payable or by any other bank in the Commonwealth, is placed on the same footing as a foreign bill of exchange. (Kentucky Statutes, section 483.)

In Hargis v. Louisville Trust Co., 17 Ky. Law Rep., 219, it was held by this court that, even before the adoption of this statute, neither a partial nor a total failure of consideration, nor fraud between antecedent parties to a negotiable note put upon the footing of a bill of exchange, was a defense to the title of a bona fide holder thereof, who had acquired it before maturity for a valuable consideration and without notice of any previous infirmity, and it was held in the same case that the possession of such a note by a bank imports that it was acquired by the bank in good faith before its maturity and in the regular course of business, and, therefore, it was endorsed to and discounted by the bank.

The rule is stated in a valuable note to the case of Bedell v. Herring (Cal.), 11 Am. St. Rep., 323, with many authorities there referred to, to be that "the mere possession of a negotiable instrument by the endorsee * * * imports prima facie that he is the lawful owner, and that he acquired it before maturity, bona fide, in the usual course of business, and without notice of any circumstances impeaching its validity."

This presumption that attaches to the mere possession by an incorporated bank in Kentucky of a promissory note that is made negotiable and payable at such a bank we apprehend can not be overcome by mere allegation in defense of an action on the note by the bank of anything short of facts which, if true, would render the note absolutely void from the beginning, so as to shift the burden of proof upon the plaintiff. And in all cases, except where the allegations in defense or of facts which would render the instrument sued on void from the beginning, allegation and proof must be made by the defendant, who is bound on the negotiable instrument, of facts that would remove the presumption, such as of fraud in its inception or circumstances raising a strong suspicion of fraud, before the plaintiff can be required to show by testimony when, by what means, and the circumstances under which he acquired the right to and possession of the note, in order to show his right to recover thereon. (Bedell v. Herring, and note supra; Shenandoah National Bank v. Marsh, Iowa, 48 Am. St. Rep., 381.)

And where the instrument has been acquired and is held in good faith, the right to it is not affected by bad faith on the

part of the endorser, or even by the gross negligence of the holder, unless it amounted to bad faith on his part. (Am. & Eng. Enc. of Law, 1st edition, volume 2, pages 390-393; Comstock v. Hanna, 76 Ill., 550.)

In these cases the facts alleged in the answers, while they may have constituted a good defense against the notes in the hands of the payee, or of Edwards & Cruse, his assignee, were wholly insufficient to place the burden of proof on the plaintiff, and upon the merits of the cases, conceding that the facts relating to the transactions between Conway and the makers of the notes were as alleged, and that Conway deceived and overreached them and by false promises induced them to purchase the lots, the proof wholly failed to show that the Louisville Banking Co. had any notice or knowledge of these things, either actual or constructive.

The statement in the notes that they were executed for purchase money of the lots, on which a lien was retained to secure them, was not sufficient, as contended by counsel for the appellants, to put the company on inquiry as to any fact the existence of which could have been ascertained by investigation, and that might have been favorable to the defense. Besides, the testimony in behalf of plaintiff company established beyond question the title of the company to the notes, and that they were acquired by discounting them in good faith for a valuable consideration before maturity, and in the regular course of business, and all confirmed the presumption raised by the possession of the notes by the company; so that upon the whole case the finding of the court below of the facts was fully sustained by the evidence, which being true, the law was for the plaintiff company as found by the court.

It would seem to follow, from what has been said, that the court below properly sustained the demurrer to the cross petition, and we so hold.

The defense attempted here, as we understand it, is not based upon the absolute invalidity of the notes, and there is no statement in the answers to show that Edwards & Cruse were connected in any way with the transactions between Conway and the appellants which resulted in the execution of the notes. The notes not being void, if Edwards & Cruse acquired them from the payee for a valuable consideration, and if they were the bona fide owners of them when they negotiated and endorsed them to the Louisville Banking Co., they were under no obligation to hold them for the benefit of the appellants, and in order that their right of defense might be preserved; but whatever may be the rights of the appellants in the premises, it is the opinion of the court that the cross petition failed to allege such a state of facts as constituted a cause of action against Edwards & Cruse.

Finding no substantial error each judgment is affirmed.

ASHER v. NICHOLSON.

(Filed October 14, 1896—Not to be reported.)

1. Attachment—Failure of garnishee to make satisfactory disclosures—The appellant who was summoned as a garnishee in a suit in a city court having failed to make a satisfactory disclosure, the plaintiff had the right to sue him in the circuit court, alleging that fact and setting up his indebtedness to the defendant in the original action. And the failure to allege that the attachment was sustained did not render the petition bad on demurrer.

2. Same—Parties—If the defendant to the original action was a necessary

party to the suit against the garnishee, the failure to make him a party does not afford ground for reversal, there being no special demurrer for defect of parties.

Edward W. Hines for appellant.

A. B. Smith, O. V. Riley and Wm. H. Holt for appellee.

Appeal from Bell Circuit Court.

Opinion of the court by Judge Guffy.

The appellee, Nicholson, sometime before the institution of this suit had brought suit in the Pineville City Court against Joseph C. Gross, and had the appellant, Asher, summoned as a garnishee, who had answered that he did not owe Gross anything.

Appellee took judgment against Gross, and afterwards brought this action against appellant Asher, in the Bell Circuit Court, upon the ground that he, Asher, had not made a satisfactory disclosure, and that he was really indebted to Gross at the time, and still remained so indebted. A trial resulted in a judgment in favor of appellee, and to reverse the same this appeal is prosecuted.

Section 227 of the Code provides that if the garnishee fails to make a satisfactory disclosure plaintiff may, by petition or amended petition, bring an action against him, and the proceedings thereon shall be the same as in other actions. It is, therefore, manifest that the appellant had a right to bring this suit in the circuit court.

It seems to us that the general demurrer was properly overruled, inasmuch as the petition showed that appellant was summoned as a garnishee in the other suit, and that appellee had obtained judgment against Gross.

It is true that the petition does not allege that the attachment was sustained, but we do not think that the omission is fatal to the petition. The principal question of interest to Asher was as to whether or not he had been garnished, and whether he was really indebted to Gross.

If it be suggested that Gross was a necessary party to this last suit, the reply is that no special demurrer for defect of parties was filed, and it also appears in this record that Gross testified in appellee's behalf, and it is pretty evident that he desired the success of appellee in the suit. It is, therefore, not at all probable that any harm can come to appellant from the failure to make Gross a party, if indeed he was a necessary party.

We deem it unnecessary to quote or repeat the testimony introduced, as it seems to fully authorize the judgment appealed from, and that judgment is affirmed with damages.

FRENCH v. COMMONWEALTH.

(Filed October 22, 1896.)

1. Practice in criminal cases—Separation of jurors after submission of felony case—While sickness is not the only cause which will authorize the court, by order of record made in the presence of the accused and his counsel, to permit a juror to separate from the other jurors after a felony case has been finally submitted to the jury, yet the accident or other cause which will authorize such a separation must be of as imperative a character as sickness. The mere comfort or convenience of the juror does not furnish such a cause.

1. Upon the trial of appellant for murder the fact that one of the jurors was allowed, under the verbal assent of the trial judge, to go to his place of business for the purpose of closing his house, although in company with a deputy sheriff, entitled the appellant to have the jury discharged upon a motion therefor.

2. Same—Even if the cause for a separation was sufficient there would still have to be a reversal because the State has not clearly shown that no opportunity was afforded for the exercise of improper influences on the juror, which must be done in every case of separation.

Wilson & Goldsmith for appellant.

W. S. Taylor for appellee.

Appeal from Jefferson Circuit Court, Criminal division.

Opinion of the court by Judge Hazelrigg.

While the accused was on trial for murder, and after the final submission of the case to the jury, one of the jurors was allowed, under the verbal assent of the trial judge and in company with a deputy sheriff, to go to his place of business, some blocks away, in the city of Louisville, for the purpose of closing his house. The other eleven were taken to their hotel, to which place, in some twenty minutes, the deputy and the jurors returned, having gone in the meantime to the juror's house and also to the "Pendennis Club."

Upon ascertaining these facts on the following morning, and before the verdict was returned, a motion was made to discharge the jury. It was overruled, and a verdict of guilty returned.

Whether this separation is such an error as demands a reversal of the judgment is the sole question presented on this appeal.

Section 244 of the Criminal Code provides that "on the trial of offenses which are or may be punished capitally, the jurors, after they are accepted, shall not be permitted to separate, but shall be kept together, in charge of the proper officers. On the trial of other felonies the jurors, before the case is submitted to them, may be permitted to separate, in the discretion of the court; but after the case is submitted they shall be kept together in charge of an officer. On the trial of misdemeanors the jurors may be permitted to separate at any time until finally discharged, or the court may order them to be kept together."

It is seen that on the trial of capital offenses the provision is explicit that the jurors, after acceptance, shall not be permitted to separate, but shall be kept together, and the only provision which even looks toward an exception or modification is found in section 251, Criminal Code, which is as follows: "If, after retirement, one of the jurors become so sick as to prevent the continuance of his duty, or other accident or cause occur, preventing them being kept together, or if, after being kept together such a length of time as the court deems proper, they do not agree in a verdict, and it satisfactorily appear that there is no probability they can agree, the court may discharge the jury; or if the sickness of a juror be temporary, the court may permit him to separate from the other jurors, and may place him in charge of an officer, or not, in its discretion."

We are not disposed to so construe this section as to prevent the court, by order of record made in the presence of the accused and his counsel, from permitting a separation when required by the sickness only of a juror.

A fair construction would be to allow it when such separation is required by accident or other cause, of such an imperative

character as would be the sickness of the juror. Certainly the mere convenience or comfort of a juror ought not to be held to furnish such a cause.

This safeguard of the ancient law, alike vitally important to the State and to the accused, must not be impaired or frittered away. Manifestly the occasion here furnishes no cause for the separation within a fair construction of the law; and, if it did, it must yet, in all cases of separation, be shown clearly by the State that no opportunity has been afforded for the exercise of improper influences on the juror. The explanations offered here for traveling about the street are indefinite, if not evasive.

It is proper to say that no actual wrong or evil motive is imputed to the juror or deputy in this case.

For the reasons indicated the judgment is reversed and a new trial ordered to be awarded.

HELMERKING v. COMMONWEALTH.

(Filed October 22, 1896.)

Indictment—Allegation and proof—Variance—To authorize a conviction under an indictment the evidence must substantially sustain the allegations of the indictment as to the acts constituting the offense. Therefore, under an indictment for murder, charging that the defendant did the killing by "striking, beating and bruising" the deceased "with his hands and fists," testimony showing that the death of deceased resulted from striking his head against some hard substance in falling did not authorize a conviction of the offense charged or of any of its degrees, and a peremptory instruction to find for defendant should have been given. While it may be that the defendant was guilty of involuntary manslaughter, as found by the jury, he can not be convicted except under an indictment truthfully alleging the acts constituting the offense.

Phelps & Thum for appellant.

W. S. Taylor for appellee.

Appeal from Jefferson Circuit Court, Criminal division.

Opinion of the court by Judge Guffy.

The appellant, Henry Helmerking, was indicted, tried and convicted in the Jefferson Circuit Court upon an indictment charging him with the murder of Joseph Graf, and his punishment fixed at a fine of $200 and ninety days' imprisonment in the county jail. His motion for a new trial having been overruled, he has appealed from the judgment.

Several grounds for a new trial were relied on, but the one most earnestly urged here is the variance of the proof from the allegation in the indictment. We quote from the indictment as follows:

"Did unlawfully, willfully, maliciously, feloniously and of his malice aforethought, kill, slay and murder Joseph Graf, by striking, beating, bruising and mortally wounding him, the said Joseph Graf, with his hands and fists, in and upon the head, body and person of him, the said Joseph Graf, from which said striking, beating, bruising and mortally wounding as aforesaid the said Joseph Graf did then and there die."

The evidence seems to clearly establish the fact that prior to the time of the difficulty the defendant and deceased were

friends, and but a few minutes before the difficulty drank together; and there is proof conducing to show that appellant had left the saloon and gone out in the street, or upon the sidewalk, with intent to go home, and that deceased followed out and, going towards appellant, asked him if he (appellant) said he owed him, and appellant said yes; and deceased then called appellant a d—d liar, and that appellant struck him and knocked him partly down, and after he got up and possibly started towards appellant, and perhaps used insulting or threatening words, appellant again struck him and knocked him down, deceased falling on his back towards the house, on a cellar door or something. Soon thereafter appellant went home. Deceased was assisted to his home, and died before next morning.

The proof seems to clearly show that deceased had struck some hard substance and fractured his skull, and thereby caused his death. The jury evidently thought that appellant was not acting in his own necessary defense; but did not think he was either guilty of murder or voluntary manslaughter.

The contention of appellant is that there is no proof that the blows inflicted produced the death of deceased; that death was the result of the head striking some hard substance, and it seems clear that contention is sustained by the evidence. It is further contended by appellant that the proof as to the manner of the killing was so variant from the allegations made in the indictment that the peremptory instruction asked by appellant should have been given, and that the motion to dismiss the indictment should have been sustained.

Section 122 of the Criminal Code requires a statement of the acts constituting the offense, and the rule is well settled that the evidence must substantially sustain the allegations of the indictment as to the acts constituting the offense, and the authorities go so far as to hold that if the description given might be omitted, yet the main facts alleged must be proven as laid.

In the case of Clark v. Commonwealth, indicted for having counterfeit bills payable at certain-named banks, with intent to pass the same, the proof showed that he had counterfeit bills with intent to pass the same, which was an offense; but the proof failed to show that any of them were payable by any of the banks named, or purported to be issued by such bank. At the conclusion of the evidence the defendant asked the court to instruct the jury that unless the jury should believe from the evidence, to the exclusion of a reasonable doubt, that the defendant had, before the finding of the indictment, in his possession a counterfeit bank bill of the denomination and description mentioned, with the intention of passing the same, they should acquit him; which instruction was refused by the trial court.

Upon appeal to this court it was held that the instruction should have been given, although the evidence showed the possession of counterfeit bills with intent to pass the same. (16 Ben Monroe, 207.)

In the case of Guedel v. The People, 43 Ills., 226, the court discusses at length the same question, and holds that an indictment for murder committed by shooting from a gun can not be sustained by evidence of the killing by striking on the head with a gun, and that an acquittal under such an indictment does not bar another trial, charging that the murder was committed by striking deceased on the head with a gun. The court also quotes with approval from Greenleaf on Evidence, volume 3, section 140. We quote as follows from the section supra:

"But if the evidence be of death in a manner essentially dif-

ferent from that which is alleged, as if the allegation of stabbing or shooting, and the evidence be of death by poisoning, or the allegation be of death by blows inflicted by the prisoner, and the proof be that the deceased was knocked down by him and killed by falling on a stone, the indictment is not supported."

It is suggested by the Commonwealth that the question as to the killing in this case, as alleged in the indictment, was submitted to the jury and a verdict of guilty rendered.

If there was any proof at all to authorize or sustain that verdict this court could not set it aside unless other errors of law had occurred, but we are satisfied that the jury was of opinion that as the blows caused deceased to fall and thereby meet his death, this proof sustained the allegations to the indictment; but such is not the legal effect of such evidence. There was, in fact, no proof that the blows killed the deceased; but, on the contrary, it is pretty clear that if his head had not struck some hard or sharp object he would have sustained but a slight injury.

While it may be true that appellant could have been legally convicted and punished for the killing, if he did it, yet the acts constituting the killing would have to be alleged in the indictment.

It results from the foregoing that the court below erred in refusing the peremptory instruction asked by appellant.

The judgment appealed from is, therefore, reversed and the cause remanded, with directions to set aside the verdict and judgment and award a new trial, and for proceedings consistent with this opinion.

MASONIC SAVINGS BANK'S ASS'EE v. ESCHMAN.

(Filed October 24, 1896—Not to be reported.)

Assignments for creditors—Reconveyance to assignor—Bond of indemnity—Where an assignee for the benefit of creditors reconveyed the assigned estate to the assignor upon the execution to him of a bond reciting that the assignor had effected a compromise with its "recognized creditors, but that there were still asserted claims against the assignor and its assignee which were resisted," and that in consideration of these facts and of the reconveyance of the property the obligors undertook "to hold him harmless and indemnify him against any and all claims against him as assignee," a creditor of the assignor who seeks to be subrogated to the rights of the assignee under this bond must, even conceding that the rights of subrogation would exist in any case, show that his claim belongs to the class against which the obligors in the bond agreed to indemnify the assignee, and the allegation in this case that the plaintiff's claim were "regarded as secured debts and were as such expressly excepted from the composition," is not sufficient for that purpose. Moreover, if the claims were secured, an allegation ought to have been made that the plaintiff, before bringing the action, had attempted, by due diligence and without avail, to collect the claims.

Helm & Bruce for appellant.

Dodd & Dodd for appellee.

Appeal from Jefferson Circuit Court, Common Pleas division.

Opinion of the court by Judge Lewis.

The Germania Safety Vault and Trust Co., assignee of the Masonic Savings Bank, brought this action to recover of J. L. Eschman and other defendants judgment upon the folllowing

statement of facts: That, during the year 1887, the Kentucky Furniture Manufacturing Co., a corporation, became indebted to the Masonic Savings Bank for various sums of money, evidenced by seven distinct notes, which, together with partial payments endorsed on each, are set out and described in the petition; that, prior to December 5, 1887, the Kentucky Furniture Manufacturing Co. executed and delivered to defendant, Otis Hidden, a general deed of assignment for the benefit of its creditors; but that, subsequently, certain parties interested in that company, among others defendants to this action, induced said Hidden to convey and transfer back to it all its assets, which were of large value, though the amount is unknown to plaintiff; and, in order to induce him to make that transfer back, which he would not otherwise agree to do, the following bond was executed: "Whereas, the Kentucky Furniture Manufacturing Co., lately assigned, has effected a compromise with its recognized creditors satisfactory to said company and to its said creditors, but there are still asserted claims against said company and Otis Hidden, its assignee, which are resisted; and whereas, at a regular meeting of the board of directors of said company, as reorganized, it was resolved and requested that the said Otis Hidden, assignee, should, by deed duly executed and placed on record, reconvey and transfer to said company, as reorganized and now constituted, all said property and assets; now, in consideration of the premises and of said reconveyance, we, the Kentucky Furniture Manufacturing Co. and Jacob Kreiger, H. S. Cooling, Frank Ingram, R. R. Glover, Nathan Bensinger and J. L. Eschman, as a board of directors and individually, covenant with and obligate and bind ourselves unto the said Otis Hidden to hold him harmless and indemnify him against any and all claims and demands against him as said assignee, whether the same existed before or since said assignment, and to pay him on demand all money he may be compelled to pay on account thereof, and to pay to him all costs, commissions and expenses of said assignment, and in all respects to fully indemnify him against every claim and demand made against him as assignee of said company."

It is further stated in the petition that said Hidden has sold all his property in and removed from this State, and plaintiff asks that it be subrogated to his rights, allowed to maintain this action on said bond and have judgment directly against the defendants for the amounts of the notes mentioned.

To the petition a general demurrer was sustained, as also to two amended petitions successively filed, and then, plaintiff declining to further amend, the action was dismissed.

In the first amendment it is stated "that the claims of each of them sued on were, at the dates of the composition by the Kentucky Furniture Manufacturing Co. with its creditors, regarded as secured debts and were, as such, expressly excepted from the composition, and as to those debts, and each of them, there was no settlement or composition, but the Kentucky Furniture Manufacturing Co. remained bound on each of them, and the estate of said company in the hands of defendant, Otis Hidden, as assignee, was bound as a trust fund for the payment of said debts," etc.

In the second amendment it is stated that Otis Hidden did not return an inventory of assets that came to him as assignee, nor state the character and value, thereof when he retransferred, though they were sufficient to satisfy the debts here sued on; that said transfer was unauthorized—made without the consent of and to the damage of the Masonic Savings Bank.

The Kentucky Furniture Manufacturing Co. is not made a

party to this action; nor is it stated that Otis Hidden has been heretofore sued; but judgment is asked against only those who executed the indemnity bond. So that, conceding without discussion plaintiff may be properly subrogated to the rights and equities of Otis Hidden, if he has any, it must primarily and necessarily appear that the claims or demands, as set out and described in the pleadings, were in the contemplation of the parties to the bond and such as the obligors agreed "to hold him harmless and indemnify him against."

It is distinctly stated in the bond that the Kentucky Furniture Manufacturing Co. had effected a compromise "with its recognized creditors satisfactory to said company and to said creditors," but that there were still asserted claims against said company and Otis Hidden, its assignee, which were resisted.

It is too plain for disputation that the only claim which the obligors in that bond intended or did, according to a fair meaning of the instrument, in fact agree to indemnify Otis Hidden against were such as had not been recognized, but were resisted by the company; consequently if Otis Hidden had been compelled to pay the present claims of plaintiff he could not have maintained an action for indemnity against the obligors of that bond without alleging and showing those claims belonged to the class which, in the words of the bond, had not been recognized, but were resisted by the company. And if he would in such case have been required to allege that fact, certainly the present plaintiff must do so in order to maintain this action.

In our opinion the statement in the first amended petition, that the claims of the Masonic Savings Bank were regarded as secured debts, and were expressly excepted from the composition, is not, in any sense, equivalent to the averment required to constitute a cause of action on the bond. On the contrary, if the claims of the Masonic Savings Bank were secured, they were manifestly not of that class the obligors in the bond intended to indemnify Otis Hidden against. Moreover, if they were secured, an allegation ought to have been made that plaintiff, before bringing this action, had attempted by due diligence, and without avail, to collect the claims. Nor, waiving the question whether the second amendment is not a departure from the original cause of action, do we think the statements therein cure the defect mentioned.

Judgment affirmed.

LOUISVILLE & NASHVILLE R. R. CO. v. MILES.

(Filed October 24, 1896—Not to be reported.)

1. Railroads—Right of passenger to get on train which does not stop at his station—It is the duty of one who desires to become a passenger on a railroad train to ascertain in advance whether it stops at the station to which he desires to go, and if, without making inquiry, he gets upon a train which is not scheduled to stop at the station for which he holds a ticket, and he is required by the company to leave the train at the last station at which the train stops before reaching the station for which his ticket calls, he has no ground of complaint against the company.

2. As the facts appear in the record, if there is a recovery at all for the failure of defendant to carry plaintiff to the station for which he held a ticket, the damages must be compensatory and not punitive.

W. J. Lisle and Thompson & McChord for appellant.

Lafe S. Pence for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Paynter.

The plaintiff seeks to recover damages because, as he avers, that on the 27th day of July, 1893, he purchased of defendant's agent at Chicago, Ky., a round-trip ticket to Lebanon, Ky.; that on that day he went to Lebanon on the defendant's regular passenger train; that defendant agreed to carry him back on the night of that day on its freight train; that the freight train was nine hours behind; that after it arrived plaintiff was informed that a passenger coach would be attached and the train backed to the station; that without doing so the train departed, leaving plaintiff at the station; that the employes negligently and purposely left him at the station, and that he set up the remainder of the night, "to his physical discomfort and annoyance;" that on the following morning he got on a regular passenger train which passed Chicago; that the defendant's employes refused to stop the train at Chicago, and told him he would have to leave the train at a station called Loretto, about 2½ miles from Chicago. He got off at Loretto and walked to the station called for by his ticket.

The defendant answered that its employes did not purposely depart without the plaintiff on the night in question, but provided a coach for passengers going to Chicago; that the train was so heavy that it could not be backed, owing to the grade, so as to bring the passenger coach to the station, but the passengers were ordered to get aboard of the coach where it stood; that several of the passengers did, and the employes supposed all had done so before the train pulled out.

There is a conflict in the evidence as to whether the conductor announced he would back the train to the station, and as to whether he told those waiting for the train to get aboard the coach where it was.

It appears from the uncontradicted evidence in this case that the train which the plaintiff got aboard the morning following the departure of the freight train was the express train on the road, and was not scheduled to stop at Chicago. While the plaintiff testified that he had known it to stop at that place as much as twice during the preceding year, yet he also testified that it did not stop there regularly.

The plaintiff claims that he got aboard the train without showing his ticket to any of those connected with the train, while the employes of the road claim that all persons holding tickets for Chicago were told the train would not stop there, and those holding such tickets agreed to get off at Loretto. It is immaterial which claim is true.

Railroads have the right to make reasonable rules and regulations for the conduct of their business. It has the right to place a train upon its road and designate on a schedule the stations where it will stop to receive and discharge passengers. It is the duty of a holder of a ticket, or one who desires to become a passenger on a train, to ascertain before boarding it that it stop at the station to which he desires to go.

If it be within the power of a passenger by getting aboard of a train to compel it to stop at any station he may designate, then the authority of the company to make reasonable rules for the conduct of its business and the running of its train is de-

stroyed; the traveling public would be seriously interrupted; a railroad could no longer calculate upon its trains making certain connection with trains in other roads, and the hazard of operating them would be increased.

To give the power to an individual to thus board a train and have it stop at any station would serve the convenience of such one, but while his convenience was served may be the convenience of many others on board of the train would be seriously interfered with.

The traveling public, as well as the railroad, is greatly interested in preserving the right to the railroad to make reasonable rules for operating trains on the road. Instruction B told the jury that if the plaintiff was permitted to get aboard of the train on the morning of the 28th of July, and that defendant failed to carry him further than Loretto, and required him to get off at that place, then the jury should find for plaintiff damages, etc.

It appears from the record that the plaintiff was not entitled to have the train stop at Chicago. It was the business of the plaintiff to know the train would stop at Chicago (he did know that it did not regularly stop there) before boarding the train, and having failed to do so the defendant incurred no liability because he was not carried to Chicago on that train.

As the facts appear in this record, if there is a recovery the damages are compensatory, not punitive.

The judgment is reversed, with directions that further proceedings conform to this opinion.

LOUISVILLE & NASHVILLE R. R. CO. v. MILES, BY, &c.

(Filed October 26, 1896—No to be reported.)

W. J. Lisle and Thompson & McChord for appellant.

Lafe S. Pence for appellees.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Paynter.

The plaintiff, who sues by her next friend, is a daughter of W. D. Miles, who had a suit against the company based on the same state of facts as appear in this case. This court delivered an opinion in that case on the 24th inst., which is applicable to this case. (Supra, 580.)

Wherefore, the judgment is reversed, with directions that further proceedings conform to this opinion.

HILGER, &c. v. DOLLE, &c.

(Filed October 29, 1896--Not to be reported.)

Construction of devise—Life estate—A testator, after devising all his property to his widow for life, provided that when his youngest child should attain the age of twenty-one years, or as soon thereafter as his widow's life estate should terminate, his property should be equally divided among all his children, providing further that in the event of the death of any of his children before arriving at the age of twenty-one years, such portion of his

estate as such child would have been entitled to should go to his or her survivor or survivors; and further, that should any of his daughters marry or be married at the time of his death, such portion of his estate as they should be entitled to should be held by them free from the debts and liabilities of their husbands, "and after their death it shall go to their children." Held—That the daughters who shall be living at the time of the division of the estate will take a fee simple estate and not merely a life estate, remainder to their children. The provision that if one of the children should die before arriving at the age of twenty-one years, his or her share should go to the survivors, shows that a fee-simple estate was intended.

Wm. Mix for appellants.

Calloway & Miller and C. B. Seymour for appellees.

Appeal from Jefferson Circuit Court, Chancery division.

Opinion of the court by Judge Paynter.

By the second clause of the will of Michael Zimlich he devised to his wife (and who is now living) during her life his real and personal estate, but in the event she should again marry (she has not done so) then she was to take such portion of his estate as she would have taken had he died intestate.

The third clause of his will is as follows: "It is my will and desire that no division of my real or personal property shall be made until my youngest child shall attain the age of twenty-one years. When my youngest child shall have attained the age of twenty-one years, if my wife's life estate shall have been terminated, either by her marriage or death, or as soon thereafter as it shall so terminate, it is my will that all my real and personal property shall be divided equally among my children. In the event of the death of any of my children before arriving at the age of twenty-one years, such portion of my estate as such child would have been entitled to shall go to his or her survivor or survivors. Should any of my daughters marry or be married at the time of my death, it is my will that such portion of my estate as they shall be entitled to under this will shall be held by them free from the debts and liabilities of their husbands, and after their death it shall go to their children."

The testator's daughters survived him and arrived at the age of twenty-one years. They have married and have children. The questions in this case are whether the daughters took a life estate, subject to the widow's life estate, or a vested remainder, or did they take such life estate and their children the remainder.

The evident purpose of the testator was to give his wife the use of his estate during her life or widowhood, and that his children should take the remainder equally. His purpose was that his estate in any event should not be divided among his children until they were twenty-one years of age. As an evidence that he intended that the fee simple estate should go to his children, he provided that in the event that one should die before arriving at the age of twenty-one years, such portion of his estate should go to his or her survivors.

The meaning of the testator is somewhat obscure, wherein he says should any of his daughters marry or be married at the time of his death, such portion of his estate as such ones shall be entitled to under his will shall be held by them free from the debts of their husbands, and after their death it shall go to their children. He did not intend by this provision to destroy the

power of the will, which looked to the division of his estate among his children when the youngest should arrive at the age of twenty-one years. If we followed strictly that language of the will, which is relied upon to sustain the contention that the testator's daughters who married and had children were given only a life estate, subject to that of the testator's widow, then we would be compelled to hold that it only applied to such of his daughters as married before his death.

To ascertain the intention of the testator we must consider the third clause of the will as a whole. From it we must conclude that the testator had in view the preservation of the estate which he devised to his children until the youngest arrived at the age of twenty-one years, when it could be equally divided among them. Then having in mind that a daughter might marry, and die leaving children before the division of the estate, he desired that her children should take such portion as she would have done under the will. We, therefore, conclude that the children of the testator took a fee simple title to his estate.

Wherefore, the judgment is affirmed.

MAKEMSON, ASS'EE v. BRANN.

(Filed October 29, 1896.)

Judicial sales—Liability of bidder for failure to execute bond—While an accepted bidder at judicial sale who fails to comply with his bid may by proper proceedings be required to pay the damage resulting from such failure, which would include the difference between the bid, if any, and the amount realized on the final sale, if the property sold for less on that sale, yet where the commissioner has elected to treat the bid as a nullity and has proceeded to advertise and sell again, and the second sale has been confirmed without objection, it is then too late to proceed against the first purchaser for failure to comply with the terms of the sale.

L. T. Applegate and L. R. Pryor for appellant.

John H. Barker for appellee.

Appeal from Pendleton Circuit Court.

Opinion of the court by Judge Guffy.

J. W. Makemson, assignee of Jas. J. Brann, Jr, brought suit in the Pendleton Circuit Court for the settlement of the estate of Brann, assigned to him for the benefit of creditors, and in said suit a judgment was entered, directing the master commissioner to sell a certain tract of land.

At the October term, 1894, of the said court the commissioner made report of sale. The report shows that on the 3d day of September, 1894, he offered the land for sale, and that J. J. Brann bid the sum of $8,100 for the entire tract of 180½ acres of land; also to include island and bed of stream to the main channel of South Licking river, and no person offering to pay a greater sum, and he being the highest and best bidder, his bid was accepted, and he refused to execute bonds for said purchase money, and the commissioner readvertised the property for sale October 1, 1894, at which time the same was purchased by S. T. Ewing at his bid of $7,600, he being the highest and best bidder, and bonds were executed for the purchase money as required by

the judgment. On the 19th day of October, 1894, the report of sale was confirmed, the report having been filed the 15th.

At the January term, 1895, of the said court, on the 14th day of January, a rule was issued against the appellee, on motion of appellant, to show cause why he should not be required to pay the difference in the price bid at the first sale and the price brought at the second sale. On the 25th of the same month and term of court appellee demurred to the rule, and on the 28th day of January a response was filed and the demurrer was sustained and rule discharged, and from that judgment this appeal is prosecuted.

The substance of the response is that appellee bid for the land in good faith, believing he could execute the required bonds, and offered the best security he could at the time of sale and afterwards. It is a well-settled law that a bidder who fails to comply with an accepted bid may, by proper proceedings, be required to pay the damage resulting from such failure, which would include the difference between his bid, if any, and that realized on the final sale, if the property sold for less at the final sale; but in this case it appears that the commissioner elected to treat appellant's bid or purchase as a nullity, and proceeded to re-advertise and sell again, and reported all his acts to court, and appellant took no steps to compel appellee to comply with his purchase, but procured, or at least allowed, without objection, the last sale to be confirmed, thus investing the second purchaser with a complete title, and making it impossible for appellee to obtain the land, and in fact made no complaint until the next succeeding term of the court.

It seems to us that the rule was obtained too late, and the judgment of the court below was, under the facts in this case, right and proper, and that judgment is affirmed.

SCHWERMAN v. COMMONWEALTH.

(Filed April 4, 1896.)

1. Collection of saloon license fees by county clerk—Action upon official bond—In an action by the Commonwealth upon the bond of a county clerk to recover saloon license fees which he has collected and failed to pay over it is not necessary to allege that the licenses in question were granted by the county court, as the authority to grant license to sell liquor by retail in an incorporated city or town is conferred upon the municipal government and is not dependent upon the action of the county court. Nor was it necessary in this case to allege in terms that the licenses were even granted by authority of any city or town, as that fact may be fairly implied from the language of the petition.

2. Same—Limitation—Section 2519 of the Kentucky Statutes, as to the limitation of actions for relief for fraud or mistake, does not apply to an action upon the official bond of a clerk or other public officer. And, therefore, in an action for the fraudulent breach of such a bond the sureties are released after the lapse of seven years from the time the cause of action accrued without regard to when the fraud was or might have been discovered.

T. M. Hill for appellant.

Ira Julian and W. J. Hendrick for appellee.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Lewis.

August 29, 1882, Thomas Jones, clerk of the Campbell County Court, and his sureties, Frank Schwerman and others, executed a bond to the Commonwealth of Kentucky, covenanting he would faithfully discharge all the duties of said office and pay over in due time to the proper persons any money received by him as clerk.

July 29, 1893, the Commonwealth instituted this action against Jones and his sureties, Katherine Schwerman, widow and sole devisee of Frank Schwerman, then deceased, being also made a defendant. In the petition it is alleged that during the period from September, 1883, to September, 1885, Jones as clerk had collected a stated amount of saloon license fees, which he failed to pay over or report to the auditor, or in any way account for, as by law it was his duty to do, and judgment therefor was asked.

The action, having by agreement of parties been transferred to equity, was referred to the master commissioner, who, after taking proof, made a report of the amount of such fees received during the period mentioned by Jones as clerk which he had not accounted for to the Commonwealth. Thereupon the court, confirming that report, rendered judgment in favor of plaintiff for the sum of $1,950 against the defendants, including Katherine Schwerman, though it is to be enforced as to her only to the extent of assets received from the estate of her deceased husband. There was a further judgment for $800 against all the defendants except her, it appearing an order of the county court was made in June, 1885, releasing her husband from future liability on the bond.

As none of the other defendants have appealed, the inquiry is whether the judgment for the first-named sum, so far as it affects Katherine Schwerman, is erroneous.

The first of the grounds relied on in argument for reversal is that a cause of action is not stated in the petition, which, as contended, ought to have contained an averment that the saloon licenses in question were granted by order of the Campbell County Court. The statute did during the period referred to, and does now, by section 4208, Kentucky Statutes, provide in general terms that all licenses to sell by retail spirituous, vinous or malt liquors shall be granted by the county court, and in cases to which that provision applies the clerk thereof can not, without an order of court, legally either issue a license or collect tax therefor.

It was accordingly held in Commonwealth v. Wilson, 7 Ky. Law Rep., 666, cited by counsel, that an indictment against a county clerk for misappropriating money received by him as tax upon a license to a merchant to retail liquor was defective in omitting a statement that the license was granted by the county court. But exclusive authority to grant licenses to sell by retail liquor in an incorporated city or town is generally vested in the municipal government, and the exercise of such license then is not at all dependent upon an order of the county court. On the contrary, express provision is made by statute in such cases for collection by the clerk, independent of the county court, from the person licensed the State tax prescribed in addition to the tax imposed for the benefit and collected by an officer of the city or town.

The particular condition in which it is provided the county court shall have exclusive jurisdiction to grant licenses to sell by retail liquor plainly apply to the country; or, in the language of the statute, "a neighborhood," and not to an incorporated city or town, when authority to grant or withhold coffee-house, or what is commonly understood "saloon license," is conferred upon the municipal officer or officers thereof. It was not, there-

fore, necessary for plaintiff in this case to allege, nor could it have been truthfully alleged, that there had been an order of the Campbell County Court granting the licenses, taxes on which it is stated were collected and appropriated by Jones for his own use.

The plaintiff does not allege in terms the licenses in question were even granted by authority of the city of Newport, or any other city or town in Campbell county. But it seems to us that inasmuch as the statute conferred the right and imposed the duty upon the county court clerk to collect for the benefit of the Commonwealth the prescribed amount of tax on each coffee-house or saloon license granted by municipal authority, it may be fairly implied from the language of the petition licenses were granted in each case mentioned.

The next question is whether the statute of limitation can avail the sureties in the bond, it being shown that more than seven years had elapsed after the collection and appropriation by Jones of the license taxes in question, or rather after June, 1885, when Frank Schwerman was released from liability, before the action was commenced. And that question involves the construction of the statute not heretofore made by this court.

Section 2551, Kentucky Statutes, is as follows: "A surety in any obligation or contract * * * shall be discharged from all liability thereon when seven years shall have elapsed without suit thereon after cause of action accrued."

And it is qualified by section 2552, which provides that limitation of actions against sureties shall not apply to so much of the time elapsed when there was no executor, administrator or other person authorized to commence an action, nor to the six months during which an action can not be brought against a personal representative, nor to any delay assented to by the surety in writing, nor when the surety obstructs or hinders his being sued.

Section 2515 provides that an action for relief on the ground of fraud or mistake shall be commenced within five years next after the cause of action accrued. But it is qualified by section 2519, as follows: "In actions for relief for fraud or mistake, or damages for either, the cause of action shall not be deemed to have accrued until the discovery of the fraud or mistake, but no such action shall be brought ten years after the making of the contract or perpetration of the fraud."

If the last quoted section applies in this case appellant is not released, because it fully appears that the fraud of Jones was not, nor could by reasonable diligence, have been discovered within ten years after the time of the perpetration of the fraud, if it was in the meaning of that section a fraud.

But we think the last two sections were not so intended nor can appropriately apply to an action on the official bond of a clerk or other public officer, for under section 2514 an action may be brought against a public officer for a breach of his official bond at any time within fifteen years after the cause of action first accrued, whether that cause consists of the fraudulent appropriation of public money to his own use, or defalcation or other breach resulting from mere misfortune or miscalculation. But if section 2519 be made to apply it would strangely result that the Commonwealth, while still retaining the right under section 2514 to bring an action against a public officer at any time within fifteen years after the breach of his bond, if it was not a fraudulent breach, if fraudulent, could not, under the operation of section 2519, be brought against him ten years after the perpetration of the fraud. Another absurd and improper result would be that

while the period within which the Commonwealth could maintain an action against a public officer for the fraudulent breach of his bond would be lessened by the operation of section 2519 to ten years. The period within which an action might be maintained for the same cause against his sureties, wholly innocent of the fraud, would be prolonged from seven to ten years. Certainly the legislature never intended these sections should be so construed and applied.

In our opinion the only conditions or acts which do stop running of the statute of limitation in favor of sureties are prescribed in section 2552.

The judgment is reversed for dismissal of the action against appellant.

NATIONAL EXCHANGE BANK OF LEXINGTON v. BRIGHT, &c.

(Filed June 5, 1896—Not to be reported.)

1. Policy of life insurance—Assignment—Consent of beneficiary—In this action between the beneficiary in a life insurance policy and a creditor of the insured, whose name was substituted for that of the beneficiary named in the policy by a writing on the margin of the policy, the answer and cross petition of the creditor having failed to allege the assent of the beneficiary to the assignment, presented neither ground of defense nor cause of cross action; the condition of such assignments as shown by the rules printed on the back of the policy being that "this policy may be assigned to any party having an insurable interest in the life of said member, with the assent thereto of the beneficiary named herein, etc."

2. Same—The creditor whose name was substituted for that of the beneficiary has no lien upon the policy of insurance in virtue of the rate printed on the policy that "the beneficiary herein may at any time be changed at the request in writing of the member above named on the surrender of the policy, and a new one may be issued on payment to the association of the sum of one dollar," since the change of beneficiary was made merely by a marginal writing on the original policy.

3. Change of beneficiary—Insurable interest—The writing on the margin of the policy, being in substance that the change of beneficiary had been made at the request of the insured, does not amount to an assignment of the policy or any benefit therefrom, since the association which issued the policy recited in its articles of association that it was "organized for the purpose of assisting widows, orphans and other dependents of deceased members, etc.," and the creditor did not, within the meaning of the rule, have an insurable interest in the life of the insured.

Falconer & Falconer, Z. Gibbons and Breckinridge & Shelby for appellant.

Bronston & Allen for appellees.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Lewis.

September 18, 1890, "The Massachusetts Benefit Association," a corporation organized under statute of and doing business in that State, for the consideration recited, issued a policy showing William Bright to have been constituted a benefit member of said association, and its agreement to pay, if ninety days after proof of his death, to Alice Bright, his wife, if living; if not, to the executors or administrators of said member, in trust, how-

ever, for and to be forthwith paid over to his heirs at law the sum of $5,000. Upon the margin of the original policy, filed and made an exhibit, there is the following writing: "Boston, Oct. 1, 1891. At the request of the holder of this policy the beneficiary is hereby changed by the substitution of the National Exchange Bank of Lexington, Ky., creditor, or its successors or assigns, as its claim shall appear, instead of the person therein named. W. E. SOUTHELL, Tr."

William Bright died in 1894, and the present litigation is between Alice Bright, his widow, designated in the policy as beneficiary, and the National Exchange Bank as to ownership or right of said sum of $5,000, which has been by the Massachusetts Benefit Association paid into and made subject to order of court.

The bank avers that William Bright was indebted to it at the date of the attempted transfer of the policy in two sums, of about $3,000 and $2,500, and that a lien was acquired on the policy, and now exists on the fund in court for the satisfaction of that indebtedness.

Upon the back of the policy are printed conditions and rules upon which it was issued and accepted. Of these rules two are made subjects of discussion in this case, and we are required to determine the proper meaning and effect of them. The first is as follows:

"This policy may be assigned to any party having an insurable interest in the life of said member, with the assent thereto of the beneficiary named herein, but every assignment shall be absolutely void unless it is assented to by the proper officers of the association in writing, but this policy shall not be invalidated thereby.

"2d. The beneficiary herein may at any time be changed at the request in writing of the member above named on the surrender of the policy, and a new one may be issued on payment to the association of the sum of one dollar."

The change of the beneficiary and the assent of Alice Bright, the beneficiary, was indispensable to the validity and efficacy of the assignment; and as the National Exchange Bank did not in its answer and cross petition allege such assent was given by her, it contained neither ground of defense nor cause of cross action. Counsel, however, contend there was an issue made in the pleadings on that matter as to which the lower court ought to have heard proof; but it seems to us too plain for dispute that Alice Bright did not assent to the assignment, and, if she had, the bank would, and ought to, have alleged it, for not only was time given for that purpose, but counsel was informed such allegation was necessary.

There is no foundation whatever for the claim of the bank in virtue of the second rule we have quoted, for, in order to substitute another without the assent of the beneficiary designated and named in the policy, it is indispensable that the original policy be canceled, and a new issuing of a new policy, as herein provided, shall cancel and render the policy null and void.

It is plain the writing on the margin of the policy did not, in meaning or substance, amount to an assignment of the policy or any benefit therefrom to the National Exchange Bank, for—

1st. The Massachusetts Benefit Association was, as expressly recited in articles of association, organized for the purpose of assisting widows, orphans or other dependents of deceased members, by providing for the payment by each member of a fixed sum, to be held until the death of a member, then to be paid to the person or persons entitled thereto, etc. And, in our opinion, the National Exchange Bank did not, in meaning of the rule

quoted, have an insurable interest in the life of William Bright as such member.

2d. It is very questionable whether the mere signature of the treasurer of the association should be treated as assent to the assignment by the proper officers of the association.

However, waiving all other inquiries, one issued; for while the first contract exists the original beneficiary can not, without his or her assent, be displaced or deprived of the contingent interest thereby secured.

The only way by which it can be done is after lapse or forfeiture of the original policy, making a new contract and issuing a new policy; and, as that has not been done, the writing on the margin of the policy, signed by the treasurer of the association, did not have any validity or effect whatever.

Judgment affirmed.

The court delivered the following response to a petition for rehearing December 19, 1896:

Two petitions for rehearing, one unusually verbose, have been filed in this case, though in neither is there any new ground for reversing the judgment of the lower court suggested; but as it is very earnestly insisted that the opinion of this court is contrary to the law governing such cases, we have carefully reread the record and reconsidered the questions presented, notwithstanding one of the counsel, old enough to know better, has expressed his dissent from our decision in disrespectful language.

According to rule or condition, one which was quoted in the opinion, the policy of insurance might have been assigned to any party having an insurable interest in the life of William Bright, with the assent of Alice Bright, the beneficiary named; but we held in the opinion that appellant had failed to allege, as it was incumbent upon it to do, that she had assented to the assignment of the policy, and, as a consequence, the answer and cross petition did not contain a cause of action or defense. But it is now argued, as was done in the original briefs, the defect of the answer and cross petition in that respect was cured by the denial of the appellee in her reply that she gave such assent; and that an issue of fact being thus, according to a recognized rule of pleading, really joined, the lower court ought to have heard proof instead of sustaining the general demurrer.

To make manifest the error of that position of counsel we will now refer to the various pleadings and orders of court in regard to them in more detail than was deemed necessary to do in the original opinion.

In her petition appellee stated substantially that William Bright having, as cashier, suffered overdrafts, aggregating $38,000, to be made upon appellant, the Exchange National Bank, property belonging to him and others was mortgaged to secure payment thereof, and she consented the policy in question should be pledged for the same purpose; but that, although there was a sum realized from the mortgaged property sufficient to satisfy that debt, appellant wrongfully withheld said policy in order to secure payment of two other debts, evidenced by notes of $8,000 and $2,500, William Bright owed, for which purpose, as she alleged, it was never pledged or agreed by her to be held or used.

In the original answer and cross petition appellant stated that the policy was assigned and transferred by William Bright to secure payment of the two notes, and has since been held as pledge and security for that purpose. It was also stated, though vaguely, that the policy was so assigned and pledged with the assent of appellee. But although the court, upon motion, ruled

appellant to make more specific the allegation as to assent of appellee, it was never done, there being no reference whatever in the amended answer filed to that matter. So both the original answer and the amendment thereto were, without complaint now made by appellant, stricken from the record.

Subsequently what was called an amended and substitute answer was filed; but in it there was no mention at all of the assent of appellee to the assignment and pledge of the policy for the purpose mentioned; instead there was an allegation that William Bright agreed that he would make the policy available as security for the two notes by changing the beneficiary and putting the bank in place of appellee as such, which, as therein alleged and now argued by counsel, could, according to rule two, have been done without the assent of appellee.

To that amended and substitute answer a reply was filed, in which was iterated the denial contained in the petition that she assented to the assignment and pledge of the policy as security for said two notes, and following it was a rejoinder in which appellant still failed to allege the assent of appellee to such assignment and pledge. And now, notwithstanding appellant's determined and persistent failure and refusal to allege such assent was given, the obvious reason of which being that it could not be truthfully or consistently done, counsel seriously argue that the needless repetition in the reply of appellee's denial had the legal effect to make an issue as to that matter, whether the parties were willing or unwilling.

The purpose of pleading is to enable parties to reach a clear, well-defined and direct issue; but not by construction to force one that involves duplicity or dishonesty.

Having, in the amended and substitute answer, shifted its ground of defense, and thereafter relied upon the alleged change of the beneficiary, which, according to rule two, could have been done without the assent of the first-named beneficiary, appellant could not consistently allege there had been even an assignment of the policy to secure the two notes, much less that appellee had assented to it.

The demurrer was, therefore, properly sustained unless the attempted substitution of appellant as beneficiary in place of appellee was made in the manner required, and was valid and effectual when done.

If, according to the nature and purpose of the Massachusetts Benefit Association, as shown by an authenticated copy of the articles of association filed as an exhibit, appellant had no insurable interest, the attempted substitution was void, although provided for in rule two of the policy. Appellee still continued the beneficiary, and, upon the death of her husband, was entitled to the insurance fund; and that he had no insurable interest we still think is manifest.

It is, however, argued that the demurrer ought not to have been sustained to the entire pleading because appellant was, in any event, entitled to $135.49, the amount of premium paid on the policy. But it was not thereby prejudiced, because that demand was never controverted, and judgment was ultimately rendered for the amount thereof, less interest, which was, by clerical misprision, omitted and may yet be allowed.

Petition overruled.

NICHOLASVILLE WATER CO. v. BOARD OF COUNCILMEN OF THE TOWN OF NICHOLASVILLE.

(Filed June 24, 1896—Not to be reported.)

Grant of franchise by city without receiving bids—The grant by a town of a franchise to a water company was void because of the failure of the town to receive bids publicly after advertisement, as provided in section 164 of the Constitution, which became operative upon the adoption of that instrument. And the grant of the franchise being void, a contract made by the town with appellant, the assignor of the company, for water supply is also void. But the town is liable to the extent it has received its water supply under the contract, even though appellant be regarded as an occupant of the streets of the town without lawful authority.

Breckinridge & Shelby for appellant.

Ben P. Campbell for appellee.

Appeal from Jessamine Circuit Court.

Opinion of the court by Judge Hazelrigg.

The grant of the franchise by the town of Nicholasville to the Kentucky Water Heating and Illuminating Co., in June, 1892, may be treated as void because of the failure of the municipality to receive bids publicly after due advertisement as provided in section 164 of the Constitution. The prohibitory provisions of that instrument became operative upon its adoption. (Beard, &c. v. City of Hopkinsville, 95 Ky., 239.)

In September of the year named the water heating and illuminating company, with the approval of the city, conveyed and transferred its rights and privileges to the appellant, who erected its plant and proceeded to supply the water for city purposes as demanded by the original contract. The city paid two quarterly installments of water rental of $6.25 each, the last one being in February, 1893, but becoming dissatisfied, refused to pay further. The appellant then brought this suit for some four quarterly installments, due up to April, 1894.

Among other defenses the city seeks to repudiate its contract and avoid the payment of its water rental because of the constitutional provision indicated. That bids were not received publicly after due advertisement is conceded, and for that reason the court upheld the defense and dismissed the petition.

However equitable may seem the right of the appellant to enforce the contract of June 20, 1892, we can not override the plain mandate of the Constitution, that before granting such franchise or privilege for a term of years such municipality shall first, after due advertisement, receive bids therefor publicly, and award the same to the highest and best bidder."

Nor can we hold the grant of the franchise and the contract for water supply to be separable, declaring the one void and the other valid. Such a construction would fritter away the force of the entire section. Nevertheless, if in other respects the company is entitled, we are constrained to hold that the city is liable to the extent it has received its water supply from the appellant, even if the latter be regarded as an occupant of the streets, etc., of the city without lawful authority. There is nothing in the Constitution denying the right of the city to pay for what it gets when the necessities of the public require its outlay.

Judgment reversed for proceedings consistent with this opinion.

The court delivered the following response to petition for rehearing December 19, 1896:

It is urged on petition for rehearing that by section 162 of the State Constitution the appellee is prohibited from paying "any claim created against it under any agreement or contract made without express authority of law," and the argument is that because the grant of the water franchise and the contract connected therewith are void, the city could not perform the manifest duty of providing water as a security against fires, etc.

Disregarding the void grant and the twenty-year contract, we think the appellee might have bought water from water carts allowed to deal in that useful commodity on its streets; or finding the appellant already on the street, however it may have gotten there, it could contract with it temporarily for water; or, not making an express contract, it might, by using the water, put itself under legal obligation to pay for it, and especially as the old charter of the town then in force gave the city authority to provide against fires and obtain water for public purposes.

In Argenti v. San Francisco, 16 Cal., 255, referred to in Dillon on Municipal Corporations, section 384, Chief Justice Field states the rule by which this legal obligation may arise in this language: "The doctrine of implied municipal liability applies in cases where money or other property of a party is received under such circumstances that the general law, independent of express contract, imposes the obligation upon the city to do justice with respect to the same. If the city obtain money of another by mistake, or without authority of law, it is her duty to refund it, not from any contract entered into by her on the subject, but from the general obligation to do justice, which binds all persons, whether natural or artificial. If the city obtain other property which does not belong to her it is her duty to restore it; or, if used by her, to render an equivalent to the true owner from the like general obligation. The law, which always intends justice, implies a promise."

To the same effect see Dillon on Municipal Corporations, section 383; Frankfort Bridge Co. v. City of Frankfort, 18 B. M., 41; Lee v. Trustees of Flemingsburg, 8 Dana, 28.

As aptly said by counsel for appellant, "the fact that the contract which was made in 1892 in connection with the franchise was unauthorized, could not make it unlawful for the town by a subsequent act, wholly distinct from the unauthorized one, to place itself in a contractual status towards the water company."

Petition for rehearing and modification are overruled.

MENNINGER v. RAMPE'S ADM'X.

(Filed October 29, 1896—Not to be reported.)

1. **Funeral expenses—Judgment supported by evidence—In this suit by an undertaker to recover of defendant the amount of an account for the funeral expenses of her husband, in which the principal defense was that the services were performed and the goods furnished at the instance of a railroad company, in whose service the deceased was at the time he was killed, the finding of the court for defendant is supported by the evidence.**

2. **Practice in civil cases—Reversible errors—As this was an ordinary action in which the law and facts were submitted to the court without intervention of a jury, the judgment of the court must be treated as the verdict of a properly-instructed jury, and can not be disturbed unless flagrantly against the evidence.**

8. Same—In the absence of a motion for a new trial the only question that can be considered here is whether the pleadings and evidence support the judgment.

O'Hara & Rouse for appellant.

R. B. Brown for appellee.

Appeal from Gallatin Circuit Court.

Opinion of the court by Judge Guffy.

This action was instituted in the Gallatin Circuit Court by the appellant against the appellee to recover judgment for $165 for casket and box and other funeral expenses of Charles Rampe, the husband of appellee.

It seems that the husband was an employe of the L. & N. R. R. Co., and was injured while in the service by the negligence of said company.

The claim of appellant is that the goods were furnished at the instance of appellee. The chief defense is that the services and goods were furnished at the instance of the said company, as was its custom in such cases. It also appears that appellee sued the company, and compromised her claim for the sum of $1.500.

The law and facts were submitted to the court, and the court dismissed the petition, and from that judgment appellant prosecutes this appeal. No motion for a new trial was made, hence the only question that can be considered here is whether the pleadings and evidence support the judgment.

A separate finding of law and facts was rendered by the court from which it appears that the court was of the opinion that a preponderance of the evidence showed that appellant's superintendent came to appellee and informed her that he was the undertaker of said company, and sent there to take charge of the husband and bury him; that the body was shipped over the L. & N. railroad from Ludlow to Louisville, and taken from the depot to the cemetery, at an expense of from $50 to $60, and the same was paid by the L. & N. railroad; that appellant sent the claims sued on to the L. & N. R. R. Co. for payment, and never demanded payment of appellee until the 12th of April, 1893; that the proof tended to show that the articles were not sold to appellee, but to the L. & N. R. R. Co., or rather furnished at the request of the company, and that appellee never contracted with appellant to furnish the articles.

The bill of exceptions shows that Scott, on the behalf of plaintiff, was the only witness who professed to know the facts. Without repeating his testimony, suffice it to say that he sustains plaintiff's claim, but the defendant testified on her behalf to the effect that she did not buy the goods, nor authorized the services to be rendered, and that Scott told her that he was the company's undertaker and had come to attend to the burial.

The judgment of the court below must be treated as the verdict of a properly instructed jury, and can not be disturbed unless flagrantly against the evidence, and we are not prepared to say that the judgment is not sustained by sufficient evidence, or flagrantly against the evidence, and it must, therefore, be, and is, affirmed.

HUGHES v. RODES, TRUSTEE, &c.

(Filed October 29, 1896—Not to be reported.)

1. Construction of devise—Where a testator, after devising certain real estate to his daughters, added a clause directing that the portions of his estate given to his daughters should be placed in the hands of his executors as trustees, with the provision that "the trustees shall hold and manage their shares as long as they remain under age and unmarried, but when each comes of age or marries she shall be entitled to the use, possession, control and enjoyment of her share and its proceeds, to her sole and separate use, free from the debts or engagements of her husband," and further providing that "the trustees are authorized to sell any portion of the share of either of my daughters and re-invest in other property or funds, to be held for the same uses and subject to the same limitations," and "this they may do at their discretion during the minority of my daughters and while they are single, but after each marries or comes of age said sale or reinvestment of her share shall be made by her direction," the trusteeship was to continue only so long as the daughters remained under age and unmarried.

2. Same—A clause directing that if either of the daughters "shall die without issue the trustees shall deliver her estate to my other two children and their issue" has reference to a dying before majority or marriage. But even if this be not true, the trust imposed is a mere naked one, and when one of the real beneficiaries made a conveyance with her husband the title passed and no duty was imposed upon the purchaser to see to the reinvestment of the purchase money.

3. Continuance of trusteeship—Application of purchase money—Where a deed of trust gave to the trustee power to sell and reinvest, further providing that if the trustee named should die before fully executing the trust his successor should be appointed by the grantor in the deed, if living, and if he should die, then by his executor, both the trustee named and the grantor having died and a successor to the trustee having been appointed by the executor of the grantor and afterward resigned, in an action which he had brought in the circuit court for a settlement of his accounts as trustee, a trustee appointed by the chancellor had the right to sell the land under the express power given in the original deed of trust, and will hold the proceeds for reinvestment in accordance with that deed.

George S. Shanklin for appellant.

Morton & Darnall and J. D. Hunt for appellees.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Hazelrigg.

By his written contract of April, 1896, the appellee, as trustee of Anna D. George, widow of John W. George, sold and agreed to convey to the appellant, by good and sufficient title, some 276 acres of land in Fayette county, and for which the latter was to pay the sum of $27,500 in cash.

To the suit of appellee asking a specific performance of this contract the appellant contends that the title tendered in the petition is not sufficient for two reasons: First, because the land is a part of the lands given by Thomas Hughes, deceased, to his daughters, and whose title was limited under the will of their father.

The clause of the will supposed to affect the title is as follows: "The portions of my estate herein given to my daughters I direct shall be placed in the hands of my executors, as trustees, for their use respectively. The trustees shall hold and manage their shares as long as they remain under age and unmarried; but when each comes of age or marries she shall be entitled to

the use, possession, control and enjoyment of her share and its proceeds, to her sole and separate use, free from the debts and engagements of her husband. The trustees are authorized to sell any portion of the share of either of my daughters and reinvest in other property or funds, to be held for the same uses and subject to the same limitations. This they may do at their discretion during the minority of my daughters and while they are single, but after each marries or comes of age said sale or reinvestment of her share shall be made by her direction. If either of my daughters shall die without issue the trustees shall deliver her estate to my other two children and their issue; if both should die, the whole shall pass to my son or his issue." The testator left two daughters and a son. One of the daughters died without issue, and the land then passed to the surviving daughter and son.

After the marriage of the daughter her husband, James B. McCreary, qualified as her trustee, and, together with his wife, conveyed the land to Hughes, who conveyed it to George.

The latter then conveyed it to a trustee for his wife Anna, with power to sell and reinvest the proceeds.

The will sought to be construed is not made a part of the record, but the ninth clause is copied in the petition and the answer. We are to suppose that in some preceding clause the testator had given to his daughters, in appropriate and unrestricted language, certain lands, and only added the ninth clause to create the limitation imposed therein; and, so assuming, we think it clear that the trustees might hold and manage the estate only so long as the daughters remained under age and unmarried.

The sale and reinvestment, therefore, contemplated by the will could occur only while the trustees were so holding and managing. There is no provision for any trusteeship after marriage or after reaching maturity Sale and reinvestment are provided for during minority and before marriage. After that a sale of the land may be made at the direction of the daughter, or a reinvestment may be made at her direction.

During their minority and while single the language is "sell and reinvest," after that the daughters for themselves may "sell or reinvest." And this power, especially that to sell at pleasure, is altogether in accord with the unrestricted devise which we have supposed is made in other portions of the will.

The clause wherein the trustee is directed to turn over the estate to the other daughter, if either should die without issue, refers to dying before majority or marriage, as it was then only that the estate was under the management or control of the trustee; and it is otherwise reasonably clear that the limitation over upon failure of issue is not of indefinite duration, but has reference to the death of the daughter before reaching full age or marriage.

If, however, we are mistaken in this, yet it follows that the trust imposed is a mere naked one, and, when the real beneficiary made the conveyance, as she did with her husband, the title passed, and no duty was imposed on the purchaser to see to the reinvestment. (Section 4848, Kentucky Statutes.)

There does not appear to have been any irregularity, as suggested as the second objection to the title, in the appointment of the appellee, Rodes, as trustee of Anna D. George, or in the execution of his powers as such trustee.

As we have seen, W. T. Hughes was invested with perfect title by the deed of McCreary and wife. Hughes sold to John W.

George, and George conveyed to Morgan, to hold for the benefit of his wife, Anna D. George, and others, with power to sell and reinvest.

The deed of trust further provided that if Morgan should die before fully executing the trust his successor should be appointed by said John W. George, if living; and if he should die, then his executor should appoint. Morgan died before George, and the latter did not appoint a trustee. His executor, however, appointed one Scott, who filed a suit in equity in the Fayette Circuit Court to settle his account as trustee, and therein resigned his office as trustee. The chancellor thereupon appointed appellee Rodes, who made the sale of the land under the express power given in the original deed of trust, and is to hold the proceeds for reinvestment in accordance with that deed.

The judgment below decreeing specific performance is affirmed.

GRANT, ASS'EE v. ROSS, &c.

(Filed October 14, 1896.)

1. Corporations—Dividend declared by mistake—Right of assignee to make reclamation—Dividends declared by the directors of a corporation and received by the stockholders may be reclaimed by the directors if illegally declared under a misapprehension of the right to declare them, or under the belief that there were profits when there were none. And if there be an assignment by the corporation for the benefit of creditors, such right to reclaim dividends improperly declared and paid passes to the assignee if the terms of the assignment are sufficiently comprehensive to embrace them, as they are in this case, the right of reclamation against any and all stockholders being expressly given to the assignee.

2. Same—The fact that the stockholders authorized and directed the board to make the payment does not alter the rule. The stockholder can not do a wrong even by mistake and take advantage of it. Moreover, it is the business of the board of directors alone and not of the stockholders to declare dividends, and, therefore, the resolution of the stockholders was to no purpose.

Thomas W. Bullitt and St. John Boyle for appellant.

Swager Sherley for appellees.

Stone & Sudduth for Mason, Gooch & Hoge Co.

Appeal from Jefferson Circuit Court, Chancery division.

Opinion of the court by Judge Hazelrigg.

By reason of its insolvency the Southern Central Co. in 1893 executed a deed of assignment for the benefit of its creditors, by which it conveyed to the appellant its entire property, including all claims, demands, choses in action, and right of reclamation against any and all of its stockholders and debtors.

Thereupon this suit was brought by the assignee against the stockholders of the company to recover assets of the corporation, which had been distributed among the defendants when it was insolvent and largely indebted.

This distribution was not alleged to have been fraudulently made, but, on the contrary, the dividend was declared and distribution made, it is averred, under a mistaken belief on all sides that sufficient assets would remain to discharge all corporate debts.

While other issues are tendered in the answer of the stockhold-

ers, it seems conceded that if the defense set up in the third paragraph be held good the plaintiff can not recover.

This is substantially to the effect that the distribution complained of was not the act alone of the board of directors of the company, but was also the act of the company itself; that the stockholders immediately before the distribution made a thorough examination of the financial condition of the company, and found thereby and declared it to be solvent, with a large surplus of capital stock and assets over all liabilities, and for that reason the stockholders, at a meeting held for that purpose, authorized and directed the board of directors to distribute the funds in dispute. A demurrer to this defense was overruled, and the plaintiff declining to plead further the petition was dismissed.

The first question presented is whether or not plaintiff can maintain this suit.

We have seen that express authority is given the plaintiff by the deed to sue for demands, reclamations, etc., against the stockholders, and the question, therefore, is, could the company have brought such a suit?

In Lexington L., F. & M. Ins. Co. v. Page, &c., 17 B. M., 412, it was held that dividends declared by the directors and received by the stockholders may be reclaimed by the directors, if illegally declared under a misapprehension of the right to declare them; and if there be an assignment by the corporation to a trustee, such right to reclaim dividends improperly declared and paid passes to the assignee if the terms of the assignment are sufficiently comprehensive to embrace them. It was there said to be well settled that "if dividends were made under a misconception on the part of the directors of what constituted profits, and under a belief that there were profits to divide, when in fact there were none, they might be reclaimed, because the stockholders who received them were not entitled to them, and they had been paid over and received under the operation of a mutual mistake." (Gratz v. Redd, 4 B. M., 191; 3 Thompson's Law of Corp., section 3555; Cook on Stock and Stockholders, volume 1, sections 548-9.)

The petition, therefore, presents a good cause of action.

It is said in the answer, however, and this presents the only remaining question, that because the stockholders authorized and directed the board to make the payment the company itself acted, and the rule announced by the authorities cited does not apply. We do not appreciate this reasoning. It is impossible to give a different effect to the mistake of the stockholder when the facts in his individual capacity in receiving the dividend, and to the mistake of all the stockholders when they act in their official capacity in giving the direction to the board.

It is the mutual mistake which the law seeks to rectify, and the form or manner of its commission is immaterial. The stockholder neither in his individual nor corporate capacity can do a wrong even by mistake and take advantage of it. Moreover, the resolution of the stockholders was to no purpose, as it is alone the buisness of the board of directors to declare dividends and control the distribution of profits. (1 Waterman on Cor., section 124; Hoyt v. Thomson's Ex'ors, 19 N. Y., 216.)

Judgment reversed for proceedings consistent herewith.

SOUTHALL v. GRIFFITH.

(Filed October 29, 1896.)

1. Elections—Nominee by petition—Right to have name placed on ballot under party device—Where a candidate for office seeks to have his name placed upon the official ballot by petition he must, in order to entitle himself to have his name placed under the device of a particular party, make two things to appear: First, that the party in question has failed to nominate by convention a candidate for that office; and, second, that he is in fact a nominee by petition of that party. And as the plaintiff in this case, who seeks by mandamus to compel the clerk to place his name on the ballot under the device of the People's Party as a nominee by petition, has failed to make either of those facts appear, he is not entitled to the relief sought. As it is nowhere stated that any one of those who signed the petition, or even the plaintiff himself, is a member of the People's Party, it can not be said that plaintiff is a nominee by petition of that party.

2. Same—As neither the plaintiff in his pleading nor the electors in their petition ask that his name should be placed elsewhere on the ballots than under the device of the People's Party, and the plaintiff was not entitled to that relief, the court erred in requiring the clerk to place his name at all on the ballots as a candidate for congress.

3. Same—An answer alleging that electors who signed the petition in question had also signed a petition for the name of John W. Lockett to be placed on the ballots as a candidate for the same office, and that they were numerous enough to reduce the whole number below 400, constituted a complete defense to the action.

Little & Little for appellant.

C. S. Walker for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Lewis.

G. W. Southall brought this action for a writ of mandamus, requiring J. T. Griffith, clerk of the Daviess County Court, to cause printed on the ballots his name as a candidate for congress in the Second district of this State, at the November election, 1896, under the device of the People's Party, being "a plow and hammer," and under the name or title of that party ticket.

It is stated in his petition that he is a candidate, and has all the requisite qualifications for that office; and that more than 400 electors of said district, qualified to vote for such candidate, did in writing petition the county court clerk of each county to so have printed his name on the ballots, which he, October 19, 1896, presented to defendant Griffith as such clerk; but that defendant refused to receive or to comply with it by causing plaintiff's name placed, in the manner mentioned, on the ballots.

The lower court adjudged plaintiff was not entitled to the specific relief asked, but was entitled to have his name placed on the ballots as a candidate for congress under a suitable device to be selected by defendant as clerk. From that judgment plaintiff has appealed, while defendant moves for cross appeal; and, as public interest demands and parties have agreed to submission of the case out of due order, we will now pass on the questions involved.

The manner of conducting elections is provided by article 3, chapter 48, Kentucky Statutes, but the conditions in which the name of a person offering as a candidate for an office may be placed on ballots are in detail prescribed in section 1458, which

we will consider in connection with section 1460, that relates particularly to the form and requisites of ballots.

It is the purpose of those two sections to accomplish the two principal objects of enabling each elector to vote intelligently, and have a reasonable opportunity to vote during the single day allowed by the Constitution to hold an election; and in providing the plan by which both those objects can be accomplished the legislature recognizes at the outset the existence of two well-known facts: First, that there are distinct political parties, each of which is regularly organized; second, that electors in selecting candidates for offices for whom they will vote are generally controlled rather by party fealty than personal preference.

Upon that idea the legislature has in detail provided in section 1453 the manner by which the names of candidates nominated by a convention or primary election of a particular party may procure their names printed on the ballots, though, assuming that persons may occasionally become candidates independent of a mere party nomination, or in cases of failure of a particular party to make a nomination or selection by primary election, the legislature has made provision for the names of such persons to be placed on ballots as candidates for the respective offices to which they may aspire. And the mode prescribed in such exceptional cases is by petition of qualified electors residing within the State, county or district where such independent candidate may be voted for and elected; and in furtherance of those two objects the actual form of ballot to be used in all elections is prescribed by section 1460, which must contain at the top a device regularly adopted by each party. Under that must be printed the party ticket, such as Democratic ticket, Republican ticket or Populist ticket, as the case may be, and under that are placed names of all candidates who are entitled, according to provision of the statutes, to be classified as candidates of the respective parties for the various offices to be filled at a particular election.

By section 1453 it is provided: "The county clerk of each county shall cause to be printed on the respective ballots the names of the candidates nominated by the convention or primary election of any party that can cast two per cent. of the total vote of the State at the preceding general election, as certified to said clerk by the presiding officer and secretary of such convention; or, in case of primary election, by the chairman and secretary of any county or district committee; and also the names of any candidate for any office when petitioned to do so by electors qualified to vote for such candidate;" the number of petitioners required in such case as this being 400.

It is further provided "that, if two or more conventions be called by authorities claimed to be the rightful authorities of any party, said clerk shall select some suitable devices to distinguish one faction from the other, and print the ballots accordingly: Provided, however, That if any political party entitled to nominate by convention shall in any case fail to do so the names of all nominees by petition for any office, who shall be designated in their petition as members of and candidates of such party, shall be printed under the device and title of such party on the ballots as if nominated by convention."

It is plain that under the first portion of that section quoted and italicised the county clerk is not required to place the name of a candidate, in whose behalf a mere petition is presented, under the device or on the ticket of either particular party; and to entitle the name of any candidate for office to be placed, in virtue of the second portion quoted and italicized, under a particular party device or ticket, it is equally plain that the facts

should exist and be made to appear, first, that the party in question had failed to nominate by convention a candidate for that office; second, that the person who seeks to have his name so placed on the ballots is in fact, and shown to be in meaning of the statute, a nominee by petition of that pary.

It is not stated nor shown the People's Party had failed to nominate by convention a candidate for congress in the Second district, to be voted for at the November election. It does not appear, nor is any statement of facts made from which it can be reasonably inferred, that appellant is, in any sense, the nominee by petition of that party, for it is nowhere stated that any one of those who signed the petition, or for that matter even appellant himself, is a member of the People's Party. In fact, for any thing to the contrary appearing, the petitioners as well as appellant may be members of another or other parties.

It is stated the petitioners desire his election, but that does not alone entitle him to have his name, as a candidate for congress, placed under the device or on the ticket of that party.

There should, in such case as this, be a substantial compliance with the requirements of the statute, otherwise electors, who are not both intelligent and circumspect, would be deceived and defrauded of their right to vote for candidates of their choice.

In our opinion the court properly denied the specific relief asked by appellant, but erred in requiring appellee to place his name at all on the ballots as a candidate for congress, because neither he in his pleading nor the electors in their petition ask that his name should be placed elsewhere on the ballots than under the device, and on the ticket of the People's Party.

It seems to us the lower court also erred in sustaining a general demurrer to the answer, for section 1454 provides that if any person shall join in nominating by petition more than one nominee for an office to be filled, such person shall not be counted as a petitioner for either nomination; and, therefore, the statement in the answer that the electors, who signed the petition in question had also signed a petition for the name of John W. Lockett to be placed on the ballots as a candidate for the same office, and they were numerous enough to reduce the whole number below 400, constituted a complete defense to the action.

For the reasons indicated the judgment is affirmed on the original and reversed on cross appeal, and cause remanded for proceedings consistent with this opinion.

McCLURE v. BIGSTAFF.

(Filed October 17, 1896—Not to be reported.)

1. Contract in writing—Vendor and vendee—The acceptance of a deed by the grantee and the possession of the land under it operate as an agreement on his part to part to pay the purchase price recited in the deed, and an action therefor is founded upon a contract in writing within the meaning of the statute of limitation.

2. Vendor's lien upon land of married woman—Limitation—The land of a married woman can be subjected to the payment of a note for the purchase money, a lien being retained in the deed, although no personal judgment can be rendered. And a lien follows the notes into the hands of an assignee, however remote. And to an action to enforce the lien the fifteen years' statute applies, the contract being in writing within the meaning of the statute.

3. Same—Although the notes are not described in the deed, yet as they

recite, and the proof shows, that they were executed for the deferred payments, and it appears that the notes and deed were but one transaction, the contention that the action to enforce the lien is based upon the provisions of the deed alone and not upon the notes, and that the five years' statute for that reason applies, is not well founded.

4. Same—Parties to action—The notes being made payable to a part of the grantors for the benefit of all and assigned by the payees to plaintiff, the other grantors were not necessary parties to the action, although by the terms of the deed the deferred payments were to be made to the grantors and the lien was retained for the benefit of all, the payees being persons "with whom, or in whose name, a contract is made for the benefit of another." (Civil Code, section 21.)

5. Validity of assignment—The fact that the assignments of the notes were signed by the payees, with the addition of the words "administrators of J. F. Triplett, deceased," does not operate to nullify the assignment, as the title will be treated as words of description.

6. Amendment to pleading—Infants—As an amended answer of infant defendants was practically an amendment to conform to proof, the court did not err to the prejudice of the infants in imposing as a condition to the filing of the pleading that it should be traversed of record.

7. Same—The court had discretion to impose reasonable terms in permitting one of the defendants to file his answer out of time.

8. Pleading—A denial that plaintiff is the owner of the notes "as the assignee of the vendors in the deed" is not only objectionable as argumentative, but falls within the rule that facts must be pleaded affirmatively, showing how or why the plaintiff is not the owner.

9. Same—A denial that by the terms of the deed a lien was retained to secure the payment of the notes is a mere conclusion of law.

10. Same—A mere denial of information and belief as to whether the payees assigned the notes sued on is not good, the notes being a part of the record, with all the assignments endorsed upon them at the time of the preparation of the answer.

11. Description of lands—As the judgment describes the land to be sold by naming the abutting owners, the quantity of land to be sold, and the grantors from whom it was obtained, it affords complete and sure means of identification.

12. Purchase price—Interest payable after the maturity of the purchase-money notes can not constitute a part of the price of the land, but is necessarily for forbearance.

13. Interest and usury—While by the conventional interest law in force at the time of the execution of the notes sued on it was legal to contract for eight per cent. interest, yet as it was provided by the act that after the death of the obligor such contract, after maturity, and any judgment thereon, should bear six per centum, it was error in this case to hold the estate of the deceased obligor bound after her death and after the maturity of the notes to pay eight per cent., the conventional rate.

Reuben Gudgell & Son and Wm. H. Holt for appellant.

O'Rear & Bigstaff for appellee.

Appeal from Bath Circuit Court.

Opinion of the court by Judge DuRelle.

The appellee, Bigstaff, brought suit in the court below against William McClure, individually and as administrator of Martha L. McClure, and against Samuel, Fannie W., Mattie R., and Mollie McClure, alleging in the petition that on January 22, 1877, "J. C. O'Rear and S. T. Howard sold and conveyed for the heirs of J. F. Triplett a tract of land hereinafter described to one Martha L. McClure, and in consideration therefor the said Mar-

tha L. McClure and the said William McClure, her husband, executed and delivered to the said J. C. O'Rear and S. T. Howard" two notes, which were filed with the petition, the first dated January 22, 1877, for $2,000, with eight per cent. interest after maturity, payable on or before March 1, 1879; the second, bearing the same date, for $1,293.75, with eight per cent. interest after March 1, 1879, and payable on or before March 1, 1880.

It was further averred that the note for $1,293.75 was assigned directly to the plaintiff by the payees, and that the $2,000 note was assigned to Nesbitt, by him to Colliver, and by Colliver's executor to plaintiff; that Martha McClure was dead, and William was her administrator; that she left two living children, the defendant, Samuel, and Andrew, who is alleged to have conveyed his interest in the land to Samuel; that she had one child, who died before her, leaving two infant children, Fannie and Mattie, and a widow, the defendant, Mollie McClure. The petition further avers that the notes are the unpaid purchase money on a lot of land in Bath county, described in the petition, and prays personal judgment against William McClure, and for a sale of the land to pay the notes.

The notes are alike in form, and as follows: "On or before the 1st day of March, 1879, I promise to pay to J. C. O'Rear and S. T. Howard (for the use and benefit of the heirs of the estate of John F. Triplett, deceased) the sum of two thousand dollars, same being amount of third payment on land bought of the heirs of said J. F. Triplett, deceased, this day, and a lien being retained on the said land to secure the purchase money, and said payment to bear eight per cent. interest per annum after maturity till paid.

"Witness my hand this January 22, 1877.

"Attest:
"J. M. BIGSTAFF.

her
MARTHA L. x McCLURE,
mark.
"W. M. McCLURE."

The execution or delivery of the deed is not otherwise set up in the petition.

By an amended petition, filed at the February term, 1892, it was alleged that on the execution of the note sued on "the vendors and the assignors of plaintiff made, acknowledged and delivered to the female grantee a deed conveying the land described in the petition, which deed was accepted by her and duly recorded in the clerk's office of the Bath County Court, and a lien is retained thereon for the payment of the two notes sued on in this action. A certified copy of said deed is filed as a part hereof, etc."

The deed, a copy of which was filed with the amendment, was by and between Sarah F. Triplett and thirteen other-named persons," being the widow and children of John F. Triplett, deceased, except the wives of the grantors named Triplett, and except the said T. D. Moss, J. C. O'Rear and S. T. Howard," parties of the first part, and "Martha L. McClure, wife of W. M. McClure, party of the second part," and recites that "the parties of the first part, in consideration of the sum of $7,293.75, paid and to be paid to them by the party of the second part in four payments" (the third and fourth of which payments, as stated in the deed, corresponded with the dates, amounts, and time of payment of the notes filed with the original petition), convey the land in question to the parties of the second part.

By an amended petition J. C. O'Rear and S. T. Howard, administrators of J. F. Triplett, were joined as co-plaintiffs, and

it was alleged that it was necessary to the settlement of the estate to sell part of the realty, and that the heirs, being all of full age, sold and conveyed the land at private sale, and the notes were taken, payable to O'Rear and Bigstaff, and accounted for by them in their settlement of the estate as administrators, including the two notes for the third and fourth payments, which were sold, one to appellee Bigstaff and the other to Nesbitt, by whom it was assigned as before alleged.

The infant defendants, by their guardian, after filing and withdrawing one answer, filed a second answer, in which they pleaded the coverture of Martha L. McClure, their mother, at the time of the execution of the notes; denied that the notes sued on were given for the remaining unpaid purchase money, and pleaded payment of all the purchase price as stipulated in the deed. There were other paragraphs in the answer, but the lower court correctly, as we think, decided them to be insufficient.

At the May term, 1894, Samuel McClure tendered an answer, and the infant defendants tendered an amended answer. The answer of Samuel McClure was not in time, as the appearance term for him had passed, and the court, in its discretion, permitted it to be filed upon the condition that the affirmative matters therein should be traversed of record, and that the filing should not delay the trial of the case. The amended answer of the infant defendants was allowed to be filed upon the same terms.

It is earnestly contended on behalf of appellant that there was a defect of parties plaintiff, in that all the grantors in the conveyance should have been made parties to the suit; that the suit is based upon the lien reserved in the deed which was for the benefit of all the grantors, and in consequence, that the plaintiffs, O'Rear and Howard, could not sue to enforce that lien without joining all the other grantors, as the stipulation of the deed was that the deferred payments of purchase money should be made "to the parties of the first part."

It is further contended that the right of action for a sale of the property was based solely upon the provisions of the deed in which no mention is made of the notes), and, therefore, was barred by limitation in five years after it accrued.

Upon the authority of Robinson v. Robinson, 11 Bush, 178, it is insisted that as Mrs. McClure was a feme covert at the time of the execution of the notes, they were absolutely void as to her and those claiming under her; and that, as no action can be maintained on the notes, the lien, which was only a security, can not be enforced (Vandiver v. Hodge, 4 Bush, 540; Bates v. Weeden, 6 Bush, 438); and further, that the notes being void as to her, the demand secured by the lien of the deed was not evidenced by a covenant, and was barred in five years under the rule laid down in Prewitt v. Wortham, 79 Ky., 287.

This court has held, however, in Elliott v. Saufley, 89 Ky., 52, that the acceptance of a deed by the grantee and the possession of the land under it operate as an agreement on his part to pay the purchase price recited in the deed, and an action therefor is founded upon a contract in writing, within the meaning of the statute of limitation.

And it seems to be well settled in this State that after a married woman has received a deed for land it may be subjected to the payment of the unpaid purchase money, for the reason that, as the contract has been executed whereby she has received the vendor's title to the land, she is estopped to deny his right to subject the same to the payment of the purchase money. (Bybee

v. Smith, 88 Ky., 650.) And while the note of a married woman is void so far as obtaining a personal judgment against her is concerned, it is nevertheless evidence of an indebtedness, to secure the payment of which a lien may be retained or a mortgage executed, and is a contract in writing within the meaning of the statute of limitations.

"The land of a married woman can be subjected to the payment of a note for the purchase money, a lien being retained in the deed, although no personal judgment can be rendered, and the lien follows the notes into the hands of an assignee, however remote." (Hite v. Hewitt, 7 Ky. Law Rep., 454; Frank v. Lacey, 8 Ky. Law Rep., 335.)

So it was held in Perry v. Roberts, 30 Ind., 244 (95 Am. Dec., 689), "that the assignment of a note given to secure the purchase money for real estate carries with it the vendor's lien on the property. * * * It can make no difference in principle that the payor is under disability of coverture."

It does not seem to be disputed by the appellant that if the deed described the purchase-money notes, and provided that a lien was retained to secure their payment, it would make no difference whether they were signed by her alone or with her husband, or by him alone; but it is insisted that as they are not referred to in the deed the lien therein retained does not secure their payment.

After examining the evidence in this case there can be little doubt that these notes were given for the third and fourth of the deferred payments of the purchase money, to secure which the lien was retained in the deed. That they were made payable to O'Rear and Howard, for the use of the grantors, can make no difference, provided it be established that the notes and the deed were one transaction. Of this there can be no reasonable doubt. The notes on their face recite that this is the case, and the evidence supports them.

"The notes for the purchase money having been executed by the husband and wife, and the conveyance made to the wife, we perceive no reason why the house and lot may not be sold to pay the purchase money." (Faught v. Henry, 13 Bush, 472.)

Nor do we think that the other grantors were necessary parties to the action, as O'Rear and Howard were persons "with whom or in whose name a contract is made for the benefit of another, etc." (Civil Code, section 21.)

The assignments of the notes by O'Rear and Howard were signed by them, with the addition of the words "administrators of J. F. Triplett, deceased," but this does not, in our opinion, operate to nullify the assignment. The title will be treated as words of description. (Hampton v. Moffett, 17 Ky. Law Rep., 584.)

Appellant complained that it was error to require the answer of Samuel McClure and the amended answer of the infant defendants to be filed upon the terms which the court imposed. The amended answer of the infant defendants was practically an amendment to conform to proof. The pleading itself states that the facts came to the knowledge of the pleader from the plaintiff's testimony and exhibits. There was, therefore, no error to the prejudice of the infants' rights in requiring the amendment to be traversed of record. Samuel McClure did not tender his answer at the appearance term, and, while no default had been taken against him, he was not in time and the court had discretion to impose reasonable terms when it permitted him to file his answer out of time.

We do not think the conditions imposed were an abuse of discretion, as it is not shown that McClure desired to take any

proof or asked for time for that purpose. Indeed his answer is almost identical with the answer theretofore filed by the infants. His plea of payments made on the notes by his father (being the payments of interest at eight per cent.) is fully proven by William McClure's deposition.

In this answer it is alleged that "O'Rear and Howard collected all the purchase money for the said land and distributed the same to the vendors named in said deed, and that they were charged with the same and accounted for it in a settlement made by them as administrators, etc.," and are estopped to deny said collection by the record of said settlement. If this were a good plea of payment the evidence relied on to support it is shown by the pleading to be in the record as an exhibit filed with the amended petition. We conclude, therefore, that in imposing terms the court did not prejudice the substantial rights of either Samuel McClure or the infant defendants.

The action of the court upon the demurrers to the various paragraphs of the answer was, in our judgment, correct. The third paragraph denying plaintiff's ownership of the notes is not only objectionable as argumentative, being a denial that he is the owner "as the assignee of the vendors in the deed of Sarah F. Triplett and others," etc., but seems also to fall within the rule laid down in VanBuskirk v. Levy, 3 Met., 134, that facts must be pleaded affirmatively, showing how or why the plaintiff is not the owner. (Newman's Pleadings and Practice, 525.)

The fourth paragraph of the answer, denying that by the terms of the deed a lien was retained to secure the payment of the notes, is a mere conclusion of law.

Paragraph sixth is a mere denial of information and belief as to whether the plaintiffs, O'Rear and Howard, assigned the notes sued on and filed with the petition as therein alleged. It has been held that a defendant may "rely upon a want of belief where he has not sufficient knowledge or information upon the subject of the controversy to enable a person of ordinary intelligence to form a belief. But when the record, as made up at the time of the preparation, furnishes the necessary information, or when the fact is necessarily within his personal knowledge," this plea has been treated as a sham, and judgment rendered as if no answer had been filed. In this case the notes were a part of the record, with all the assignments endorsed upon them at the time of the preparation of the answer, and we are, therefore, of opinion that this paragraph presented no defense to the action. (Civil Code, sections 113-17; Huffaker v. National Bank, 12 Bush, 287; Grider, &c. v. Farmers and Drovers Bank, 12 Bush, 336.)

Objection is made to the judgment that the land to be sold is not sufficiently described. There were 121 acres conveyed by the deed to Mrs. McClure, described by metes and bounds. It appears from the answer of Samuel McClure that Mrs. McClure sold and conveyed 21 acres of the tract to the plaintiff, Bigstaff. This, however, is controverted of record. The judgment describes the land to be sold as 100 acres, more or less; not by metes and bounds, but as bounded on the north, east, south and west by the lands of various-named persons. The lands of the plaintiff are given as bounding the property on two sides, and appellees claim that by naming the abutting owners, the quantity of land to be sold, and the grantors from whom it was obtained, it affords complete and sure means of identification, and excludes from the boundary the twenty-one acres previously sold to Bigstaff. In this we are disposed to concur,

Appellants complain that the judgment was for eight per cent. interest, and that the excess of interest over six per cent. paid by William McClure was usurious.

On the other hand it is claimed by appellees that the eight per cent. interest was alleged in the petition, and not denied, to be a part of the consideration for the sale of the land. Interest payable after the maturity of the purchase-money notes can not constitute a part of the price of the land, but is necessarily for forbearance. (McCann v. Bell, 79 Ky., 112.)

By the conventional interest law, in force at the time of the execution of the deed and notes, it was legal to contract for eight per cent. interest. It was, however, provided by the act that after the death of the payor or obligor, such contract, after maturity, and any judgment thereon, shall bear six per centum. But if there are two or more payors or obligors, the provisions of this section shall not affect the liability of the survivor or survivors to pay the agreed interest. (General Statutes, page 564.)

Mrs. McClure died September 2, 1885, but all the payments of interest were made by her co-obligor, Wm. McClure, who was bound for the payment of both principal and interest at the agreed rate, as well after as before her death. But the judgment subjecting her land to the payment of eight per cent. interest after the date of the last payment by Wm. McClure was erroneous. It was in effect holding her estate bound after her death and after the maturity of the notes to pay the conventional rate.

For the reason stated the judgment is reversed, with directions to set aside the judgment and enter a judgment in accordance with this opinion.

Judge DuRelle delivered the following modification of opinion on petition for rehearing December 17, 1896:

The case of Sulling's Adm'r v. Atchison, 7 Ky. Law Rep., 752, which is for the first time brought to the attention of the court by the petition for rehearing, sustains the contention of appellants that the payments of interest, made after the death of Mrs. McClure by her co-obligor, Wm. McClure, should be applied to the extent they are in excess of six per cent. to extinguish the principal of the debt sought to be enforced against her property. This court in this case said, referring to General Statutes, chapter 60, article 1, section 5, and article 2, section 3: "If the three obligors had been bound for $100, one of the obligors died at maturity of the note, and at the end of twelve months a payment had been made by the living obligor of ten dollars, the living obligor would still have owed the $100, and the estate of the dead obligor ninety-six dollars, the payment by the living obligor of ten dollars reducing it as to the dead obligor or his estate to ninety-six dollars. Any other rule would make the estate pay more than six per cent. interest."

To the extent indicated the opinion is modified. Petition for modification overruled.

MONTGOMERY v. GARR, SCOTT & CO., &c.

(Filed November 10, 1896—Not to be reported.)

1. Appeals—As the judgment appealed from has been affirmed upon appeal by appellees, and appellant, being a party to that appeal, failed to prosecute a cross appeal, he can not reopen the question by this appeal.

2. Appellate jurisdiction—Priority of liens—The judgment appealed from was not erroneous in allowing priority to appellees under their mortgage, for while appellant was entitled to a lien as attorney upon the judgment, yet his lien could not be permitted to supplant the prior lien of appellees upon the property in controversy and its proceeds; and, therefore, the judgment would have to be affirmed if the court had jurisdiction of the appeal.

L. A. Faurest and Jas. Montgomery for appellant.

S. H. Bush for appellees.

Appeal from Hardin Circuit Court.

Opinion of the court by Judge Landes.

This appeal is prosecuted upon the record of the case of Garr, Scott & Co. v. W. N. Lyon, &c., which was decided at the present term of this court. (Ante, 500.)

In that case the present appellant, James Montgomery, was made a party appellee. The complaint now made is that the court below erred in adjudging that the appellees were entitled to a lien or claim under their mortgage prior to that of the appellant under his contract of employment as attorney for Lyons upon the oxen and separator, and in ordering that the judgment of Garr, Scott & Co. against Lyons should be credited with the sum of $325, the value of said property as found by the jury. But that judgment has been affirmed in the case of Garr, Scott & Co. v. Lyons, &c., supra, and the appellant, having been a party to the appeal in that case, is concluded thereby; and, having failed to prosecute a cross appeal, can not reopen the question by this appeal.

But, aside from this, the judgment appealed from was not erroneous in allowing priority to Garr, Scott & Co. under their mortgage, for although, as we held in the case referred to, the present appellant was entitled to a lien as attorney under his contract by virtue of the statute upon the judgment of Lyons v. Garr, Scott & Co., yet his lien could not be permitted to supplant the prior lien of Garr, Scott & Co. upon the property in controversy and its proceeds, and, therefore, could not affect the right of set-off claimed by Garr, Scott & Co., to the extent of the judgment subjecting the property to their claim secured by the said mortgage.

The judgment appealed from having been once affirmed, this appeal is dismissed.

HAWTHORN v. MYERS & WOLKING, &c.

(Filed November 10, 1896—Not to be reported.)

Dedication of street—When lots have been sold according to a map on which squares, lots and streets are laid out, and such lots are conveyed by deeds describing them as binding on or bounded by designated streets, a dedication is implied for the benefit of purchasers of adjacent lots, whose rights are thus affected; and this is the case even if the city has not formally accepted the dedication. But where the conveyance does not call to bind on a street, but for the "center" of a street "extended," a dedication can not be implied.

Simmons & Simmons for appellant.

D. A. Glenn for appellees.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Paynter.

This action is to enforce an alleged lien for street improvements against the property of R. H. Hawthorn.

The improvements were made on what appellees claims to be Holman street extended, between Sixteenth and Seventeenth streets, in the city of Covington. The only question is as to whether the strip of ground on which the improvements were made had been dedicated as a street.

Richard Southgate owned certain lands which are now known as Southgate's Addition to the city of Covington. He died testate, leaving this land to his children, among whom was Mary L. Hawthorn, and by appropriate proceedings she had assigned to her a certain part of it. By the terms of her father's will she could only dispose of her share by will or deed to her children or testator's lineal descendants.

The partition of the land appears to have been made in 1860. Mary L. Hawthorn was assigned block 15 in the subdivision. She seems to have made no disposition of that part of block 15 against which the lien is asserted, until 1885, when she conveyed it to her son, the appellant, Richard H. Hawthorn.

It is contended that the strip of ground on which the improvement was made was dedicated, first, by Mary L. Hawthorn platting the land as and for a street, and having it duly recorded in the office of the Kenton county clerk; second, that by the terms of the deed to the appellant it was dedicated as a street.

The plat relied upon to sustain the first contention was not made and recorded until May 22, 1886, seven months after the ground had been conveyed to the son. At that time she had no title to the ground, and of course could not dedicate it to the city for a street. Besides, the record shows that her son was then of unsound mind, and seems to have continued so, as he is now confined in an asylum for the insane.

In the deed of Mary L. Hawthorn to her son lot 5 is described as beginning at a point in Banklick street, southwardly from the intersection of the centers of Sixteenth and Banklick streets; thence southwardly with Banklick street 38 feet 7½ inches; thence westwardly at right angles to the center of Banklick street 220 feet 4 inches, to the center of Holman street extended; thence northwardly with the center of Holman street, etc."

It is manifest that by the terms of this deed Richard H. Hawthorn was vested with the title to the center of Holman street extended. There is nothing in the language showing a purpose to dedicate the ground to public use, nor can it be said the grantor reserved any right to so dedicate it.

This court has held that where lots have been sold according to a map, on which squares, lots and streets are laid out, and such lots are conveyed by deeds, describing them as binding on or bounded by designated streets, a dedication is implied for the benefit of the purchasers of adjacent lots, whose rights are thus affected. This is the case even if the city had not formally accepted the dedication. (Roman v. Town of Portland, 8 B. M., 237; Wickliffe v. City of Lexington, 11 B. M., 155.)

The conveyance in question did not call to bind on a street, but for the center of one which does not appear to have been previously dedicated. The record does not show a dedication. (Gedge v. Commonwealth, 9 Bush, 61; Wilkins v. Barnes, 79 Ky., 823.)

In the case of Sanford, &c. v. City of Covington, 12 Ky. Law

Rep., 452, a deed similar to the one under which the ground is claimed in this case was construed. The court held that it did not have the effect of dedicating the ground to the public.

The judgment is reversed, with directions that further proceedings conform to this opinion.

COMMONWEALTH v. LOUISVILLE & NASHVILLE R. R. CO.

(Filed November 12, 1896—Not to be reported.)

Construction of statute—Remedy prescribed exclusive—Right to recover fine by penal action—Where a statute which creates an offense prescribes a remedy for the enforcement of its penalties, that remedy must be pursued; therefore, as section 786, Kentucky Statutes, provides that the fine which it prescribes for the offense there created is "to be recovered by indictment," the fine can not be recovered by penal action, although section 11 of the Criminal Code and section 1189, Kentucky Statutes, provides for the recovery of fines by civil procedure.

Chelf & Vanmeter and W. S. Taylor for appellant.

W. H. Marriott and H. W. Bruce for appellee.

Appeal from Hardin Circuit Court.

Opinion of the court by Judge Paynter.

Section 786, Kentucky Statutes, is as follows, to wit: "Every company shall provide each locomotive engine passing upon its road with a bell of ordinary size, and steam whistle, and such bell shall be rung or whistle sounded outside of incorporated cities and towns at a distance of at least fifty rods from the place where the road crosses, upon the same level, any highway or crossing, at which a sign board is required to be maintained, and such bell shall be rung or whistle sounded continuously or alternately until the engine has reached such highway crossing, and shall give such signals in cities and towns as the legislative authorities thereof may require."

Section 793 provides that in case of violation of the provisions of the section quoted, in addition to subjecting itself to any damages that may be caused by such failure or violation, the company is guilty of a misdemeanor, and shall be fined not less than $100 nor more than $500, "to be recovered by indictment."

The plaintiff is proceeding not by an indictment, but by an action brought to recover the penalty fixed by section 793.

Section 11, Criminal Code, provides that a public offense, of which the only punishment is a fine, may be prosecuted by penal action in the name of the Commonwealth of Kentucky.

Section 1189, Kentucky Statutes, provides that all fines and forfeitures which may be imposed by law may be recovered by civil procedure, or upon indictment of a grand jury.

It is contended that the provisions of the Criminal Code and the statutes are applicable to this case, and that the remedy is either by civil procedure or by indictment.

Of course if the remedy was not prescribed by the statute under consideration, there could be no doubt that the position would be correct. At the time the statute was enacted to recover fines or forfeitures either of the two remedies could be pursued. We must presume that the legislature was acquainted with the exist-

ing law upon the subject. It, therefore, did know that if no remedy was prescribed in the act that the existing law furnished either of two remedies.

If the legislature had no purpose to prescribe the remedy for the violation of the statute, it would have said the fine was recoverable by civil procedure or by indictment, or would have been silent upon the question of remedy.

Were we without rules for the interpretation of statutes the foregoing view would be a satisfactory answer to the contention.

It is said by Lawson on Rights, Remedies and Practice, volume 7, section 3777, that "when a statute has created a new right, and has also prescribed a remedy for the enjoyment of the right, he who claims the right must pursue the statute remedy; so when a summary remedy is given by statute, those who wish to avail themselves of it must be confined strictly to its provisions, and can take nothing by intendment. When a statute, to attain a particular object, prescribes the mode of proceeding to enforce it, that mode must be pursued."

In Russell, &c. v. Muldraugh's Hill, Campbellsville & Columbia Turnpike Co., 13 Bush, 310, it is decided that when a statute has created a new right, and also prescribed a remedy for the enjoyment of the right, he who claims the right must pursue the remedy.

The same rule is enunciated in Commonwealth v. Jellico Coal Mining Co., 17 Ky. Law Rep., 109.

The statute gave a new right, prescribed an indictment as the remedy for enforcing it, therefore, this action can not be maintained.

The judgment is affirmed.

HOWARD, &c. v. FULLER, &c.

(Filed November 14, 1896.)

Provisions of Civil Code applicable to criminal cases—Return of "no property" on judgment in justice's court—Where a judgment for a fine rendered in a justice's court has been replevied and execution issued upon the replevin bond and returned "no property found," the attorney or other representatives of the Commonwealth may file in the office of the clerk of the circuit court a certified copy of the judgment, execution and return, and thereupon the plaintiff shall be entitled, as provided in section 722 of the Civil Code, to the same remedies for the collection of the judgment as if it had been rendered in the circuit court. While the section authorizing such a procedure is found in the Civil Code, the law is a general one, and embraces executions in favor of the Commonwealth as well as individuals.

W. J. Hendrick and G. W. Howard for appellants.

Appeal from Knott Circuit Court.

Opinion of the court by Judge Hazelrigg.

Where a fine is imposed in behalf of the Commonwealth on a justice's court and judgment for money is rendered, the defendant may execute bond with surety in satisfaction thereof "for the same time and substantially of the same form and (which) shall have the same force and effect as a replevin bond." (Section 305, Criminal Code.)

If an execution upon the bond be issued, and in due course be returned in substance "no property found, etc.," the attorney or other representatives of the Commonwealth may file in the office

of the clerk of the circuit court a certified copy of the judgment, execution and return, and thereupon the plaintiff shall be entitled to the same remedies for the collection of the judgment as if it had been rendered in the circuit court. While the section authorizing such a procedure is found in the Civil Code (section 723) the law is a general one and embraces executions in favor of the Commonwealth as well as of individuals.

In this case judgment in favor of the Commonwealth was rendered in a magistrate's court in Knott county against L. D. Fuller for $100 and costs in a prosecution against him for violating the "local option" law. The defendant replevied the judgment, with Archibald Fuller as his surety, and thereafter prosecuted an appeal from the judgment to the Knott Circuit Court, where the appeal appears to have been dismissed. The execution which issued upon the bond having been returned "no property found to satisfy it," the county attorney procured the copies of the record required by section 723 supra, and caused an execution to issue from the circuit court clerk's office as that section authorizes.

When the sheriff was about to sell the land of the defendants in the suit they instituted this action to stop the sale, alleging that the prosecution of the case against Fuller was dismissed in the circuit court and the defendant discharged. A demurrer to the petition was, therefore, overruled, but the answer disclosed that not the prosecution of the case but the defendant's appeal was dismissed.

A demurrer to the answer was sustained and the sale perpetually enjoined. This, we are told, was upon the theory that section 723 of the Civil Code does not authorize the steps taken by the county attorney looking to the collection of the judgment. This, as we have seen, was error, and the demurrer to the answer should have been overruled. Whether the case was dismissed in the circuit court or only the defendant's appeal we are not able to say, as the order of that court is not in the record before us. This issue may be tried out on the return of the case.

The judgment is reversed for proceedings consistent herewith.

LEBANON & PERRYVILLE T. P. R. CO. v. PURDY, &c.

(Filed November 14, 1896—Not to be reported.)

1. Turnpikes—Failure to keep in safe condition—Contributory negligence—In this action against a turnpike road company to recover damages for injuries received by plaintiff while driving on defendant's road, plaintiff's horse becoming frightened by a passing train and throwing his buggy over an embankment, the plaintiff was not guilty of such contributory negligence in continuing to drive his horse along the pike after discovering the train as will exonerate the defendant from liability for its negligence, the crossing which the train was passing being 200 yards distant from where the accident occurred, therefore, the court did not err in refusing an instruction as to contributory negligence.

2. Same—The fact that the railroad crossed the pike so near the fill was one the jury could properly consider in connection with the character of the fill in determining whether the pike at the point where the accident occurred was in a reasonably safe condition.

John McChord for appellant.

Wm. E. & S. A. Russell for appellees.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Paynter.

In constructing the pike a fill was made about forty yards long, fourteen feet wide at the top, with a steep slope of about three feet high on either side.

Purdy and wife were driving in a buggy over the pike to Lebanon and while passing over the fill, as testified by Mr. Purdy, a train on the Louisville & Nashville Railorad passed over its crossing on the pike at a point distant two hundred yards from where the accident occurred. The horse became frightened at the train, whirled suddenly around and the buggy turned over the bank on the side of the pike and badly injured the wife. Her collar-bone was broken and shoulder dislocated, and in consequence of which, at the time of the trial of this case, could not raise her left hand except with her right one.

The verdict of the jury was for $200 damages. The court properly instructed the jury as to the duty of the defendant to keep its road in a reasonably safe condition, and as to its liability for damages to one injured by such failure.

It is urged that the court should have given an instruction on contributory negligence.

The evidence is that the owner regarded the horse as a gentle one. There is an entire absence of evidence conducing to show he was not regarded as or that he was not a gentle horse.

It could not be said that it was negligence on the part of plaintiffs to continue to approach the crossing after the train was discovered. The fact that the railroad crossed the pike so near the fill was one the jury could properly consider in connection with the character of the fill in determining whether the pike at the point where the accident occurred was in a reasonably safe condition.

It is known to every one that a trustworthy horse may, in charge of a careful driver, become frightened, wheel or back or run. It results from the nature of the animal. The defendants are conclusively presumed to know such fact. Although the accident would not have happened except for the horse becoming frightened, and probably would not have become frightened except for the passing of the train over the pike, it can not be said that he was guilty of such contributory negligence in continuing to drive his horse along the pike after discovering the train as will exonerate the defendant from liability for its negligence.

Judgment affirmed.

COMMONWEALTH v. STURGEON.

(Filed November 18, 1896—Not to be reported.)

Carrying concealed deadly weapon—Upon the trial of appellee under an indictment for carrying concealed a deadly weapon, evidence showing that appellee opened a satchel lying in a wagon in which he was driving and took a pistol from it did not tend to show his guilt, there being two other persons in the wagon with him and no proof as to who owned the satchel or the wagon. Whether, if the evidence had shown that the satchel belonged to defendant, it would have been sufficient to authorize the submission of the case to the jury is not determined.

W. S. Taylor for appellant.

Blanton & Berry for appellee.

Appeal from Harrison Circuit Court.

Opinion of the court by Judge Paynter.

The indictment charges that the defendant carried concealed upon or about his person a deadly weapon, to wit, a pistol.

It appears from the evidence that the defendant was riding on a wagon, a difficulty arose between him and one King, when he "went down under the seat of the wagon on which he was riding and got a small brown grip satchel and opened it and took out a pistol." There were two others in the wagon with defendant. There was no evidence as to whom the grip belonged, nor as to who placed it in the wagon, nor as to whom the wagon belonged.

The facts as proved do not raise the question for determination as to whether one can be said to carry a pistol concealed "upon or about his person" who places it in a hand satchel, and the satchel in a wagon, and thus carries it, or as to whether one can be said to carry it so concealed by placing it in his hand satchel, and then carry with him the satchel, therefore, we do not decide such question.

The judgment is affirmed.

COMMONWEALTH v. BUTLER.

(Filed November 18, 1896—Not to be reported.)

Indictment for forgery—An indictment for forgery, which alleges that the defendant altered an express receipt which was issued to him for a package which he had shipped for another, it being charged that the alteration was made by erasing the figures "60" and inserting in place thereof the figures "90," and that this was done with intent to defraud the person for whom the shipment was made of thirty cents, does not state facts sufficient to constitute the offense charged, as the receipt imports no kind of obligation upon the part of any person to pay the amount named therein. Besides, the indictment contains no allegation that the freight charge on the package was no more than sixty cents, or that defendant had paid only that sum thereon, and, therefore, the facts stated do not constitute a foundation for the allegation of an intent to defraud. If the defendant, by using the altered receipt, induced the person for whom he made the shipment to pay him more money than he had paid out for him, the offense was entirely different from that of forgery.

W. S. Taylor for appellant.

James & James and C. S. Nunn for appellee.

Appeal from Crittenden Circuit Court.

Opinion of the court by Judge Landes.

The appellee was charged with the crime of forgery, and a demurrer to the indictment was sustained and the indictment dismissed, and the Commonwealth appeals.

The facts alleged as constituting the crime are that the appellee altered an express receipt which was issued to him by the Southern Express Co., at Marion, Ky., for a package received by the company from him for one J. P. Stephens for shipment to Mary Thompson, at Dawson, Ky., by erasing the figures "60,"

which were written in the receipt, and writing in place thereof the figures "90," with "the intent to defraud."

The figures "60," written in the receipt by the company, represented the charge in cents paid by the appellee to the company for conveying the package to the consignee, and the alteration of the receipt, made as alleged, was charged to have been done by the defendant "to defraud said Stephens of 30 cents."

The facts alleged in the indictment are not sufficient to constitute the crime of forgery, either under section 1185 or section 1189 of the Kentucky Statutes.

Upon the face of the receipt it was shown to belong to the appellee, and the alteration of it, if made as charged in the indictment, imported no kind of obligation or liability upon either the company or Stephens, and it afforded on the face of the receipt as altered no ground or cause of action against either in favor of the appellee. If, as we may assume, the object was to prosecute and punish the appellee for obtaining thirty cents from Stephens more than the freight charges that were paid by him for Stephens on the package, by using the altered receipt as evidence of the payment, by which false pretense Stephens was induced to pay him the money, the offense would be one entirely different from that of forgery. Besides, the indictment contains no allegation that the freight charge on the package was no more than sixty cents, or that the appellee had paid only that sum thereon, and the facts as alleged do not constitute a sufficient foundation for the alleged intent to defraud.

No offense under the statute having been charged in the indictment, the demurrer was properly sustained and the judgment is affirmed.

ABERT v. TAYLOR, &c.

(Filed November 25, 1896—Not to be reported.)

Attorneys fees—Contribution—Where one is resisting the relief sought in an action, and employs his own counsel, although the judgment granting the relief may directly or incidentally benefit him, he ought not to be compelled to contribute to the payment of the counsel fees of his adversary.

L. J. Crawford and Follett & Kelley for appellant.

George Washington for appellees.

Appeal from Campbell Circuit Court.

Opinion of the court by Chief Justice Pryor.

This is a contest between the heirs and devisees of James Taylor, Sr., deceased, as to the payment of attorneys' fees, the appellants claiming that the attorneys employed by them rendered such services as enured to the benefit of all the parties in interest, and for that reason the fees should be paid out of the general fund, or, in other words, that all should contribute to their payment. Col. Taylor was the owner of a large estate, and by writings executed prior to his death, and recognized in his last will, he placed his estate in the hands of a trustee to hold and dispose of for the beneficiaries mentioned in the deed.

The purpose of the action brought by the appellants was to have the deed of trust construed and the powers of the trustee

defined, and finally to declare the trust ended and the partition of the landed estate between the devisees.

The trustee, as well as some of the beneficiaries, claimed the right on the part of the trustee to hold the property mentioned in the deed of trust until the land could be sold and converted into money.

That the proper construction of the deed was involved in doubt is manifest from the provisions, so much so that the court below decided adversely to the appellant, who is also the appellant in the present case. Many of the beneficiaries resisted a partition of the estate by filing an answer and employing counsel.

The judgment was reversed by this court, and for the services rendered by the appellant's attorneys a fee of $80,000 is demanded, and the estate required to pay it.

There was no evidence on either side as to the payment of fees, except such as might be implied from the record. The presumption is that counsel on both sides were working for compensation, and the question is, can the appellees in the original action be made to pay for services rendered in obtaining a judgment they sought to defeat? We think not.

This court, in Thirlwell's Adm'r v. Campbell, 1 Bush, 168, held that the statute enforcing or allowing contribution did not apply to cases where the litigation was against the wishes of the party in interest, but only in cases where the services of counsel were rendered at the instance of one joint owner for the benefit of all, and where no objection was interposed by any one of the joint owners to the proceeding.

This, it seems to us, is a reasonable and just rule, as well as a fair interpretation of the statute, but where one is resisting the relief sought and employs his own counsel, although the judgment may directly or indirectly benefit him, he ought not to be compelled to pay the counsel fees of his adversary. (Kilgore v. Crawford, 51 Ill., 249.)

On the subject of the testimony on either side the record seems to be silent, and no case has been made out by the appellants if the defense had not been interposed. The records before us, however, show a character of litigation that was contested by able counsel on each side, and those employing them should pay their fees.

Judgment affirmed.

The Kentucky Law Reporter.

EDITOR:
WALTER G. CHAPMAN, ... Frankfort, Ky.

VOL. 18. FEBRUARY 15, 1897. No. 16

KENTUCKY COURT OF APPEALS.

PHŒNIX INSURANCE CO. OF HARTFORD V. MCKERNAN, &C.

(*Filed October* 29, 1896.)

1. *Alteration of insurance policy without consent of company*—Any material alteration of a written contract made by the obligee without the consent of the obligor invalidates the contract. And an alteration may be a material one, although it does not make the contract more disadvantageous or burdensome to the obligor than the true contract made and signed by the parties. Nor is an intention to defraud necessary to make the change work a forfeiture of the contract.

Where a policy of fire insurance upon a building was by the procurement of the insured and without the consent of the insurance company so altered after its delivery as to include the "shelving, counters and drawers" in the building, the policy is thereby rendered void. And in an action on the policy the court erred in submitting to the jury the question as to whether the alteration was made with fraudulent intent, as that was immaterial.

2. *Same*—Courts may reform written contracts so as to make them conform to the real agreement, but an obligee in a contract can not do so. And if it be a fact that the alteration in this case was made for the purpose of conforming the policy to the verbal agreement between the parties, that does not prevent it from rendering the contract void.

3. *Same*—The withdrawal of any claim on account of the loss of the additional property included by the alteration does not have the effect to restore or revive the contract really executed and delivered.

Craddock & Sandidge for appellant.

Wilbur F. Browder for appellees.

Appeal from Logan Circuit Court.

Opinion of the court by Judge Guffy.

The appellees, McKernan and Conn, instituted this action in the Logan Circuit Court against the appellant, Phœnix Insurance Co. of Hartford, Conn.

It is substantially alleged in the petition that the appellant undertook to insure appellee McKernan against loss or damage by fire

which he might sustain, not exceeding $1,800, on account of the destruction or damage to one two-story brick, metal roof building owned by appellee, in Adairville, Ky.; also by the terms of the said policy the appellee was insured against loss or damage by the destruction of the shelving, counters and drawers in said building, the total amount agreed on at the time being $1,800—that is to say that appellant undertook to pay appellee the sum of $1,800 in the event of the destruction of the brick building and shelving, counters and drawers.

It is further alleged that the property was mortgaged to appellee, J. H. Conn, which was known to appellant, and that by the terms of the policy appellant was to pay Conn the sum which might be due him. The policy is filed with the petition. The total destruction by fire of the building, counters, shelving and drawers, etc., occurred, as is alleged, September 17, 1893, by which appellee sustained, as is alleged, $2,600 loss, and more.

The petition also alleges that the appellee made all the proofs required by the said policy, and made due demand upon appellant for payment of the $1,800, for settlement of the loss sustained by reason of the destruction of said house, shelving counters and drawers, and that, by reason of the said contract and by reason of the destruction of the house, shelving, drawers and counters, appellant was indebted in the sum of $1,800, for which sum, with interest, plaintiff asked judgment.

The answer of appellant, among other defenses, pleaded that the policy provided that if any other insurance was taken on the property without the consent of appellant endorsed thereon, that the policy should become null and void; and alleged that appellee had taken out a policy in the Ætna Insurance Co. on the shelving, counters and drawers.

The appellee in his reply denied that the policy sued on covered any of the counters, shelves or drawers. It is also alleged in the reply that the following provision in the policy, "this policy includes shelving, counters and drawers," is not a part of the contract of insurance; that after the fire appellant, through its agent, inserted that provision in the face of the policy, and he makes no claim for damages to same. The defendant moved to strike out that part of the reply.

Appellee then tendered and filed an amended petition, in which it is substantially alleged that appellee's attorney by mistake inserted in the petition a claim for the loss of the shelving, etc., and the claim in reference thereto was inserted by appellant's agent after the fire, and appellee disclaims any claim for the destruction of said shelving, etc.

The appellant, in answer to the amended petition of the appellee, admitted that the said words as to shelving, counters and drawers was inserted in the policy after the fire, but denied that it was done by appellant through its authorized agent or at all, and that it never knew until the filing of plaintiff's amended petition, June 9, 1894, that said clause had been inserted after the fire, and pleads said alterations and fraudulent attempts to collect the same in bar of plaintiff's right to recover.

A trial resulted in a verdict and judgment in favor of appellees for the sum of $1,800, with interest from the 1st of June, 1894. Appellant's motion for new trial was overruled, and it has appealed.

Several grounds for new trial were relied on and various errors of court alleged, but we deem it unnecessary to notice or discuss them in detail. The most serious question in the case is as to the insertion

in the policy after the fire of the words "this policy includes shelving, counters and drawers."

It is very manifest that this addition was made at the instance of plaintiffs, or by their consent and procurement, and without the consent or authority of appellant. It will be readily conceded that any material alteration of a written contract made by the obligee, without the consent of the obligor, invalidates the contract, but the appellee insists that the addition to the policy in question was not a material change or alteration, for the reason that appellant was only bound for $1,800, and that the house alone was shown to be worth more than $2,600, therefore, appellant was bound to pay the $1,800, independent of the loss to shelving, etc.

It seems to us that appellee's contention is not tenable, and not sustained by the authorities. An alteration or change in a written contract may be a material change, and yet not be more disadvantageous or burdensome to the obligor than the true contract made and signed by the parties, nor is an intention to defraud necessary to make the change work a forfeiture of the contract. It has been often held that a change by which a note was made to fall due at a later date than that named or changed, so as to call for a smaller sum than the true sum named, invalidates the note. Likewise the addition of another name to a note vitiates the note as to the obligor unless he consented. It has also been held that the obligee can not erase the material interpolation and thereby restore the validity of the instrument.

The contract of insurance in this case, as sued on in the suit that was dismissed by plaintiff as well as this one, contained the interpolation, and plaintiff set it up and relied on it as fully as any other part of the policy. It is true that he afterwards withdrew any claim for the loss sustained by the destruction of the shelving, etc.

It is not in proof that the shelving, etc., was by the verbal contract to have been included in the policy, but, if such had been the contract, yet plaintiff could not legally change the written contract to make it correspond with the oral contract. Courts may correct and reform written contracts so as to conform to the real agreement, but an individual obligee can not do so.

It appears in this case that at one time the house and lot, and presumably the shelving, etc., were all valued and appraised at $2,000, and it might have been that appellant was willing to insure the house alone to the extent of three-fourths of its value, not exceeding $1,800, but not willing to include the shelving, etc.; but, be that as it may, the addition of the shelving, etc., necessarily increased the burden of appellant at least to the extent of diminishing his chance to show that $1,800 was more than three-fourths of the value of the insured property, and the withdrawal of any claim on account of the shelving, etc., could not have the effect to restore or revive the contract really executed and delivered. The alteration *prima facie* increased the risk, and was a meterial alteration, for the further reason that it added a number of articles to the policy not theretofore embraced.

The following authorities and cases referred to therein sustain the foregoing views, viz: 2 Bibb, 167; 18 B. M., 536; 7 Bush, 275; 10 Bush, 517 and 510; 11 Bush, 69; Am. & Eng. Ency. of Law, volume 1, page 511; 10 Am. Decisions, volume 10, page 267; Angle v. N. W. Mut. Life Ins. Co., 92 U. S., 330; Brown v. Straw, 6 Neb., 537; Bowers v. Briggs, 20 Ind., 139.

It seems clear to us that the court erred in submitting to the jury the question of fraudulent intent on the part of appellee in regard

to the aforesaid addition to or change in the contract. The court below also erred in refusing to give instruction No. 2, asked by the appellant.

The addition of the words "this policy includes shelving, counters and drawers" was a material change or alteration, and, unless done by the authority or consent of appellant, invalidated the policy, and the court below should have so instructed the jury.

For the reasons given the judgment of the court below is reversed and cause remanded, with directions to set aside the verdict and judgment and award appellant a new trial and for further proceedings consistent with this opinion.

COMMONWEALTH V. LOUISVILLE WATER CO.

(*Filed November 7, 1896—Not to be reported.*)

1. Tax upon franchise of corporation—Assessment of the value of the franchise of the Louisville Water Company could not legally be made by the assessor of Jefferson county, but only by the board of valuation and assessment provided for in section 4077, Kentucky Statutes.

2. The franchise tax was not in the first instance collectible by or payable to the sheriff, but directly to the auditor.

3. The tax upon value of the franchise is in addition to and independent of amount due on tangible property of the corporation.

4. Res judicata—In an action by the Louisville Water Company against the sheriff of Jefferson county to enjoin the collection of taxes a judgment requiring the corporation to pay into court a certain sum in full of all taxes, both *ad valorem* and franchise, was erroneous in fixing too small an amount as due, but as there was no appeal therefrom that judgment is a bar to this action by the Commonwealth to recover an additional amount, alleged to be due as a franchise tax for the same year. If that judgment was procured by fraud, an action to vacate it should first have been brought in the court which had acquired jurisdiction.

Wm. J. Hendrick for appellant.

T. L. Burnett and Lane & Burnett for appellee.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Lewis.

December 19, 1893, the Louisville Water Co., a corporation, instituted in the Louisville Chancery Court against H. A. Bell, sheriff of Jefferson county, an action to enjoin him from levying on and selling the property of plaintiff to satisfy a claim and demand alleged to be illegal. The nature of said claim was not explicitly stated in the petition, though it subsequently appeared to be for State taxes due by plaintiff.

April 11, 1894, in pursuance of previous notice, a petition of the Commonwealth of Kentucky, signed by R. L. Suter, special counsel, and F. Parsons, Commonwealth's attorney, was filed, asking for an order making the Commonwealth a party defendant, which was done.

In the answer thereupon filed it was stated plaintiff was indebted to the Commonwealth for taxes amounting, according to an assessment duly made by the assessor of Jefferson county, to the sum of $12,336.84; also to a penalty prescribed by statute for a failure to pay.

June 29, 1894, judgment was rendered in the action that the sum of all taxes, both *ad valorem* and franchise taxes, due from plaintiff to the Commonwealth upon the assessment made in 1892 is $8,000, which, as recited, was thereupon paid into court in full satisfaction of the judgment; but upon leave of court the Commonwealth of Kentucky, by R. Lee Suter, its attorney, withdrew it.

The present action of the Commonwealth of Kentucky against the Louisville Water Co. was, November 13, 1894, brought in the Franklin Circuit Court to recover $927.60, the amount alleged due for taxes on the franchise of defendant.

In defense of this, judgment rendered in the previous action by the Louisville Chancery Court is pleaded.

We are satisfied the assessment of the value of the franchise of the Louisville Water Co. was not nor could have been legally made by the assessor of Jefferson county, but only by the board of valuation and assessment provided for in section 4077, Kentucky Statutes.

We are satisfied the franchise tax was not, in the first instance, collectible by or payable to the sheriff, but directly to the auditor; and there is enough of the record of the action of the Louisville Water Co. against H. A. Bell, sheriff, before us to make it plain that the Louisville Chancery Court erred in adjudging $8,000 to be the entire sum of taxes due to the Commonwealth, for that portion assessed upon the value of the franchise was an addition to and independent of the amount due on the tangible property of the corporation; but the judgment rendered in that action, not having been appealed from or vacated in a direct action instituted for that purpose, can not be now set aside or disregarded in this action; for, if reversible, as we are satisfied was the case, an appeal therefrom ought to have been taken, or if procured by fraud, as is here suggested though not sufficiently alleged, an action ought to have been first brought in that court, which had acquired jurisdiction, to vacate it.

We are, therefore, of opinion this action can not be maintained, and the judgment is affirmed.

COMMONWEALTH V. BELL, SHERIFF, &C.

(*Filed November 7, 1896—Not to be reported.*)

Sheriff—Failure to collect taxes—Res judicata—The sheriff having collected of a corporation the full amount of takes fixed by a judgment which is still in force, he can not be held liable for his failure to collect a greater amount. Besides, he can not in any event be held liable for his failure to collect the tax on the franchise of the corporation, as that tax was not in the first instance collectible by him.

W. J. Hendrick for appellant.

T. L. Burnett and Lane & Burnett for appellees.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Lewis.

The facts upon which the controversy in this case arises, as well as the issue involved, are stated in the opinion this day delivered, in the case of the Commonwealth v. Louisville Water Co., *ante*, 7; and if the judgment rendered by the Louisville Chancery Court, and

now appearing to be in full force, is a bar to the present action of the Commonwealth against the corporation, it is equally an obstacle to a recovery against the sheriff, who can not be made accountable for a greater amount of taxes than was thereby determined and fixed. Moreover, we agree with counsel that the tax on the franchise of the water company was not, in the first instance, collectible by the sheriff, and, if not, no action can be maintained against him for failure to collect.

Judgment affirmed.

HANCOCK V. PARKER.

(*Filed November* 14, 1896.)

Witnesses—Right to compulsory process for prisoner in penitentiary—The defendant in a criminal prosecution is entitled to compulsory process for a material witness confined in the State penitentiary, and, therefore, the warden of the penitentiary is not entitled to a writ of prohibition restraining a circuit judge from proceeding against him for contempt on account of his refusal to obey an order of the court requiring him to produce a prisoner to testify for a defendant in a criminal prosecution. And this would be true even though no provisson were made by law for paying the expenses incident to the production of the witness. But provision is made therefor, it being the duty of the court to ascertain and make allowance for such expenses to be paid out of the State treasury under section 361 of the Kentucky Statutes.

W. S. Taylor for petitioner.

Samuel M. Wilson for respondent.

Opinion of the court by Judge Landes.

This is an application to this court by petition of R. A. Hancock, the warden of the penitentiary at Frankfort, as plaintiff, against Watts Parker, the judge of the Fayette Circuit Court, as defendant, praying that the defendant may be prohibited, by the proper writ, from proceeding by rule against the plaintiff for contempt, in refusing to comply with an order made by defendant as judge, requiring the plaintiff to produce in said court a prisoner, who is confined in the said penitentiary for felony, to testify as a witness in behalf of one Ed. Warfield, who has been indicted for the crime of rape.

The material question, upon which authority to issue the writ applied for depends, is whether the defendant, as judge of the Fayette Circuit Court, had the jurisdiction or power to require the plaintiff, as warden of the penitentiary, to produce the prisoner in his court to testify, and that question we will proceed to consider.

It appears that the prisoner who is wanted as a witness, John Gatlin, was tried and convicted in the Fayette Circuit Court, at the April term, 1896, upon an indictment charging him with the crime of obtaining money under false pretenses, and that he was sentenced to solitary confinement and hard labor in the said penitentiary for a period of two years, and that he was received there on the 16th day of May, 1896.

It further appears that on the 16th day of September, 1896, the order referred to was made in the Fayette Circuit Court, directing the plaintiff to produce said Gatlin in court on the 16th day of September, 1896, to testify in behalf of said Warfield in the prosecution against him, and that said order was issued because it was made to appear, to the satisfaction of the court, that the said Gatlin was a

material witness for the defense. The plaintiff refused to obey the order because he believed in good faith that the court had no jurisdiction in the premises, and because the commissioners of the sinking fund refused to permit the prisoner to be taken out of the penitentiary for that purpose.

Gatlin was not disqualified from testifying by reason of his having been convicted of the crime of obtaining money under false pretenses, or by reason of his being confined in the penitentiary under sentence for said crime. (Commonwealth v. McGuire, 84 Ky., 57; Commonwealth v. Minor, 89 Ky., 555.)

Under section 11 of the Bill of Rights Warfield, who is the subject of a criminal prosecution, has the right not only "to meet the witness face to face," but also "to have *compulsory process for obtaining* witnesses in his favor." This right, guaranteed to him by the Bill of Rights, can not be denied to him. (Chief Justice Marshall in 1 Burr Trial, 158–9; Commonwealth v. Jones, 10 Bush, 746.)

He is entitled to have his own witnesses in court, if they can be reached by the compulsory process of the law, and to coerce their attendance whenever they may reside in the State, and, in order to do this, it is not required that he shall tender to his witnesses any compensation for expenses before resorting to process to compel them to attend. (Criminal Code, section 151.)

He is not bound to waive this right by taking the depositions of his witness, and the condition and circumstances of this witness are not such as to allow him to take his deposition, if he wished so to do. (Criminal Code, section 153; Kaelin v. Commonwealth, 84 Ky., 355.)

In addition to this ample authority for requiring the production of this witness, confined in execution of his sentence in the penitentiary, is provided by section 425 of the Criminal Code, which provides, in any proper state of case, for the removal from prison of persons convicted for any criminal offense "by writ of *habeas corpus* or *some other legal writ*."

It is contended, however, by counsel for the plaintiff that the order in this case ought not to have been made because there is no provision in law for paying the expenses incident to the production of this witness in the Fayette Circuit Court. If this were true, it would not affect the rights of the accused to have compulsory process to secure the attendance of the witness.

The Commonwealth has the custody and control of this witness, and the accused can not reach him except by compulsory process, to which he is entitled under the Bill of Rights. If there is no provision in the law for paying the expenses in such emergency, it should be made by the legislature, and the want of it is by reason of no fault of the accused; but we hold that it is the duty of the court to ascertain and make allowance for the expenses of such removal and conveyance of this witness, such as are embraced by section 361 of the Kentucky Statutes, and that the same are payable out of the State treasury under the said section.

For the reasons given it is the opinion of the court that the plaintiff should comply with the order and produce the witness in court to testify, and compliance with the order will be in discharge of the rule of contempt. The application for the writ of prohibition is, therefore, denied, and the petition dismissed.

COMMONWEALTH v. BOSSIE, &C.

(*Filed November* 19, 1896.)

Gaming—Accomplice—As each person engaged in a game of chance is guilty of an individual offense under the statute, the one is not the accomplice of the other within the legal meaning of that term, and, therefore, one may be convicted upon the testimony of the other alone.

W. S. Taylor for appellant.

Appeal from Laurel Circuit Court.

Opinion of the court by Judge Guffy.

The grand jury of Laurel county returned an indictment charging Jack Bossie, William Doan and Stephen Curtis with the offense of gaming, committed as follows, viz: "The said Jack Bossie, William Doan and Stephen Curtis did, on the 22d day of May, 1895, * * * unlawfully engage in a game of hazard and chance by engaging in and playing a game of cards with William Curtis, in which game money and other property was bet, won and lost by each of them."

Upon the calling of the cause for trial as to Bossie it was agreed that the same be submitted to the court for trial, and it was further agreed that the witness would prove the charge to be true, but that the witness was also engaged in the same game of chance.

The contention of the defendant was that the witness was an accomplice of the defendant, hence no conviction could be had upon his testimony alone, and the court below so adjudged, and from that judgment this appeal is taken.

The judgment of the court below is clearly erroneous. The witness was not an accomplice in the legal meaning of the term. Each one engaged in the game was guilty of an individual offense.

In the case of Whitaker v. Commonwealth, 95 Ky., 632, it was held by this court that in an indictment for incest the jury were authorized to convict upon the testimony alone of the female, the crimes of each being seperable under the statute.

To the same effect is the decision of the Superior Court in Green v. Commonwealth, 6 KY. LAW REP., 217.

For the reasons indicated the judgment appealed from is reversed and cause remanded for further proceedings consistent with this opinion.

LOUISVILLE & NASHVILLE R. R. CO. v. JOHNSON.

(*Filed November* 19, 1896—*Not to be reported.*)

Railroads—Right to have decaying trees near track removed—Where dead or decaying trees stand so near a railroad track as to endanger the lives of passengers on the company's trains, by reason of the probability of the trees being blown across the track by high winds, the company offering to pay the expenses of removal as well as the value of the timber, may maintain an action in equity against the owner to compel him to remove the trees. And in this action brought for that purpose the court erred in sustaining a demurrer to the petition.

John S. Kelley and H. W. Bruce for appellant.

Ben Johnson for appellee.

Appeal from Nelson Circuit Court.

Opinion of the court by Chief Justice Pryor.

This action was instituted by the railroad company for the purpose of having certain trees removed, standing on the lands of the appellee, and near appellant's right of way. A demurrer was sustained to the petition.

If, as the appellant alleges, the trees are so near appellant's roadbed as to endanger the lives of those who are passengers on its trains from the falling timber during high winds the trees ought to be removed.

The record presents a question of fact, and if the danger is such, from the proximity of the trees to the road, that one might reasonably say the safety of passengers and those on the train required their removal, the trees ought to be felled. The averments of the petition are direct and positive that the timber is dead, and so near the road as those on the train would be in imminent peril from the falling timber carried by high winds or the decay of the trees, and, the statements being admitted to be true by the demurrer, it should have been overruled and the case heard on its merits.

In the case of Filbin's adm'r v. Chesapeake & Ohio Ry. Co., 91 Ky., 444, this same question was disposed of, the court saying that if the danger was probable, and the company aware of that fact, the timber should be removed whether on the land of the railway company or on the land of another; and if the company is liable in such a state of case a remedy should be afforded for abating the danger, and a court of equity should give the relief, if upon the proof the averments of the petition are sustained.

The appellants are offering to pay the expenses of removal as well as the value of the timber, and, while the owner should not be deprived of the use of his property, unless its condition renders it dangerous to travel, this case should be heard by the chancellor in order to ascertain whether the complaint of the appellant is sustained by the facts.

Reversed and remanded for proceedings consistent with this opinion.

MECHANICS TRUST CO., &C. V. DANDRIDGE, &C.

(*Filed October* 24, 1896—*Not to be reported.*)

1. Warehouse receipts—Lien—The statutory definition of a warehouseman embraces only such persons as in fact keep a warehouse to store goods in and are engaged in that business. A person does not become a legal warehouseman by simply receiving one particular piece of property in store and issuing a receipt therefor, and the endorsement of a receipt issued by one who is not a legal warehouseman passes no interest in the property.

A receipt for certain railroad rolling stock, which recited that it was given under the statute commonly known as the warehouse law, was not valid as a warehouse receipt, the person who issued it not being a warehouseman. And, although the receipt was followed by a statement that "the above property is pledged as security" to a certain creditor of the corporation which owned the property, the note intended to be secured being described, and there was endorsed upon the receipt a statement signed by the corporation which owned the property that it was turned over to the person who executed the receipt as warehouseman, to be held by him as therein specified, no lien was created thereby, and, therefore, it is immaterial whether a creditor who had his execution levied upon the property had any notice of the receipt. And as the person who executed the receipt was the secretary of the construction com-

pany which owned the rolling stock and the manager of the railroad upon which the rolling stock was in use, there was in fact no change of possession, and there was, therefore, no valid pledge of the property.

2. *Same*--It is, as a general rule, indispensable that possession should accompany the pledge of property in order to vest the pledgee with title or interest therein.

J. W. Bryan and O'Hara & Rouse for appellants.

T. N. Lindsey for appellees.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Guffy.

The appellant, Mechanics Trust Co., obtained a judgment against the appellee, Home Construction Co., for $———, upon which judgment an execution issued, which was levied upon certain railroad rolling stock, consisting of cars, engines, etc., as the property of the Home Construction Co. Thereupon the appellee, W. F. Dandridge, Mason, Gooch & Hoge Co., and the German National Bank of Covington, brought suit to enjoin the sheriff of Franklin county from seizing and selling said property.

It is alleged in the petition that in December, 1889, the Home Construction Co., the owner and in possession of certain personal property, consisting of two locomotive engines, Nos. 1 and 2, five stock cars, Nos. 1,000 to 1,004, nine box cars, Nos. from 500 to 502, and from 504 to 509, and twelve flat cars, Nos. from 1,500 to 1,511, one passenger coach, No. 1, and one consolidated coach, No. 50, all lettered Kentucky Midland Railway, and that on the 28th day of December, 1889, the Home Construction Co. became indebted to Mason, Gooch & Hoge Co. in the sum of $15,000, and for which it executed its note, and to secure the payment of the note it delivered the possession of all the aforesaid articles to W. F. Dandridge, to be held by him in pledge for the benefit of Mason, Gooch & Hoge Co., with authority to issue to it a paper in the nature of a warehouse receipt, and said Dandridge did make a paper in the nature of such receipt, by which he agreed to hold and deliver said property as the construction company might order, but only upon the production and delivering to him of the said receipt. Dandridge endorsed upon the receipt that the property was pledged to Mason, Gooch & Hoge Co. to secure said note of $15,000, and the Home Construction Co. endorsed the receipt as follows: "The within described property was this day turned over and delivered to W. F. Dandridge as warehouseman, to be by him held as therein specified this December 28, 1889.

"Signed: THE HOME CONSTRUCTION CO.,
"By JAMES E. CANTRILL, *President*.
"W. F. DANDRIDGE, *Secretary*."

Afterwards another endorsement was made on the receipt, pledging or attempting to pledge the property to secure the payment of another note to said Mason, Gooch & Hoge Co. for $383.57. Finally the indebtedness of the Home Construction Co. due the aforesaid company was consolidated, and a new note for $16,047.54 executed December 5, 1890, at which time the construction company made another extended endorsement on the said receipt, pledging the said property for the payment of said debt; that the note has not been paid, and that the same and the Dandridge receipt are in pledge to the German National Bank of Covington to secure the payment of

two notes, of $7,500 each, due it from the Mason, Gooch & Hoge Co.; that the whole of the property is in lien to said Mason, Gooch & Hoge Co., and will not sell for enough to pay their debt, and it prays for its enforcement. The receipt and endorsements referred to read as follows:

"FRANKFORT, Ky., December, 1889.

"Received of the Home Construction Co. the following articles of rolling stock, purchased and owned by said construction company, and designed for the Kentucky Midland Railway, which I am to keep and hold and re-deliver to said company, or on its order, but only upon the production and delivery of this warehouse receipt properly endorsed, to wit: One locomotive engine, designated and numbered one (1); one locomotive engine, designated and numbered two (2); five stock cars, numbered from 1,000 to 1,004 inclusive; nine box cars, numbered from 500 to 502 inclusive, and from 504 to 509 inclusive; tweve flat cars, numbered from 1,500 to 1,511 inclusive; one coach, numbered (1) one, and one combination car, numbered (50) fifty, all lettered Kentucky Midland Railway, and constructively in the possession and control of the undersigned. It is agreed, however, that the undersigned, retaining the custody and control, and being responsible for the production of said rolling stock, unavoidable accident excepted, may allow said rolling stock to be used on connecting lines of railway in accordance with the rules regulating the interchanges of cars between the Kentucky Midland Railway and said connecting lines. This receipt is given and received under the statute of the State of Kentucky, commonly known as the Warehouse law, and under the provisions and penalties therein prescribed. W. F. DANDRIDGE."

"The above property is pledged as security to Mason, Gooch & Hoge Co. for a note, numbered A10, to Home Construction Co., dated December 2, 1889, payable at State National Bank, on which note the Home Construction Co. has borrowed $15,000.

"Signed: W. F. DANDRIDGE.

"This note was renewed August 2, 1890, for $15,274.16.

"(W. F. D.)"

"The within described property was this day turned over and delivered to W. F. Dandridge as warehouseman, to be by him held as therein specified, this December 28, 1889.

"Attest: (Signed) THE HOME CONSTRUCTION CO.,
"By JAMES E. CANTRILL,
"*President.*

"(Signed) W. F. DANDRIDGE, *Secretary.*"

"The within described property in the hands of W. F. Dandridge (warehouseman) is also pledged to pay Mason, Gooch & Hoge Co. a note of $383.57, which sum they have paid as interest or discount in the renewal of the note mentioned within, this August 13, 1890.

"Attest: (Signed) THE HOME CONSTRUCTION CO.,
"By JAMES E. CANTRILL,
"*President.*

"(Signed) W. F. DANDRIDGE, *Secretary.*"

"FRANKFORT, KY., December 12, 1890.

"We hereby transfer and assign to the Augusta National Bank of Staunton, Va., the benefit of the within collateral to secure payment of a note of ($10,000) ten thousand dollars drawn by this company,

dated December 5, 1890, and one drawn by C. E. Hoge for ($5,000) five thousand dollars, dated December 5, 1890, both payable sixty days after date.

"Attest: (Signed) MASON, GOOCH & HOGE CO.,
"By H. P. MASON, *President.*
"(Signed) W F. DANDRIDGE, *Secretary and Treasurer.*"

"The within-described property in the hands of W. F. Dandridge (warehouseman) is pledged to pay Mason, Gooch & Hoge Co. a note of $16,047.54, dated December 5, 1890, at four months, drawn by the Home Construction Co., to the order of Mason, Gooch & Hoge Co., payable at the State National Bank of Frankfort, Ky., which note was given to take up the two notes specified in the former endorsement made on this warehouse receipt, viz:

One note, due December 5, 1890	$15,274 16
One note, due December 5, 1890	383 57
Add discount on new note, four months, 7 per cent	389 81
Face of note, dated December 5, 1890	$16,047 54

"For which this property is pledged as collateral.
"Attest: (Signed) THE HOME CONSTRUCTION CO.,
"By JAMES E. CANTRILL,
"*President.*
"W. F. DANDRIDGE, *Secretary Home Construction Co.*"

"We hereby transfer and assign to the German National Bank of Covington, Ky., the benefit of the within collateral to secure payment of two notes of ($7,500) seven thousand five hundred dollars each, drawn by Mason, Gooch & Hoge Co., and each endorsed by H. P. Mason and C. E. Hoge personally, dated February 4, 1891, payable four months after date.

"(Signed) MASON, GOOCH & HOGE CO.,
"By W. F. DANDRIDGE,
"*Secretary and Treasurer.*"

The appellant denied the indebtedness alleged in the petition, and denied that the Home Construction Co. owed any part of the $16,047.54. It is also denied that the Construction Co. ever delivered the possession of the said property to W. F. Dandridge, to be held by him as a pledge to secure the debt, or that he had possession of the property at all, and denies that the said company did or could so pledge said property; denies that said company did or could authorize said Dandridge to issue any paper in the nature of a warehouse receipt for said property. In short the answer denies that the receipt filed is a warehouse receipt or of any legal effect, and denies any lien of appellee, and avers that appellant never had actual notice of said paper until the day this suit was filed, and never heard of appellee claiming any lien on said property until after judgment in appellant's favor.

It is also averred in the answer that the property was continuously used in various counties on the Kentucky Midland Railroad and upon other railroads.

The reply averred that Noel, the sheriff, had notice of appellee's claim before the levy. The reply was traversed of record. The court below adjudged that the defendants, appellants here, be perpetually enjoined from seizing or selling the said property, and to reverse that judgment this appeal is prosecuted.

The contention of appellee is that it acquired a lien by virtue of the property being delivered to Dandridge in pledge to secure the payment of the debt, and also by virtue of the so-called warehouse receipt of Dandridge and its assigment to them. Appellant insists that there was no such delivery or pledge of the property as is required by law to create any lien or claim thereon, and that Dandridge was not a warehouseman within the meaning of the law, and that his receipt was a nullity. It will be seen from the receipt, as well as from the pleadings, that the intention of the parties was to issue a warehouseman's receipt, and if Dandridge was a warehouseman within the meaning of the statute, and if the statutory requirements were complied with, then appellees acquired an interest in the property as security for the payment of their debt. It further appears that the property was to be used as railroad rolling stock on the Kentucky Midland and other connecting lines according to the railroad rules. The statute provides that "hereafter in this State all and every person or persons, firms, * * * companies, * * * who shall receive * * * in store or undartakes to receive or take care of property shall be deemed and held to be a warehouseman."

Warehousemen are also prohibited from issuing receipts for goods unless the same shall have been *bona fide* received into possession and store by such warehousman.

The statute *supra* evidently refers to only such persons as in fact keep a warehouse to store goods in and are engaged in that business. It can not be that it was the intention of the Legislature to provide that any and all persons might become legal warehousemen by simply receiving one particular piece of property in store and issuing a receipt therefor. There is no pretense that Dandridge was engaged in keeping a warehouse and storing property therein as a business. It, therefore, follows that the receipt in question was and is invalid and ineffectual, and the endorsement thereof passed no interest in the property.

It is as a general rule indispensable that possession must accompany the pledge of property in order to vest the pledgee with title or interest therein. Dandridge was the secretary of the construction company and the manager of the railroad, and so continued until the management was turned over to George Harper, into whose possession the property was then placed as the bailee of Dandridge, as the proof shows. It is, therefore, perfectly manifest that there was no change of possessession and nothing to warn the public of any change, and the property still allowed to be used as before, liable to be lost—as one car really was burned up but paid for—or worn out. If appellee desired to acquire a lien on the property it could have done so by obtaining a mortgage, and then it would have been secure and no other creditor need to have been misled. It is not necessary to discuss the question of notice, because appellees have no lien at all on the property, and it is wholly immaterial whether appellant knew of the receipt or not, but it does not appear that appellant had any notice of the receipt before the creation of the debt nor before judgment, if indeed it ever had any, until this suit was instituted.

For the reasons given the judgment of the court below is reversed and cause remanded, with directions to dismiss the petition and for further proceedings consistent with this opinion.

BROWN V. COMMONWEALTH.

(*Filed November* 7, 1896.)

Section 1130, Kentucky Statutes, which provides for an increased punishment for the second and third convictions of felony, applies only to offenses committed subsequent to the conviction or convictions relied on to increase the punishment.

R. C. Warren for appellant.

W. S. Taylor for appellee.

Appeal from Lincoln Circuit Court.

Opinion of the court by Judge DuRelle.

At the June term, 1896, of the Lincoln Circuit Court, the appellant was indicted upon two charges of breaking into a warehouse. These indictments were returned on the same day, June 8th. Appellant pleaded guilty to each, and on June 9th, after verdicts fixing his punishment at five years imprisonment in the penitentiary in each case, was sentenced. On June 10th another indictment was returned against him for feloniously breaking into and entering a dwelling house. In this indictment the two former convictions for felony at the same term were set up. He pleaded not guilty, but the jury found him guilty and fixed his punishment at confinement in the penitentiary for life, and the court sentenced him in accordance with the verdict. This was done under authority of section 1130, Kentucky Statutes, as follows: "Every person convicted a second time of felony, the punishment of which is confinement in the penitentiary, shall be confined in the penitentiary not less than double the time of the first conviction, and if convicted a third time of felony he shall be confined in the penitentiary during his life. Judgment in such cases shall not be given for the increased penalty unless the jury shall find, from record and other competent evidence, the fact of former conviction for felony committed by the prisoner in or out of this State."

The question presented for decision is whether the statute in question authorizes the imposition of the increased penalty for an offense not committed after the original convictions. We think not. The statute was manifestly intended to provide an increased penalty for a subsequent offense in order to deter the offender from its repetition. After punishment is imposed for the commission of a crime, the double penalty is held *in terrorem* over the criminal for the purpose of effecting his reformation and preventing further and subsequent offenses by him. So we find that for a third offense the punishment of imprisonment for life is provided by the act upon the theory doubtless that he must then be regarded as incorrigible. The reformitory object of the statute, namely, to provide a deterrent from future crime, would not be effected by a construction which gives to the offender no opportunity to reform. Moreover, "doubtful questions as to the severity of the penalty are to be resolved in favor of the accused." (Am. & Eng. Ency., 4,726.)

We are of the opinion that the words "convicted a second time of felony" and "convicted a third time of felony" must be restricted to felonies committed subsequent to the dates of the convictions relied on to effect an increase of the penalty, for otherwise no *locus poenitentiæ* would be offered to the accused.

For the reasons stated the judgment is reversed and cause remanded, with directions to award the appellant a new trial and for further proceedings consistent with this opinion.

AUSTIN, &C. V. COLSON, &C.

(Filed November 10, 1896—Not to be reported.)

Ejectment—Adverse possession—While the rule that the plaintiff in ejectment must recover on the strength of his own title may not apply in all its aspects to a case like this, where the defense is claiming to have divested the owner of title, yet, as the defendants here have been in the adverse possession of the land for near forty years, claiming under an execution sale, such an equity is vested in them as defeats any recovery by plaintiffs.

W. J. Weller and N. B. Hays for appellants.

Warren Montfort, Thomas H. Hines and A. K. Cook for appellees.

Appeal from Bell Circuit Court.

Opinion of the court by Chief Justice Pryor.

The next of kin of Thomas J. Beard instituted this action of ejectment against the heirs and devisees of John C. Colson to recover a tract of 250 acres of land lying in Bell county.

The defense claims to have derived title to the land from Thomas Beard by reason of various execution sales, made under judgments rendered in the Knox Circuit Court against Thomas Beard, that divested Beard of the equitable if not the legal title to the land. They also rely on the continued adverse possession for over thirty years under these sales.

The sales were made in the year 1853, and this action was instituted in the year 1892, near forty years from the time the appellees' ancestor and those under whom they claim acquired the title. Three executions were issed in favor of one Newlee and one Brittain, the two amounting, interest and costs, to about $200. The land was sold under the executions in May, 1853, and purchased by Newlee for $100. The equity of redemption was then sold for the balance and also purchased by Newlee.

In a few years after these sales Newlee sold the land to Brittain and Brittain took possession. Newlee then rescinded the contract with Brittain, or took the land back, and has claimed the land all the while, with tenants now and then in the actual possession. Beard, under whom these appellants claim, left the land shortly after these sales, and removed to Alabama, where he became insane in the year 1862 and died in the year 1882. No claim was ever made to the land by Beard or his kindred from the date of the execution sales to the time this suit was instituted, but on the contrary Newlee was the claimant and equitable owner; had placed Brittain in the possession, and then sold the land to the ancestor of the appellees.

The adverse possession of Parker as to a part of this land presents no grounds for a recovery on the part of the appellants. They must recover on the strength of their own title, and while this rule in all of its aspects may not apply to a case like this, where the defense is claiming to have divested the owner of title, it is plain that the purchase under the execution, the abandonment of the real owner when the sales were made, and a continued claim for more than forty years by the purchaser, and actual entry by him on the land, or those to whom he sold, vests in the appellees such an equity as defeats any recovery by the appellants.

The judgment is, therefore, affirmed.

AMERICAN INS. CO. OF N. Y. V. AUSTIN, BY, &C.

(Filed November 12, 1896—Not to be reported.)

1. Fire insurance—Reversible errors—In this action upon a policy of fire insurance, in which one of the defenses was that a part of the property insured was covered by a mortgage, the existence of which was concealed from the agent who issued the policy, the court is inclined to the opinion that the defendant was entitled to a favorable instruction relating to the part of the insured property which was mortgaged, but there can be no reversal for the refusal to give such an instruction because error in refusing instructions is not assigned as a ground for new trial.

2. Sufficiency of grounds for new trial—The assignment as a ground for new trial of "error of law occurring at the trial and excepted to at the time by the defendant" is not sufficient to authorize this court to reverse for an error either in giving or refusing instructions. While the instructions complained of need not be specifically designated, yet they must, in a general way, be called to the attention of the trial court by the grounds for a new trial.

R. H. Tomlinson for appellant.

W. O. Bradley for appellees.

Appeal from Garrard Circuit Court.

Opinion of the court by Judge Landes.

This was an action to recover the value of certain property damaged and destroyed by fire, which was covered by a fire insurance policy issued by the appellant to the appellee, Leon Austin.

A demurrer was filed by the defendant company to certain parts of the petition, but was properly overruled by the court, and the parts of the petition against which the demurrer was directed were not detrimental to the defendant, and were, at most, mere allegations that were not necessary in the petition. A motion was also made by the defendant company to strike out certain parts of the petition, which was likewise properly overruled by the court because they were not prejudicial to the substantial rights of the defendant, nor did they affect any defense the defendant had to the action. At the same time it may be said that some portions of the petition might well have been stricken out without affecting the substantial rights of either party, but rather to their advantage in having the issues more succinctly presented.

These grounds of defense were relied on, viz: First, that the policy of insurance was issued by the agents subject to the approval of the company, and that the company refused to approve or ratify it; second, that the appellee, the insured, was not the sole and unconditional owner of the property insured; third, that part of the property insured was covered by a mortgage, the existence of which was not known by the agents or communicated to them by the appellee, but was concealed by him from them at the time the policy was issued and delivered; fourth, that the warehouse which was covered by the policy was on leased ground; and fifth, that the appellee failed to furnish the company proofs of loss within sixty days after the destruction of or damage to the property insured.

At the conclusion of the testimony the attorneys on each side moved for instructions to the jury, some of the instructions requested on both sides being given and others refused by the court, and proper exceptions taken, and one instruction was given by the court on its own motion. The case having been submitted to the jury a ver-

dict for the sum of $885 was returned in favor of the appellee, on which judgment was rendered, and, the court having overruled a motion of the appellant for a new trial, this appeal from that judgment was granted and is prosecuted.

All of the grounds of defense were covered by the instructions given or refused by the court. The grounds upon which the motion for a new trial was based were: First, excessive damages, appearing to have been given under the influence of passion and prejudice; second, error in the assessment of the amount of recovery; third, the verdict was not sustained by sufficient evidence and was contrary to law; and fourth, error of law occurring at the trial and excepted to at the time by the defendant.

After a careful examination of the record we have not been able to find in it anything that sustains either of these grounds for a new trial. The verdict is fully sustained by the evidence. There is not the least indication that the jury were influenced by passion or actuated by prejudice in assessing the amount of recovery, which, as assumed in one of the grounds for a new trial, was not in the nature of damages. On the contrary, it appears that the jury followed, with marked precision, the course pointed out by the court in the instructions given.

We are inclined to the opinion that the appellant was entitled to a favorable instruction relating to that part of the property covered by the policy which was mortgaged. But we can not pass upon any of the instructions which were either given or refused, because they are not embraced or referred to in the grounds for a new trial. It is the settled rule in this State that errors of law complained of must be pointed out in the grounds for new trial, otherwise they can not be relied on in this court. It is not sufficient to state in a general way, as in this case, that "error of law" occurred at the trial, and "was excepted to at the time." (Civil Code, section 340, subsection 8; McLain v. Dibble & Co., 13 Bush, 297; O. V. Railway and Mining Co. v. Kuhn, 9 KY. LAW REP., 467.)

It must be shown that the trial court had its attention called to the alleged errors, and had the opportunity to correct them if committed before coming to this court. Here the instructions given, or requested and refused, were not mentioned at all; and while under the later decisions the instructions complained of need not be referred to by number or by any particular designation, yet they must be brought to the notice of the trial court, and evidence of that fact must be furnished in the grounds for new trial before this court can take cognizance of them. (L. & N. R. R. Co. v. McCoy, 81 Ky., 403; Meux v. Meux, &c., *Ib.*, 475; Helfrich Saw & Planing Mill Co. v. Everly, 17 KY. LAW REP., 795.)

It follows that the judgment of the lower court must be and it is affirmed, with damages.

CRESS V. COMMONWEALTH.

WATSON V. SAME.

SHRADER V. SAME.

SAME V. SAME.

(*Filed November* 6, 1896—*Not to be reported.*)

1. *Local option—Indictment*—An indictment for a violation of the local option law must allege facts showing that the law was in force in the county

or precinct in which the liquor is alleged to have been sold, and must therefore allege that the certificate of the canvassing board, to the effect that at an election held under the law a majority of the votes cast were against the sale of liquor, was delivered to the clerk of the county court and spread on the order book of the court as required by the statute.

2. *Same*—The county judge is not authorized to order an election under the local option law until the next term of the court after the petition therefor is noted of record. And as the election in question in this case was ordered at the same term at which the filing of the petition was first noted of record, although the petition had been lodged with the judge prior to the term and marked "filed," the election did not have the effect to put the act in operation.

Riddell & Riddell, White & Roberts, H. L. Wheeler, J. T. Sullon and G. W. Gourley for apppellants.

W. S. Taylor for appellee.

Appeal from Lee Circuit Court.

Opinion of the court by Judge Landes.

Each of these cases is before us on appeal from a judgment of conviction, rendered by the Lee Circuit Court under an indictment charging the offense of selling spirituous, vinous and malt liquors in the Beattyville voting precinct of Lee county, in violation of the "local option" act of August 6, 1892. (Session Acts, 1891–2–3, page 214.)

The question was raised in the court below by demurrer to the indictment in each case whether the act was in force in the precinct, and, although other questions were raised in some of the cases relating to the sufficiency of the indictments and the competency of testimony, it is only necessary to pass upon the question first mentioned.

In each indictment it was alleged and the record shows that a petition of the requisite number of voters of the precinct to the county judge requesting him to submit the question of the sale of liquors to the voters of the precinct was placed in the hands of the county judge and marked "filed" by him on the 12th day of July, 1893, but this was not done in court, nor was any order made in court by him at that time with reference to the petition, but the order noting the filing of the petition and submitting the question was made on the 24th day of July, which was the first day of the term of the county court for that month, which order directed that the election should be held on the 12th day of September following, which was the date fixed by the petitioners. The election was held on that day, and a majority of the votes then cast were against the sale of liquor in the precinct. It is not alleged in either case, however, that a certificate of that fact from the canvassing board was delivered to the clerk of the county court, or spread on the order book of the court as required by section 3 of the act. In our opinion the absence of such an allegation rendered each indictment fatally defective, for without it there was nothing to show that the act was in force in the precinct, and the court could not presume that the required certificate was given by the board or recorded by the clerk. (Commonwealth v. Green, 17 KY. LAW REP., 579.)

But the main question is with reference to the order of the county judge submitting the proposition concerning the sale of liquor to the voters of the precinct.

As we have seen, the petition was placed in the hands of the judge

out of court, and the order for the election was made on the first day of the term of the county court thereafter, when the petition was for the first time noted in the order-book of the court. The statute required the county judge to make the order directing the election to be held "at the next regular term" of his court "after receiving" the petition.

Following the case of Wilson, &c. v. Hines, &c., *ante*, 233, the petition can not be said to have been "received by" or "lodged with" the county judge before the time when it was noted as having been filed in court, and he had no authority under the statute to make the order directing the election to be held until the "next regular term" of his court thereafter. The order made on the 24th day of July, 1893, directing the election to be held on the 12th day of September following was, therefore, void, and the election held in pursuance of the said order did not have the effect to put the act in operation in the Beattyville precinct.

For the reasons given the judgment in each of the cases is reversed and each case is remanded, with directions to the lower court to sustain the demurrer and to dismiss the indictment in each case.

MADDOX V. NEWPORT NEWS & MISSISSIPPI VALLEY CO.

(*Filed November 7, 1896—Not to be reported.*)

Railroad—Killing of stock on track—In this action against a railroad company to recover damages for the negligent killing of live stock on the track the court erred in its instructions to the jury in assuming that the testimony of the servants of the defendant in charge of the train had overcome the presumption of negligence. The whole question of negligence should have been left to the jury.

J. A. Smith for appellant.

P. H. Darby for appellee.

Appeal from Ohio Circuit Court.

Opinion of the court by Judge Guffy.

The appellant instituted this action in the Ohio Circuit Court against the appellee to recover judgment for $100 for the killing of a two-year-old mare, the property of the appellant. The appellant alleged that the mare, without the knowledge or procurement of appellant, strayed upon the track of appellee and was, by the willful negligence, carelessness and recklessness of appellee's agents and servants, struck by the engine or cars and totally destroyed.

The answer in substance admitted the killing, but alleged that it was unavoidable and without negligence, and could not, with ordinary or great prudence, have been prevented. A trial resulted in a verdict and judgment in favor of appellee. Appellant's motion for a new trial was overruled, and he has appealed.

Appellant insists that the court erred in giving instruction No. 3, which is as follows: "The court instructs the jury that the defendant having admitted that the mare was killed by its train, the law presumes negligence on the part of defendant's servants or agents. But the agents and servants of defendant in charge of its train by which plaintiff's mare was killed having testified that the train was properly manned, and that they used reasonable care, skill and diligence

and endeavor to avoid the killing or injury to the mare, the legal presumption is rebutted, and the jury should find for the defendant, unless they believe from all the evidence that the said agents and servants were in fact negligent and careless, and by such carelessness and negligence plaintiff's mare was killed."

It seems to us that the foregoing instruction is erroneous, for the reason that it assumed that the statements of the agents, etc., had rebutted the presumption of negligence. It was the province of the jury to determine from the facts and circumstances detailed by all the witnesses whether or not negligence was in fact the cause of the injury complained of. It might be that the jury did not believe that the statements of the servants and agents established the fact of proper care; or, in other words, the jury might not have believed from the testimony that the presumption or *prima facie* evidence of negligence was overcome or rebutted by the testimony of defendant's agents and servants. The whole question of negligence should have been left to the jury, there being facts from which the jury might have inferred negligence.

For the error indicated the judgment is reversed and cause remanded, with directions to award the appellant a new trial and for proceedings consistent with this opinion.

CITY OF LEBANON V. COOPER.

(*Filed November* 13, 1896—*Not to be reported.*)

Suit to recover salary as city attorney—Sufficiency of answer.—In this action against a city, by which the plaintiff sought to recover one year's salary as city attorney and also for extra services alleged to have been rendered, the court erred in sustaining a demurrer to an answer which put in issue the fact of plaintiff's election or appointment to the office of city attorney, and also put in issue the claim for extra services.

H. W. Rives for appellant.

Thomas H. Hines for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Guffy.

The appellee, Cooper, instituted this action against the city of Lebanon to recover judgment against the city for $300, one year's salary as city attorney, and $150 for extra services alleged to have been rendered.

It is alleged in the petition that certain persons were, in November, 1893, duly elected councilmen of said city and duly qualified as such, and that the same elected and appointed appellee city attorney and fixed the salary aforesaid.

Appellant denied that the persons named as councilmen were ever elected and qualified or acted as such, and denied that appellee was ever elected city attorney or ever acted as such or was so recognized, and also denied that he ever rendered any service for the said city, and specifically denied the extra service.

It is also alleged in the answer that a suit was instituted to determine the validity of the election of 1893, and that in said suit it was adjudged that the said election was invalid, which judgment never had been reversed.

Plaintiff's demurrer to the answer and to the answer as amended was sustained and judgment rendered in favor of appellee for the sum of $650, and to reverse that judgment this appeal is prosecuted.

It seems to us that the answer put in issue the fact of appellee's election or appointment to the office of city attorney, and it clearly put in issue the claim for the $150 extra services. It was, therefore, error to sustain the demurrer.

The judgment of the court below is, therefore, reversed and cause remanded, with directions to overrule the demurrer and award appellant a new trial, and for proceedings consistent with this opinion.

GRAHAM, &C. V. BOTNER, &C.

(*Filed November* 11, 1896—*Not to be reported.*)

1. *Validity of deed—Indefinite description* A conveyance by a brother to his sister of all his estate, real and personal, was not so indefinite as to render the conveyance void as against the grantor and his heirs, as it could be shown by extrinsic evidence what estate the grantor owned at the time the writing was delivered.

2. *Construction of will*—The brother having subsequently executed a will giving to his sister all his property, real and personal, for life, and at her death all said property not disposed of to go to her heirs, the testator adding: "But this will is not to be understood or construed in any way to prevent my sister from selling and using any part of said estate that she may desire during her life," the property owned by the testator at his death passed under the will to his sister, with the power to sell it if she saw proper and apply the proceeds for her support and maintenance, her heirs taking under the will only what might be left at her death.

3. *Evidence*—The statements of the brother as to the purpose of the deed executed to his sister were incompetent as evidence because not brought home to her. But, if competent, his statement in making sales of the land that it belonged to his sister, and that she would have to unite in the deeds, are sufficient to contradict the statements made by him hostile to her title.

Alexander Lackey for appellants.

R. T. Burns, Stewart & Stewart, Wm. H. Holt and M. J. Holt for appellees.

Appeal from Lawrence Circuit Court.

Opinion of the court by Chief Justice Pryor.

The construction of the will of George Nellman and the validity of a deed made by him to the appellee, Nancy Nellman (now Botner) are the questions presented by the record. The children of Mrs. Graham, who is a sister of Nancy Nellman, are claiming the property in controversy as remaindermen, and in order to a recovery they have assailed the conveyance made by George Nellman to his sister, passing to her the absolute estate in the property as fraudulent and also void for uncertainty, and also contend that his will gave to their aunt only a life estate. They allege she has disposed of most of the estate, and being still alive they seek to hold her responsible.

The facts of this case show that George Nellman and the appellee, Nancy, his sister, lived together for more than half a century, and seem to have resolved not to seek different homes as long as they

both lived. They were frugal, industrious people, and saved by the joint labor an estate worth $3,000 or $4,000. Being unmarried, and seeing the necessity of providing for his sister in the event of his death, in January, 1879, George Nellman executed and delivered to his sister a deed, by the terms of which he conveyed to her (his sister) forever all of his estate, real and personal. The deed was acknowlegded but not recorded until after this suit was instituted.

This conveyance, it is argued, was in fraud of creditors, and made in anticipation of some future liabilities on the part of the grantor. We think the proof warrants no such conclusion, but on the contrary the presumed liability would not have affected his estate or placed him in any embarrassed, pecuniary condition. His purpose in making the conveyance was to protect his sister, and long after the deed was made in selling a part of the realty he stated to the purchasers that his sister would have to unite in the deeds to them, showing a delivery and a recognition by him in his lifetime of the ownership on her part.

The description of the property conveyed enables those who claim under it as against George and his heirs to identify it. It affords a means of identification, and if George Nellman was living he could neither assail the deed on the ground of fraud, nor would he be permitted to say that when he conveyed *all his estate, real and personal*, it was so indefinite as to render the conveyance void, for it could be shown by proof *aliunde* what estate he had when the writing was delivered. (Pond v. Beigh, 10 Page, 140; Wilson v. Boyd, 92 U. S., 320; 79 Ind., 235; 108 Ind., 130.)

George Nellman by his last will doubtless attempted to pass what property he had accumulated after the deed of 1879 was executed, but whether so or not he had passed to his sister what property he owned in 1879, and his statements as to the purpose of that deed are incompent, because not brought home to his sister, and if competent his action in making sales of the land after this, and statements that the land belonged to his sister, would and does contradict those made hostile to her title; but the will authorized her to dispose of the property and to use it if the deed had not vested in her the title. He recites in his will the consideration of love and affection for his "*dear sister*, who *has lived with me all my life, helping me in all my business, and sharing with me whatever trouble has overtaken me in life*, and caring for me tenderly with a sisterly love during all my illness. I do hereby will to my sister Nancy all my property, real and personal, to have and to hold as her separate property during her life, and at her death all said property, real and personal, not disposed of by my sister during her lifetime shall go and belong to the heirs of my sister, Sarah Graham, *but this will* is not to be understood or construed in any way to prevent my sister Nancy from selling and using any part of said estate that she may desire to during her life."

It is manifest, therefore, that the testator, under the circumstances surrounding him when the will was written, gave to his sister and intended to give to her the uncontrolled power of alienation or disposition of the estate, and what was left to go to the children of Mrs. Graham. It results, therefore, that the estate owned by the grantor in January, 1879, passed by the deed of that date to his sister, and the property owned at his death by him passed under the will to his sister, with the power to sell, if she saw proper, and apply the proceeds for her support and maintenance.

Judgment affirmed.

MORGAN V. HYMER.

(Filed November 13, 1896—Not to be reported.)

1. Vendor and vendee—Specific performance -In this action by the vendor to enforce specific performance of a contract for the sale of land, by the terms of which the vendee, in addition to the execution of notes for deferred payments, undertook to discharge a mortgage lien on the property held by a building and loan association and was to receive a transfer of the stock in the association from the vendor, who was to keep all fines and dues paid on the stock until the purchase-money notes should be paid, the defendant having taken possession of the property, the plaintiff was entitled to an enforcement of the contract, although he had not kept the dues paid up on the stock, defendant being allowed credit for the unpaid dues. But it was error not to require plaintiff and his wife, as a condition precedent to the enforcement of the contract, to make to defendant a valid assignment of the stock in the building and loan association, according to the by-laws and regulations of the association.

2. Same -If defendant had been ready, when the last of the purchase-money notes fell due, to pay the balance due plaintiff, and plaintiff had not promptly performed his part, defendant would have been authorized to consider the contract terminated.

3. The house having been damaged by fire and the damage not repaired by plaintiff, who collected the insurance due on account of the damage and kept the same, although he had agreed to transfer the insurance policy to defendant, the court should have given defendant credit for the damage to the house by fire, the amount received of the insurance company not being conclusive as to the actual damage.

J. L. Elliston and Wm. H. Julian for appellant.

James P. Tarvin and Walker C. Hall for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Guffy.

It appears from this record that appellee, on the 3d day of March, 1893, sold or contracted to sell to appellant one house and lot, where appellee then lived. Appellant was to pay $2,500 (at least that is the price named in the contract signed by appellee, $1,000 to be paid in cash), for which four notes were executed, the last one being for $900, and falling due the 25th day of December, 1893. The $1,500 was to be paid in discharge of a mortgage lien on the said house and lot, held by a building and loan association, and appellant was to have the $1,500 stock in said association, which appellee was to transfer to him. Appellant was to pay $20 per month rent, and appellee was to keep all fines and dues paid on the stock until the four notes were paid.

Appellant paid the three first notes, and refused to accept a deed for the lot, and appellee brought suit to enfore specific performance of the contract, alleging his ability and willingness all the time to perform his part of the contract.

Appellant relied on several defenses, among them was the fact that appellee had not kept the fines and dues paid on the stock, and that the house had been damaged by fire and the damage not repaired by appellee, who collected the insurance due on account of the damage and kept the same. He also claimed that he was to have the profit accruing on the stock, and that appellee represented that there was a $2,000 paid-up policy of insurance on the

house which he was to have transferred to him, none of which was traversed by the reply.

The court below adjudged in favor of appellee, but allowed appellant a credit of $38, the insurance collected for damage to the house, and also a credit for the unpaid dues, etc., on the stock, and adjudged a lien on the house and lot for the amount due from appellant to appellee, and from that judgment Morgan has appealed.

Many reasons for reversal are submitted and ably urged by counsel for appellant, but it seems to us that, under the written contract accepted by appellant and under the pleadings in the case, coupled with the fact that appellant entered into the possession of the house, the contract was enforcible.

If appellant had been ready the 25th of December, 1893, to have paid the balance due appellee, and appellee had not promptly performed his part, the appellant would have been authorized to have considered the contract terminated or annulled; but the court erred in not requiring the appellee and his wife to make to appellant a valid assignment of the stock in the building and loan association, according to the by-laws and regulations of the association.

The judgment of the court below is therefore reversed and cause remanded, with directions to require the assignment to be made as indicated, and, if it be not done, the petition shall be dismissed. The appellant should be allowed a credit for the damage to the house by fire. The amount received of the insurance company is not conclusive as to the actual damage, and the proof as to the damage should be considered by the court.

Judgment reversed and cause remanded for proceedings consistent with this opinion.

LAUGHLIN V. COMMONWEALTH.

(*Filed November* 14, 1896—*Not to be reported.*)

1. Continuance -While affidavits showing the defendant could not have a fair trial in the county would have been considered on a motion for change of venue, the failure to grant a continuance upon such affidavits was not an error.

2. Formation of jury -In forming a jury it was not improper, after exhausting the panel, to summon jurors from bystanders, instead of having additional names drawn from the drum or wheel.

3. Proof that the house of accused, where the killing with which he was charged occurred, was three or four miles west of Augusta was sufficient to warrant the jury in reaching the conclusion that the killing occurred in Bracken county.

4. Corpus delicti -Upon a trial for murder direct and positive evidence of the *corpus delicti* is not required. Presumptive evidence is sufficient.

In this case, although the body supposed to be that of the person whom defendant had killed was so burned that it could not be recognized, yet, as the circumstances under which it was found were such as to leave no reasonable doubt that it was the body of the deceased, the identification was sufficient.

5. Same -Extra-judicial confessions alone are inadequate to establish the *corpus delicti*, yet slight corroboration may suffice.

6. Confessions- Evidence -A confession, to be admissible as evidence, must be shown to be voluntary and not procured by the flattery of hope or the torture of fear. And in determining whether a confession was voluntary the court must be controlled by the facts of the particular case under consideration, the admission of such proof being in the discretion of the court. In this case a confession made by the accused to the county attorney, who came to

him at his request, was voluntary, and was, therefore, properly allowed to be proved.

7. *Same*—Although an original confession may have been obtained by improper means, yet subsequent confessions of the same or of like facts may be admitted if the court believes from the length of time intervening or from proper warning of the consequences of confession or from other circumstances that the delusion, hopes or fears, under the influence of which the original confession was obtained, were entirely dispelled. But that rule has no application here as the confession, the admission of which is complained of, was not a "subsequent" one, the claim that there had been a prior confession not being sustained by the evidence.

8. *Sanity of accused*—Section 287 of the Criminal Code was intended to provide for an inquiry as to the sanity of the accused at the time of the investigation and not as to his sanity at the time the offense was committed. And as it is only when the judge has reasonable ground to believe the accused to be insane that he is required to order the investigation, and the matter is in his discretion, his action in overruling a motion to have a jury empaneled to try the question can not be reviewed on appeal, no evidence being heard on the motion.

George Doniphan for appellant.

W. S. Taylor and M. R. Todd for appellee.

Appeal from Bracken Circuit Court.

Opinion of the court by Judge Paynter.

The accused, Robert H. Laughlin, was indicted, tried, convicted and sentenced to be hanged for the murder of his wife, Emma Laughlin. Several reasons are urged as a ground for reversal.

Emma Laughlin lost her life in February, 1896. The accused was indicted March 11, 1896, and the case came on for trial at the July term of the Bracken Circuit Court. The accused filed his own, together with other affidavits, in which there were statements that, owing to charges pending against others for murder, and perverted and aggravated statements purporting to give a true account of the facts upon which this and other indictments were found against the accused, the people of Bracken and adjoining counties were so biased at the time that they could not give him a fair trial. No motion was made for a change of venue.

The facts which the affidavits purport to give would have been considered on a motion for a change of venue, but the failure to grant a continuance on such affidavits was not an error.

After the regular panel was exhausted the judge of the court ordered the sheriff to summon jurors from bystanders. It is insisted that it was an error because, after the regular panel was exhausted, the names of others to act as jurors should have been drawn from the drum or wheel.

Section 2247, Kentucky Statutes, is as follows:

* * * "And the court, after the petit juries for the term have been selected and empaneled, may, in any action, proceeding or prosecution, after said panel has been exhausted, direct the sheriff to supply from bystanders the place of one or more who may be hereafter excused by the court for good cause or removed by the challenge of either party, or the judge may supply such jurors by drawing names from the drum or wheel as herein provided." * * *

It seems to us that it is but necessary to quote the statute to answer the complaint of the accused that the jurors were not properly selected.

The record shows the killing, if at all, was at the house of the accused, which was said by the witnesses to be three or four miles west of Augusta. It is, therefore, claimed that the proof does not show the killing was in Bracken county. Before the jury could convict they were required by the instructions to believe from the evidence that the killing took place in Bracken county. The proof that the accused's house was three or four miles west of Augusta was sufficient to warrant the jury in reaching the conclusion that it occurred in Bracken county. (Combs v. Commonwealth, 15 KY. LAW REP., 659.)

The instructions which the court gave the jury on the motion of the Commonwealth's attorney fully and with more than ordinary precision stated the law of the case. Those given at the instance of accused were unnecessary.

After a careful examination of the instructions we are unable to discover any error in the instructions which the court gave the jury prejudicial to the rights of the accused. It is contended that there was a failure to prove the *corpus delicti*. The accused lived with his wife some three or four miles west of Augusta, Bracken county. They had no children, but were frequently visited by his wife's niece, May Jones, who was about twelve years of age. She was staying with them on the night of February 14th. The proof in this record shows that the accused had borne a good character, and he and his wife seemed to sustain the most pleasant relations to each other, and both seemed to be very fond of the niece. On February 15th, at 3 or 4 o'clock A. M., the deceased went to the house of his sister, who lived a short distance from him. As he approached the house he was hallowing to her son that some one was trying to cut his throat. He was in his night clothes, had on his drawers, his under and day shirt, and was barefooted and bareheaded. His neck was bleeding. He claimed that a rough looking man, with long whiskers, woke him up trying to cut his throat with a razor, and as he ran out another man stuck a lighted torch in his face, whom he pushed down, and then ran to the house of his sister. His face was blackened and his hair singed. Shortly after his arrival his sister looked out and discovered a light over on the hill, and informed the accused that his house or barn was on fire. It proved to be the house of the accused.

This is substantially the testimony of his sister and her son. The accused testified at the inquest and gave substantially the same account of the discovery of some one trying to cut his throat and his flight from the house as given by his sister. The house was destroyed by fire, and what is claimed to be the remains of the wife and niece were found in the cellar burned to a crisp. The heads and legs were destroyed. In fact nothing remained but badly burned bodies. As one witness said, he could only tell the one from the other by their size. No one appears to have been staying at the house of the accused on the night referred to except the accused, his wife and niece. He fled from the house but a few minutes before it was discovered on fire, leaving his wife and niece in it. Before the house was entirely consumed the bodies, which were afterwards removed from the debris, were discovered. They were removed in the condition described.

There was testimony tending to prove that the places on the neck of the accused looked more like briar scratches than that they were made by an edged instrument. The jury had before it the improbable story which the accused told about waking up with some one cutting at his throat, his conduct in running to his sister's house

exclaiming that some one was cutting his throat, the strange story that he ran away from his house, leaving his wife and niece alone with two men bent on mischief, and other circumstances in the case. His was a one-story house, and it is wholly improbable that if it caught fire the wife and neice could not have escaped from it had they not been injured or killed before it occurred. There can not be a reasonable doubt that the bodies found were those of Mrs. Laughlin and May Jones. The jury was warranted in reaching the conclusion that their death was produced by a criminal agency. It is not necessary that there should be direct and positive evidence of a *corpus delicti*. Presumptive evidence is sufficient for that purpose.

In many cases it would be utterly impossible to bring guilty persons to justice if it required positive evidence of the *corpus delicti*. In many cases of homicide the murderer commits the offense when there is no one to witness it. He seeks to destroy the evidence of his guilt. To hold that the murderer could escape by simply placing the body of his victim beyond recognition, or in removing that part of it which would have afforded evidence that death had been produced by violent or criminal means, would be placing a premium upon the capacity of the criminal to destroy the remains of his victim. Circumstances may often be so clearly proved, so closely connected with it or leading to one result in conclusion, that the mind may be as well convinced as if it were proved by eye witnesses.

"It is not necessary that the remains should be identified by direct and positive evidence, when such proof is impracticable, and especially if it has been rendered so by the act of the party accused." (Wills' Circumstantial Evidence, sixth American edition, page 213.) Identity of the deceased may be proved inferentially. (Wharton on Homicide, second edition, section 640.)

Mr. Wills also says (same edition, page 214): "But in accordance with the principles which govern the proof of every other element of the *corpus delicti* it is not necessary that the cause of death should be verified by direct and positive evidence; it is sufficient if it be proved by circumstantial evidence which produces a moral conviction in the minds of the jury equivalent to that which is the result of positive and direct evidence."

In Johnson v. Commonwealth, 81 Ky., 325, this court decided the *corpus delicti* could be established by circumstantial evidence.

Bishop's New Criminal Procedure, section 1057, volume 1, says that circumstantial evidence is admissible to the *corpus delicti*, and the accused may be found guilty solely upon it equally in murder and other crimes.

We have been considering this phase of the case independent of a confession by the accused.

Section 1058, volume 1 of the work last cited says: "Extra judicial confessions, alone and uncorroborated, are by abundant authority, with little dissent, deemed inadequate to establish the *corpus delicti*, yet slight corroboration may suffice."

What follows in this opinion will make manifest the pertenance of the rule stated in section 1058, *supra*, to this case, and also that the *corpus delicti* has been abundantly proved.

It is urged that the court erred in permitting the Commonwealth to prove that the accused made a confession of his guilt upon the idea it was not voluntary. The accused was arrested on the Sunday night, February 16th, and the following morning, fearing a mob, he was taken from Bracken county to the Maysville jail. After arriving there he sent for George W. Adair, county attorney of Mason county, and informed him that he had some things to tell him pri-

vately, and that he did not want him to divulge it until after he was hanged. At accused's instance some reporters who were present were sent out. Adair did not say or do anything which would render a confession other than a free and voluntary one; neither would the facts which it was avowed Jailer Johnson would prove, to wit, that the accused was, in his belief, in terror of the mob, exclude the confession.

Adair testifies that the accused confessed that he killed his wife and raped and killed his niece. He gave the details of it as related by the accused. After the accused concluded the witness told him that it did not seem to him that he had told him the exact facts. The accused studied awhile, then told the witness to come back tomorrow, and that maybe he could tell him better. Adair returned next morning, when the accused again confessed the killing, and related the circumstances somewhat different from those given on the previous day.

After making the statements the accused asked the witness what was his idea of the case. Thereupon the witness in substance told him that he believed that he had attempted to have intercourse with his niece; that his wife waked up and caught him; that he then killed her and the child, and burned the house. The accused then said: "Well, you are about right."

On a subsequent day the accused told Adair that he wanted him to put his confession in writing.

W. H. Lynch testifies that the accused, while confined in the Maysville jail, admitted to him that he killed his wife and the niece.

A. A. Pumpelley, a turnkey at the Maysville jail, testifies that the accused confessed to him that he killed his wife and her niece, and that he made the scars on his neck.

A confession procured by the flattery of hope or the torture of fear is not admissible as evidence. Before it is admitted it must be shown to be voluntary. When so made it is the most effectual proof of guilt. It can not be supposed that one will make admissions imperiling to his safety unless urged by his conscience to do so.

It is insisted that the confessions to Adair, Lynch and Pumpelley were not voluntary because, before the arrest of the accused, on Sunday night, February 16th, William Sayres, marshal of Augusta, J. J. Martin, constable, and two newspaper reporters visited the house of the father of the accused, where he was staying, and one of the reporters told him that suspicion pointed to him as the guilty party and for him to confess and be protected from the mob. Sayers then said: "Bob, you are not telling the truth. You had better tell the truth. What means all this blood on your underclothes?"

At this point the defendant objected to the witnesses, Martin and Sayers, telling what the accused then said. It, therefore, does not appear that the accused made a confession of guilt to them.

It is argued at length that, as the confession which the accused made to Sayers and Martin was obtained by the appliance of hope or fear to the mind of the accused, therefore it is presumed that the influence which induced him to make it to them had not ceased when he made his confessions to Adair, Lynch and Pumpelley.

The rule is that, although an original confession may have been obtained by improper means, yet subsequent confessions of the same or of like facts may be admitted if the court believes, from the length of time intervening, or from proper warning of the consequences of confession, or *from other circumstances*, that the delusion, hopes or fears, under the influence of which the original confession

was obtained, were entirely dispelled. We have stated the rule and might add that the court did not abuse its discretion in allowing Adair to prove the confession, in view of the fact that the accused sent for him and expressed a desire to make it, and again asked him to return on the following day that he might make a better statement of the occurrence.

The matter of admitting proof of confessions rests in the discretion of the court, and, as the facts and circumstances attending each confession are different, no rule can be stated as to just what will render the confession voluntary. The court must be controlled by the facts of the particular case under consideration.

In this case the record fails to show that there was a confession of the charge to Sayers and Martin, hence the confession to Adair was not a "subsequent" one. It follows this is not a case for the application of the rule stated as to the admissibility of subsequent confessions.

After the verdict and before judgment a motion was entered to have a jury empaneled to determine the question of his insanity. The court overruled the motion.

Section 287, Criminal Code, reads as follows, to wit: "He may show for cause against the judgment any sufficient ground for a new trial or for arrest of judgment; he may also show that he is insane. If the court be of opinion that there is reasonable ground for believing he is insane, the question of his sanity shall be determined by a jury of twelve qualified jurors, to be summoned and empaneled as directed by the court. If the jury do not find him insane, judgment shall be pronounced. If they find him insane, he may be kept in confinement either in the county jail or lunatic asylum until, in the opinion of the court, he become sane, when judgment shall be pronounced."

This section of the Criminal Code is to provide a means of inquiring as to the insanity of the accused at the time the question of insanity is under investigaton; not as to the time the offense was committed.

It is only when the judge has reasonable ground for believing the accused is insane that he orders the investigation. There was no evidence offered on the motion. The court had the prisoner before him during the trial, which lasted seven days. The law vested him with a discretion in the matter, and he, in our judgment, properly exercised it.

If a jury had been empaneled to try the question of insanity and had found him to be insane, that finding would not have had the effect of setting aside the verdict. It would simply have postponed the pronouncement of judgment until, in the opinion of the court, he became sane. The action of the court in overruling the motion to have a jury empaneled to try the question of insanity can not be reviewed by this court.

Upon the consideration of the whole case, the court is satisfied that the substantial rights of the defendant have not been prejudiced by reason of any error of law appearing in the record.

The judgment is affirmed.

COFFEY V. COMMONWEALTH.

(*Filed November* 17, 1896—*Not to be reported.*)

1. Reward for fugitive from justice—The reward which the governor may offer for apprehension and delivery into custody of the proper officer of a fugitive from justice can be paid only upon production of the officer's receipt, approved and certified by the circuit court of the county of his residence.

2. Same—A motion for an order allowing such a reward is equivalent to a motion for an order approving and certifying the officer's receipt, and an order overruling such a motion is subject to revision by this court.

3. Same—The mere apprehension of a fugitive from justice does not entitle the person making it to any reward, but there must be delivery of the fugitive into custody of the proper officer. Therefore, although a prisoner was apprehended by appellant before a reward was offered, yet as he was not delivered to the officer until after the proclamation was published appellant is entitled to the reward.

Wilson & Towles for appellant.

W. S. Taylor for appellee.

Appeal from Hart Circuit Court.

Opinion of the court by Judge Lewis.

The reward which the Governor may offer for apprehension and delivery into custody of the proper officer "of a fugitive from the justice of this Commonwealth" can, as provided by section 344, Kentucky Statutes, be paid only upon production of the officer's receipt, approved and certified by the circuit court of the county of his residence. Accordingly, J. S. Coffey, having and producing receipt showing that one Samuel Hatcher was, February 7th, delivered to and received in custody by the jailer of Hart county, moved the Hart Circuit Court for the allowance of $150 offered in the proclamation of the Governor, issued on the same day, but that motion was overruled upon the ground stated in the order that "said Coffey had said Hatcher in custody when the reward was offered."

Though the motion made was for the allowance of the sum mentioned instead of an order of court, in the language of the statute, approving and certifying the officer's receipt, it is practically the same, and if the motion had been sustained appellant would have been entitled to payment; and as the motion involved the question of his right to the money, which the circuit court had jurisdiction to determine, there can be no question of the order overruling it being subject to revision by this court.

It satisfactorily appears that though the fugitive from justice was actually apprehended by appellant November 6th, one day before, he was not delivered into the custody of the jailer of Hart county, the proper officer to receive him, until late in the evening of November 7th, and after the Governor's reward had been offered.

The mere apprehension of a fugitive from justice neither subserves the purpose of the law nor entitles the person making it to any reward, but there must be delivery of him into the custody of the proper officer. And as that was done after the proclamation was published and while it was outstanding and binding on the Commonwealth, we do not see why appellant is not entitled to the reward, for there does not appear to have been on his part any collusion or bad faith. On the contrary he states he was induced to apprehend

him in another county than Hart and deliver him to the jailer upon information of the county judge that he had, as provided in such cases by section 1932, filed a petition with the Governor to issue his proclamation offering the reward.

The order overruling appellant's motion is, therefore, reversed and case remanded for proceedings consistent with this opinion.

COMMONWEALTH V. KINNAIRD, MAYOR, &C.

(*Filed November* 19, 1896—*Not to be reported.*)

An indictment against the mayor and councilmen of a city for suffering a nuisance on a public highway in the city which alleges that defendants unlawfully suffered lewd and lascivious persons to make indecent exposures of their persons on the highway, and to be drunk and disorderly, and to obstruct travel on the highway, does not state facts sufficient to constitute any offense, there being no allegation that defendants had failed to discharge any official duty with respect to such conduct. If defendants have knowingly failed to discharge any official duty they may be indicted for malfeasance in office. And the parties guilty of the acts complained of may be indicted therefor.

W. S. Taylor for appellant.

Appeal from Garrard Circuit Court.

Opinion of the court by Judge Guffy.

The grand jury of Garrard county returned an indictment against Robert Kinniard, mayor of Lancaster, and others—the others being members of the council of the city of Lancaster—accusing them of suffering a nuisance on a public highway in said city. The substance of the charge is that the defendants "did suffer and permit a nuisance on a public highway in said city, known as Logantown, by unlawfully suffering and permitting lewd and lascivious people, both male and female, to congregate along said highway at said point, and to habitually, continually and frequently expose to view their privates, cursing, swearing, yelling, fighting, being drunk and disorderly, obstructing the safe and secure travel along said highway to the great annoyance, fright and danger of divers good citizens passing and repassing along said highway." The demurrer of defendants to the indictment was sustained and the prosecution dismissed, and from that judgment the Commonwealth has appealed.

It does not appear from the indictment that the defendants were by law required to prevent the acts complained of. There is no allegation in the indictment that defendants had failed to discharge any official duty in respect to such conduct as is alleged to occur or exist along said highway, hence we are unable to see how the indictment could be sustained. If the defendants have failed to discharge any official duty they might be indicted for malfeasance in office. The parties guilty of the acts complained of might be indicted therefor, but the indictment in question fails to show that the defendants have committed any offense.

Judgment affirmed.

COMMONWEALTH V. SIMONS.

(*Filed November* 21, 1896.)

The decision of the trial court upon a motion to set aside an indictment is not the subject of exception by either the Commonwealth or the defendant, the law placing the entire matter within the discretion of the trial judge. Therefore, an appeal does not lie in this case from an order sustaining a motion to set aside an indictment upon the ground that others than the grand jurors were present when they acted on the indictment.

O'Neal & Pryor, Stone & Sudduth and J. H. Eaton for appellant.

Zack Phelps and Kohn, Baird & Spindle for appellee.

Appeal from Jefferson Circuit Court, Criminal division.

Opinion of the court by Chief Justice Pryor.

In this case there was motion to set aside the indictment, the main ground being that others not grand jurors were present before the grand jury when they acted upon the indictment. The motion was sustained by the court below, and the Commonwealth has appealed. The motion here is to dismiss the appeal, as this court is without jurisdiction.

There are three grounds for setting aside an indictment mentioned in section 158 of the Code, and one of them is that contained in the motion made in this case. Section 281 of the Criminal Code provides: "The decision of the court upon challenges to the panel and for cause upon motions to set aside an indictment and upon motions for a new trial shall not be subject to exception."

This provision applies as well to the Commonwealth as to the party charged with an offense. In such a state of case the sufficiency of the indictment is not involved, and the sole question is to be determined by the trial judge upon such proof as may be heard, and his disposition of the motion is not the subject of revision by this court. It is not the subject of an exception by either side, the law placing the entire matter within the discretion of the trial judge, and, therefore, this court has not looked into the merits of the motion, and no doubt the trial judge is better able, with the testimony before him, than this court would be to determine whether or not an indictment had been improperly procured. We must administer the law as we find it, and that an appeal will not lie is manifest.

Appeal dismissed.

MOSS V. CARL.

(*Filed November* 14, 1896—*Not to be reported.*)

Landlord and tenant—Waiver of exemption—The fact that a contract between landlord and tenant recites that the landlord is to have a lien on the crop raised, the lien existing by statute independent of such a recital in the contract, does not operate as a waiver of the exemption allowed by the statute in lieu of provisions not on hand.

J. J. Cornelison for appellant.

Woodford & Chenault for appellee.

Appeal from Montgomery Circuit Court.

Opinion of the court by Chief Justice Pryor.

In this case it appears the appellee rented of the appellant some ten or twelve acres of tobacco land for $360, for which he gave his note, and by the terms of the contract the lessor was to have *a lien* on the crop.

The tobacco was cut and housed, and finally sold by Rice & Givens for $472. There had been advanced to the appellee in money and the value of certain hogsheads seventy dollars ($70), leaving about $400 of the sales.

The appellant attached the proceeds of the tobacco in the hands of Rice & Givens to satisfy his rent, and the appellee, who was a housekeeper with a family, claimed a part of the proceeds under the exemption law of the State, and the appellant claims that because the contract recites that the landlord was to have a lien the right to the exemption was thereby waived. We do not think so. The statute gave to the appellee a superior lien to all others, and a lien as against the tenant, except to the extent the exemption for his support prevailed.

The tenant, it seems, had but little, if anything, for his support and that of his family, and under the statute was entitled to sufficient provisions, including breadstuffs and animal food, to sustain his family for one year, and if not on hand, then personal property, money or growing crop, not to exceed $40 in value for each member of the family.

So it is plain the exemption exists, and it is manifest there was no purpose to waive the exemption by the mere statement in the writing of a lien the statute gave. The contention also is that the appellee agreed, after the tobacco was ready for market, that if appellant would permit him to ship it to Rice & Givens he would let the entire proceeds go to the payment of the debt, and, not only so, would make the debt then due, as it had some time to mature. We think there is nothing in this contention, and that with five members of the family of appellee the apportionment was just and proper.

Of the money attached the appellant received about $200, and has no cause to complain. It did not extinguish the debt, and the right of exemption was not waived, either by the original contract or the one said to have been made in order to obtain the privilege of taking it to market.

Judgment affirmed.

SWOPE'S ADM'R V. FRAZER'S COMMITTEE.

(*Filed November 7, 1896—Not to be reported.*)

Lunatic—Jurisdiction to appoint committee—Where no committee for a lunatic was appointed at the time she was adjudged a lunatic by the county court because she then had no estate, she having subsequently inherited an estate, the county court then had jurisdiction to appoint a committee for her as the statute in force at that time provided for the appointment by either the circuit or county court, although the statute in force when the inquest was held provided that if the lunatic had any estate that fact should be certified by the county court to the circuit court, and the committee be appointed by the circuit court.

Wm. Herndon for appellant.

Chas. C. Fox for appellee.

Appeal from Boyle Circuit Court.

Opinion of the court by Chief Justice Pryor.

In the month of December of the year 1888, Sallie Frazier was adjudged a lunatic by a judgment of the Boyle County Court. The proceedings there had being in accordance with the statute then in force. She had no estate, and, therefore, no committee was appointed for her.

If a lunatic had any estate under the law, as it then existed, it was made the duty of the county court to so certify to the circuit court, and it then became the duty of the latter court to appoint a committee to take charge of the lunatic's estate. The lunatic is now confined in the asylum, and, since she was declared such, she has inherited a small estate from some of her kindred.

The party holding the money went into the county court of Boyle, and the brother of the lunatic asked that a committee be appointed to take charge of the money, which is about $500. The court appointed the appellee, J. W. Sallee, the committee, and the appellant refused to pay the money over on the ground that the county court had no jurisdiction to appoint Sallee; and, if so, the appointment was invalid without notice to the lunatic.

Under chapter 67 of the Kentucky Statutes it will be found that both the county and circuit courts are invested with the power to appoint committees for lunatics, and, although enacted since the inquest of lunacy was held, it is merely a mode of procedure adopted for the security of the estates of this unfortunate class of people, and, as the inquest was had in the Boyle County Court, it was eminently proper for this tribunal to take the bond and appoint the committee to take and hold the money for the lunatic.

The lunatic is in fact the ward of the court, and, finding this money in the hands of the appellant, it was the duty of the county court to secure it for its ward. This having been done, the appointment was proper; nor was it necessary to have the lunatic before court or served with notice.

She has been deprived of no right or her interests prejudiced in any way; but, on the contrary, is only secured in that to which she was entitled. The committee and his surety are liable to the lunatic for the money received or its proper appropriation, and the appellant released from liability when he pays it to the committee.

Judgment affirmed.

ROBERTS, &C. V. PORTER, &C.

(*Filed November* 10, 1896.)

1. Restrictions in deed as to buildings to be erected on lot conveyed—Where a deed to a lot on the corner of Ormsby avenue and Second street, in the city of Louisville, provided that "it is a condition of this conveyance that said lot, when improved, shall have on it a brick residence not less than two and one-half stories high, and that said residence shall front Ormsby avenue, and the front line of same shall not be nearer to Ormsby avenue than the front line of the homestead now on the same block," this condition was for the benefit not only of the grantors to the extent of their reserved homestead, but of any one to whom they might sell adjacent lots.

2. Same—One who purchased from the grantee the lot thus conveyed having erected thereon a residence of the kind described fronting on Ormsby avenue, the purchaser of an adjacent lot has no right to complain of the erection

by him of additional residences of the kind described fronting on Second street, as the chief matter of interest was the protection of the frontage on Ormsby avenue.

C. B. Seymour, James Quarles, Quarles & Allen, John W. Barr, jr., and Fairleigh & Straus for appellants.

Walter Evans for appellees.

Appeal from Jefferson Circuit Court, Law and Equity division.

Opinion of the court by Judge Hazelrigg.

The Morats were the owners of a square of land on the north side of Ormsby avenue, between First and Second streets, in Louisville, and upon which, near the center of the square and fronting the avenue, stood their residence.

In 1890 they decided to sell off certain parts of the square, and, as a protection to their remaining property and to all the lots offered, they proposed to impose certain conditions with respect to the nature and location of the improvements to be erected on the premises by the purchasers.

Accordingly, when they sold a lot, of 40 feet by 180 feet, on the corner of Ormsby avenue and Second street, which they did in May, 1890, to J. H. Lindenberger, they inserted in their deed the following condition: "It is a condition of this conveyance that said lot, when improved, shall have on it a brick residence, not less than two and one-half stories high, and that said residence shall front Ormsby avenue, and the front line of same shall not be nearer to Ormsby avenue than the front line of the Morat homestead, now on same block."

After this sale the Morats sold to appellant Roberts a lot adjoining the Lindenberger lot, and between it and the Morat homestead, and upon it appellant erected a handsome brick residence.

Afterwards Lindenberger sold his lot to the appellee, Annie Porter, who, over the protest of Roberts, began to build a brick residence, of the kind described in the condition named, and fronting on Ormsby avenue and the required distance therefrom, and also three other like brick residences on the rear of her lot, and fronting on Second street. Thereupon Roberts brought this suit in equity, seeking to enjoin the erection of these buildings. No preliminary injunction was applied for, but notice to desist was given, in the face of which and the *suit* the buildings were erected. The petition was dismissed, and Roberts has appealed.

As already indicated, we think the condition alluded to was for the benefit not only of the Morats, to the extent of their reserved homestead, but of any one to whom they might sell adjacent lots, and this although such purchaser were no party to the Lindenberger deed, in which the condition first appeared.

This principle is clearly recognized in Graham v. Hite, 93 Ky., 481, and in the ordinary text-books on easements. (Washburn on Easements and Servitudes, side page 58.)

The chief question here, however, is, what is the extent and meaning of the condition? Confessedly, the lot has on it a brick residence not less than two and one-half stories high, fronting on Ormsby avenue, and the front line of which is not nearer that avenue than the front line of the Morat homestead; and it seems to us that if further prohibitive stipulations were intended they would have been inserted.

The frontage of the residences on Ormsby, their size and quality, and the distance the houses were to stand from that avenue, were the chief points of interest. We do not believe the improvement of the rear of the lots was in the mind of the grantors at all, but only the Ormsby avenue end, yet it is likely that no other than a brick residence of the kind described could be built anywhere on the lots. This might be assumed to have been the intention of the contracting parties, and, if so, the appellee still has not violated the condition, as the houses are of the kind required.

It does not follow, as suggested by counsel, that, if the appellee may thus erect houses on the Second street end of her lot, she might, after complying literally with the conditions in her deed and erecting a two-story and a half brick residence on a line with the Morat house, and fronting Ormsby avenue, also erect additional houses on the Ormsby end of the lot. As we have seen, the protection of this frontage was a special matter of interest, and any encroachment thereon is specially provided against.

The judgment must be affirmed.

SMITH V. COMMONWEALTH.

(*Filed November* 11, 1896.)

1. *Practice in criminal cases—Qualifications of jurors.* The provision of subsection 7 of section 210 of the Criminal Code that a juror may be challenged for implied bias "when the offense is punishable with death, if he entertain such conscientious opinions as would preclude him from finding the defendant guilty," applies to the trial of offenses which may, in the discretion of the jury, be punishable either by death or by confinement in the penitentiary, and is not restricted to those which can be punished in no other way than with death. It is, therefore, proper upon a trial for murder to inquire of the jurors whether they have "such conscientious scruples on the subject of capital punishment as would prevent them from finding a verdict of guilty where the punishment was or might be death."

2. *Same*—The fact that a juror has formed an opinion based upon rumor does not render him incompetent, if he states that he can give the defendant a fair and impartial trial, according to the law and testimony, without regard to such opinion. And a juror was not incompetent in this case, although he stated in one part of his opinion that he had a "fixed" opinion and that it "would require evidence to remove or change such opinion," as the whole of his examination is to be taken together in determining his qualifications.

3. *Reversible errors.* There can be no reversal in a criminal case for error in refusing to grant a new trial nor on account of decisions of the court upon challenges to the panel and for cause.

4. *The argument of a case may be reasonably limited*, and the court in this case did not abuse its discretion in limiting the argument to four hours on a side.

J. F. Montgomery, J. Bryan Stone and J. E. Hays for appellant.

W. S. Taylor for appellee.

Appeal from Russell Circuit Court.

Opinion of the court by Judge DuRelle.

The appellant was indicted for murder and convicted of voluntary manslaughter.

It is urged in his behalf that the trial court permitted each juror to be asked "if he had such conscientious scruples on the subject of

capital punishment as would prevent him from finding a verdict of guilty where the punishment was or might be death," and, upon certain jurors replying in the affirmative, excused them from service.

Subsection 7 of section 210 of the Criminal Code provides that a juror may be challenged for implied bias "when the offense is punishable with death, if he entertain such conscientious opinion as would preclude him from finding the defendant guilty."

It is contended that the amendment which permits the jury to fix the penalty for murder at either death or confinement in the penitentiary for life in their discretion renders this subsection a nullity; but we can not concur in this view.

"Punishable with death" means that which may be punished with death—not that which can be punished in no other way. The question appears to be a proper inquiry touching the competency of the jurors. It is further objected that "two jurors who were presented stated that they had opinions in the case, which opinions were based upon the rumors of the country, and had heard no one undertake to relate the facts in the case, and being examined by the defendant's attorneys stated that they had fixed opinions as to the guilt or innocence of the defendant, and that it would require evidence to remove or change said opinion. They were then each asked by the court if they felt that they could give the defendant a fair and impartial trial according to the law and testimony without regard to such opinion, and they answered that they could, and the court thereupon held said jurors to be competent." * * *

This procedure seems to be in reasonably strict compliance with the act of April 10, 1888, amending section 207 of the Criminal Code, which provides "that in the trial of any criminal cause the fact that a person called as a juror has formed an opinion or impression, based upon rumor or upon newspaper statements (about the truth of which he has expressed no opinion), shall not disqualify him to serve as a juror in such case, if he shall, upon oath, state that he believes he can fairly and impartially render a verdict therein in accordance with the law and the evidence, and the court shall be satisfied of the truth of such statement."

Some stress is laid upon the fact that the jurors stated, in response to inquiry by the defendant's counsel, "that they had *fixed* opinions as to the guilt or innocence of the defendant, and that it would require evidence to remove or change said opinion."

The whole examination of a person called as a juror is to be taken together to determine his qualification, and this response, evidently given in answer to an inquiry which suggested the language used, is sufficiently modified and restricted by the response given to the inquiry made by the court. A further objection is the refusal of the trial court to grant a new trial upon the affidavit of Polson as to evidence which he states he had refused to disclose until after the trial. A sufficient answer to all of the objections mentioned is found in section 281 of the Criminal Code. "The decisions of the court upon challenges to the panel and for cause, upon motions to set aside an indictment and upon motions for a new trial, shall not be subject to exception." (Morgan v. Commonwealth, 14 Bush, 106; Terrell v. Commonwealth, 13 Bush, 251; Rutherford v. Commonwealth, 13 Bush, 609.)

One other objection remains to be noticed, namely, that the court limited the argument to four hours on a side, and as defendant had six counsel this arrangement gave them only forty minutes a piece in which to present their case. We can not admit that a limitation

much as he was the agent of the company it is bound by his agreements and waivers. Appellant introduced no proof. His statements to Davis to the effect that he need not give notice or make proof of loss was a sufficient excuse to Davis for not doing so without regard to Rogers' refusal to pay, and Wright's assent and agreement to the sales and assignments previously mentioned are obligatory upon the company.

The judgment of the court below, being in accord with the views herein expressed, is affirmed.

SENG V. KELLER & SONS.

(Filed November 12, 1896—*Not to be reported.)*

1. Building contract--Damage by cyclone—Cost of repairs—In this action by contractors to recover the cost of repairing the damage done by a cyclone to a house which they had constructed for the defendant, in which the defendant contended that the loss by the cyclone was the loss of the builders, the evidence was sufficient to authorize the conclusion that the house had in fact been accepted by the owner prior to the time of the cyclone, and that the work thereafter done was with the understanding that the owner was to pay for it.

2. Same—In part payment of the original contract price the plaintiffs should be required to accept, at the price fixed in a contract, a city lot which they agreed to accept, as their claim as to fraudulent representations by defendant as to the value of the lot is not sustained by the evidence, any statement made by him as to value being merely an expression of opinion.

Geo. Weissinger Smith and O'Neal & Pryor for appellant.

Simrall, Bodley & Doolin and Benjamin F. Washer for appellees.

Appeal from Jefferson Circuit Court, Law and Equity division.

Opinion of the court by Judge Hazelrigg.

The appellees are contractors and builders in Louisville, and as such undertook, in the fall of 1889, to build a house for the appellant under the following writing:

"*L. Keller & Son, City:*

"DEAR SIRS—I agree to pay you the sum of three thousand dollars and a lot in Portland for building my house, according to plans and specifications, in a good and workmanlike manner, on Chestnut above Fifteenth. Lot fifty by one hundred and five feet, on the northwest corner of Thirty-fourth and Missouri avenue. Contractors to draw seventy-five per cent. as the work progresses.

"H. H. SENG."

On March 27, 1890, the house was substantially completed, and the contractors had drawn some $2,800. On the night of the date named the structure was materially damaged by a cyclone. Under a further employment, appellees contend, the house was rebuilt or repaired, and, at the completion of the work, they demanded of the appellant the additional cost. This was refused, the appellant contending that the loss by the cyclone was the loss of the builders, and that he had made no contract other than the writing.

This suit was then brought by the builders for some $400 alleged to be due for extra work done prior to the storm, and for some $1,200 for repairing the wreck. It was further alleged that the lot in Port-

land was represented by appellant to be worth $600, and was so estimated in the building contract, when it was in fact worth not exceeding $150, and that appellant did not own or have any interest in the lot, and judgment was therefore asked for this additional sum.

The appellant agreed that such extra work had been done of the value of some $350, which he offered to pay, but denied the other averments of the petition, and tendered a deed for the lot. The court rendered judgment for the plaintiffs on the entire demand.

The proof, while quite conflicting, conduces to show that the building was completed, save in some insignificant respects, at the time of the cyclone, and had in fact been accepted by the owner, and that the work thereafter done was with the understanding that the owner was to pay for it. This feature of the judgment, therefore, as well as that adjusting the account for extra work, must be approved.

We think, however, that if any statement was made by appellant as to the value of the Portland lot—which he denies—it was only an expression of opinion, and there is a total absence of fraud or suspicious circumstances connected with such representation. The proof discloses that he was in fact the owner of it, and, as the contract required the builders to take this lot, we see no reason why they should not be compelled to do so.

For the reason last indicated the judgment is reversed, with directions to enter judgment in accordance with this opinion.

SAWYERS V. COMMONWEALTH.

(*Filed November* 12, 1896—*Not to be reported.*)

1. *Homicide—Instructions to jury*—Upon the trial of appellant under an indictment for murder, upon which he was convicted of manslaughter, the evidence was sufficient to authorize an instruction upon the subject of murder.

2. *Reversible error*—There can be no reversal because of demonstrations of approval by the crowd in the courtroom while the attorney for the State was addressing the jury, or because one of the jurors had expressed his conviction prior to the trial that the accused was guilty of murder and ought to be hung, as these matters were first called to the attention of the court on motion for a new trial, and an error of the court in overruling a motion for new trial in a criminal case is not the subject of exception.

J. Smith Hays and S. B. Dishman for appellant.

Tinsley & Faulkner and W. S. Taylor for appellee.

Appeal from Knox Circuit Court.

Opinion of the court by Judge Hazelrigg.

Appellant was convicted of the crime of manslaughter under an indictment in the Knox Circuit Court for the murder of Robert Burnside, and sentenced to confinement in the penitentiary for twenty-one years.

The parties were young men, and appear to have been entirely friendly until a few moments before the fatal affray. They, with others, were seated about a stove in the storehouse of a relative of appellant, when Burnside, after eating some crackers and a bit of cheese, called for water, with which he rinsed his mouth, and spit

it toward the stove, but nearer to the feet of appellant—some of it probably striking his feet or legs. Sharp words followed, and the act of spitting the water was repeated several times by Burnside, accompanied with insulting language. The parties soon left their chairs and clinched—the appellant cutting and thrusting with a small pocket knife and Burnside striking with a beer glass, from which he had been drinking water.

After separation it was found that Burnside had been cut a number of times in the chest and abdomen, while appellant was bruised and cut about the head with the glass. The former died in a few days from his wounds.

Under the most favorable construction of the somewhat conflicting proof the accused was guilty of manslaughter, and if the testimony of one or more of the witnesses for the State be credited, to the effect that the accused rushed on the deceased and cut him while the latter was doing nothing beyond using provoking language, the crime might well have been pronounced a murder. Upon this theory of the case it was not improper to give an instruction on the subject of murder, and this disposes of the first error complained of by appellant and the only one complained of as to the instructions.

The second complaint is that the crowd was permitted by the court to make demonstrations of approval by applause and laughter while the attorney for the State was addressing the jury. No decision of the court was made touching this matter, however, and we learn it for the first time in affidavits filed on the motion for a new trial.

We will consider this alleged error in connection with the third and only remaining ground of complaint, to wit: That John Bright, one of the jurors, had expressed his conviction prior to the trial that the accused was guilty of murder, and ought to be hung. This is also shown for the first time by affidavits filed on the motion for a new trial, so that if error were committed by the court in respect to either of these complaints it was committed in overruling the motion for a new trial, and error in such respect is not the subject of exception (Criminal Code, section 281). No decision was made by the court during the trial touching either the juror's competency or the misconduct of the crowd.

It is proper to add that counter-affidavits disclosed that the trial judge was not remiss in preserving quiet and rapping for order when the confusion complained of occurred, and affidavits denying and explaining the alleged expressions of the juror were also filed and considered by the trial judge, in whose discretion this matter rests under the provisions of our law. (Kennedy v. Commonwealth, 14 Bush, 343, and cases cited.)

Judgment affirmed.

LANE, &C. V. BRYANT.

(*Filed November* 12, 1896.)

1. Slander—Inconsistent defenses—Election—In this action for slander in which the defendants denied the speaking of the slanderous words and also pleaded their truth, the defendants having elected, upon being required by the court to make an election, to rely upon the former defense, it was error to permit the plaintiff to read to the jury the second paragraph of the answer that had been rejected as an admission by the defendant that the slanderous words were spoken as alleged.

2. *Same*—Although the pleas were inconsistent, it was error to require the defendant to elect.

3. *Liability of husband for wife's slanders*—By reason of the changes made by statute in the relations between husband and wife as to the rights of property and of personal control by the husband, the reason of the common-law rule making the husband liable for the wife's slanders has ceased to exist, and, therefore, the rule itself no longer exists.

W. A. Morrow for appellants.

O. H. Waddle for appellee.

Appeal from Pulaski Circuit Court.

Opinion of the court by Chief Justice Pryor.

Wm. Lane and Mattie Lane, the appellants in this court, are husband and wife.

The wife (Mattie) charged the appellee, Bryant, with having committed the crime of perjury when testifying in a certain action between one Vaught and her husband. This action of slander was instituted by Bryant, the appelle, against Mattie and her husband, and a verdict returned, upon which a judgment was rendered against both husband and wife, and a capias directed to issue against the husband. They both appeal, the wife insisting the judgment should be reversed against both, because of the admission of incompetent testimony, and the husband that he is in no manner responsible for the torts of the wife unless he directs or aids in their commission.

The appellants in the first paragraph of their answer denied the speaking and publishing of the words alleged, and in the second paragraph admitted the publication, and said the slanderous words were true. On motion of the plaintiff the defendants were required to elect and make their defense either on the first or second paragraph. They elected, reserving exceptions, the first paragraph, as their defense, and when the plaintiff attempted to prove the words spoken by the wife he was allowed, over the objection of the defendants, to read to the jury the second paragraph of the answer, that had been rejected, as an admission by the defendants that the slanderous words were spoken as alleged. This was error. The defense, however, properly had been denied the right to rely on the plea of justification by being required to elect, and with this defense cut off the plaintiff was nevertheless permitted to read it to the jury as evidence establishing his cause of action, and the defense denied the right to show that the words spoken were true. It was clearly incompetent as against the defendants or either of them, and for this error the judgment must be reversed as to both defendants.

In Rooney v. Tierney, 82 Ky., 253, it is held that in slander the plea of not guilty and justification are inconsistent, and the case of Harper v. Harper, 10 Bush, 447, is no longer the law.

The right of the appellee to a judgment against the husband under the rule of the common law is unquestioned in the event the case is made out for the plaintiff, but it is insisted that when the reason for the recognition of such a rule ceases the rule itself should be disregarded.

The liability of the husband at the common law was based on the idea of his absolute domain over the person of his wife, with the right to all of her personal and the use of her real estate; to the rents and profits of her realty; to her earnings and labor, and the power of the control of the wife by the husband was caused to such an extent as to vest in him the right to use such forcible means as

would bridle her tongue or make her of good behavior. The rule is a harsh one at best, and with the progress of civilization, and the changes by a wise, modern legislature of the relations between husband and wife as to the right of property and personal control by the husband, it would seem absurd in this enlightened age to regard the wife as a mere machine, made to labor and to talk as the husband directs, and to make him liable on that ground for her torts when not committed by his direction or procurement.

Under the act of March 15, 1894, now a part of the Kentucky Statutes, the husband has "no estate or interest in the wife's property, real or personal, during her life, owned at the time or acquired after marriage. During the existence of the marriage relation the wife shall hold and own all her estate to her separate and exclusive use, and free from the debts, liabilities or control of her husband." (Kentucky Statutes, section 773, article 3, chapter 66.)

The wife under this statute may make contracts, sue and be sued, collect her rent, and may sell and dispose of her personal property. While it may be and is the marital duty of both to aid each other in the support and maintenance of each and of their children, the control and use of the wife's property by her is independent of the husband, nor subject to his control, and the familiar doctrine that the legal existence of the wife is merged in that of the husband no longer exists, and as on this rule is based the common law liability of the husband for the wife's torts, and even for her debts contracted before marriage, the reason for enforcing this doctrine is gone, and past adjudications on the subject will not be followed. The unity of person has been destroyed, and to say that it still exists, with the constant legislation of this State endeavoring to secure the wife in her person and property, and at last by the act of March, 1894, making the wife the equal of the husband in the control and use of property, would be opposed to the plain legislative intent, and result in enforcing a doctrine that has neither wisdom nor justice in it, and as said by Mr. Justice Thornton, in Martin v. Robson, 65 Ill., —, "the legal supremacy of the husband is gone and the sceptre departed from him. The wife has the legal right and aspires to battle with him in the contests of the forum; to outvie him in the healing art; to climb with him the steps of fame, and share with him in every occupation. Her brain and hands and tongue are her own, and she should alone be responsible for slanders uttered by herself."

As the husband had nothing to do with the publication of the slanderous words charged, and in no manner aided in their publication, the judgment against him is reversed and case remanded as to both defendants for proceedings consistent with this opinion.

On petition the opinion is modified by the interlineations made.

SLUSHER V. CONANT.

(Filed November 13, 1896—Not to be reported.)

1. Vendor and vendee—Agreement—The plaintiff having released his vendor's lien on land upon the execution by defendant of the note sued on, with personal security, in satisfaction of the lien note, an agreement that this note should not be paid until the land should be surveyed and the boundaries located should, if made, have been reduced to writing, and the court can not find upon conflicting parol testimony that there was such an agreement.

2. Same—The testimony is not such as would authorize the chancellor to withhold his judgment in mere anticipation of a recovery by other claimants, the vendee being in possession and from the proof not likely to be disturbed.

Thomas H. Hines and D. B. Logan for appellant.

Tinsley & Faulkner, C. W. Metcalfe and C. C. Turner for appellee.

Appeal from Bell Circuit Court.

Opinion of the court by Chief Justice Pryor.

The appellant is resisting a recovery on the note for $2,000 because of a defect in the title to the land for which it was executed, and because of the failure of the appellee (the grantor) to have the land surveyed and the boundaries located, under an agreement that the note was not to be paid until this was done, or until it was shown that the Patton patent covered the land sold.

On the facts of this case we think it immaterial whether the note sued on is or not a renewal note for the land bought by appellant of the appellee, or is to be regarded as an independent transaction. It is evident this note in controversy was in settlement of a note given for this land, and on its execution the action to enforce the lien was dismissed.

A deed has been made and accepted by the appellant. He has never been evicted, and the patent under which he claims is much older than the patent under which the hostile claim is said to exist.

When the suit was pending to enforce the lien for the purchase money the present note was executed in satisfaction of the lien note and the lien released, the appellees accepting Asher as security in lieu of the lien upon the land and the action then dismissed. On this last note that was evidently taken in settlement of the entire controversy it is now said it was not to be paid unless the boundaries of patent 10701 were ascertained so as the appellant might be enabled to defend against hostile claimants. The insolvency of the appellees is also alleged as making their warranty worthless in the event an eviction takes place.

The vendee is in the possession, and from the proof before us is not likely to be disturbed. Besides, the vendors waived their lien, took personal security, gave additional time for the payment of the debt, and if the agreement to locate the boundary of the Patton patent was of such importance as to defeat the recovery on the note it should have been evidenced by writing and not left to the memory of those who are now making conflicting statements in regard to it.

The testimony is not such as would authorize the chancellor to withhold his judgment in mere anticipation of a recovery by other claimants.

Judgment affirmed.

LUCAS V. LUCAS' ADM'R.

(*Filed November* 13, 1896—*Not to be reported.*)

Pleading—Insufficient denial—When facts alleged affirmatively in the pleading of one party are presumptively within the knowledge of the other party, justice requires a straightforward denial or confession, and not merely a statement by defendant that he has not sufficient knowledge or information upon which to form a belief; and whatever is the duty of a party to know, or he is in a position where reasonable diligence would enable him to know, the court will hold to be presumptively within his knowledge within the meaning of subsection 7 of section 113 of the Civil Code.

In this action upon a promissory note brought by an administrator, in which the defendant claimed that he was the surviving husband of intestate, and, therefore, that he was entitled to be appointed administrator, and that the appointment of plaintiff was void, the plaintiff having replied that his intestate and defendant had, prior to her death, been divorced by the judgment of a certain court in the State of Ohio, which had jurisdiction of the subject-matter, a rejoinder by which defendant alleged that he had not sufficient knowledge or information upon which to form a belief whether the Ohio court mentioned in the reply was a court of general jurisdiction, or had jurisdiction of the subject-matter of the judgment, "or whether this defendant was before said court according to the laws of Ohio," was not good.

J. C. B. Sebree for appellant.

Victor F. Bradley for appellee.

Appeal from Scott Circuit Court.

Opinion of the court by Judge Lewis.

July, 1893, A. O. Lucas executed to Margaretta A. Lucas, then his wife, a promissory note for $900.

George V. Payne, as administrator of her estate, brought this action August 22, 1895, to recover on that note, alleging his appointment and qualification by the Scott County Court. He further stated that before her death, which occurred in February, 1895, the two persons had been divorced by judgment of the Scott Circuit Court, in an action instituted by the husband, and that a judgment, likewise divorcing them, had been rendered in an action instituted by the wife in a court of the State of Ohio.

The latter statement having on motion been stricken from plaintiff's petition, the defendant filed an answer, in which he pleaded as defense, first, coverture when the note was executed; second, the note was executed without consideration; third, that at the date of the judgment of divorce by the Scott Circuit Court Margaretta A. Lucas was in fact dead, and so, they being husband and wife up to the time of her death, he (defendant) was entitled to appointment and qualification as her administrator instead of plaintiff Payne.

Plaintiff in his reply stated that August 24, 1894, Margaretta A. Lucas, while living, obtained judgment of divorce from her husband, in the county of her residence, in the Warren Court of Common Pleas of the State of Ohio, that had jurisdiction of the matter in issue in the action she then instituted, A. O. Lucas being defendant thereto, and before said court according to the law of said State.

To that reply defendant, A. O. Lucas, rejoined simply that he had not sufficient knowledge or information upon which to form a belief whether the Ohio court mentioned in the reply was a court of general jurisdiction, or had jurisdiction of the subject-matter of said judgment, or whether this defendant was before said court according to the laws of Ohio.

Although no formal demurrer to that rejoinder was filed the lower court seemed to have regarded it as insufficient, and instructed the jury to find for plaintiff, which they did do.

If the Warren Court of Common Pleas of the State of Ohio had jurisdiction of the subject-matter of said action, and A. O. Lucas was before that court according to the laws of that State, the judgment of divorce then rendered had the effect to deprive him of all marital rights, including the right of administration upon her estate when she subsequently died; and, consequently, plaintiff Payne, nothing appearing to the contrary, was legally appointed such ad-

ministrator, and was entitled to recover the judgment now appealed from. For want of consideration of the note is not properly or sufficiently pleaded; nor, as defendant failed at the proper time to move for a transfer of the action to the equity docket, can objection be now made to trial and judgment at law.

Subsection 7, section 113, Civil Code, defines the traverse provided for by section 95 as a denial by a party of facts alleged in an adverse pleading, if they be presumptively within his knowledge, or a denial that he has sufficient knowledge or information to form a belief concerning them, if they be not presumptively within his knowledge.

Where facts alleged affirmatively in the pleading of one are presumptively within the knowledge of the other party, justice requires a straightforward denial or confession that the conscience of the latter may be purged and the former be not put to delay and expense of proving admitted facts.

Whatever it is the duty of a party to know, or he is in a position where reasonable diligence would enable him to know, the court will hold that, in meaning of the Civil Code, it is presumptively within his knowledge.

It seems to us that as the statement was distinctly made in the reply that the divorce was granted in an Ohio court having jurisdiction, and A. O. Lucas was himself a party to the action in which the judgment was rendered, he was required to either admit or deny the allegation explicitly, and, having failed to do either, the statement was properly taken by the lower court as confessed.

Judgment affirmed.

WILLIAMS V. COMMONWEALTH.

(*Filed November* 17, 1896—*Not to be reported.*)

Carrying concealed deadly weapon—There was no testimony upon which to base a verdict finding appellant guilty of the offense of carrying concealed a deadly weapon, as the weapon which he carried was not concealed, but was stuck in his belt, where a person in front of him could and would necessarily see it.

Blanton & Berry for appellant.

W. S. Taylor for appellee.

Appeal from Harrison Circuit Court.

Opinion of the court by Judge Lewis.

Section 1309, Kentucky Statutes, under which appellant was indicted and convicted, provides that if any person shall carry *concealed* a deadly weapon upon or about his person, other than an ordinary pocket knife, he shall be fined, etc.

According to the testimony of the prosecuting witness in this case, upon which alone the jury did or could have based their verdict, he heard his sheep running, and, looking around, saw three boys and three dogs leaving his place and go upon the turnpike road. He then ran, and, getting over the fence, went to within three or four feet of them, having picked up a rock, which was still held in his hand; that upon being thus approached appellant pulled a pistol from in front of his person and pointed it at witness, saying he was

ready for him. He testified the pistol was a very large one, being described as long as his arm; that the boys had been out hunting; that appellant did not have on any vest, but a sack coat, and had a leather belt around his waist. He further testifies that he did not see the pistol until appellant turned around and pulled it as he turned.

To conceal, as the word is defined by lexicographers, according to the common and approved usage of language, and, therefore, in the proper meaning of the statute, is to hide, secrete, screen, cover; and, adopting that meaning of the term, which is the only one we are authorized to accept, we think the verdict of the jury in this case is not simply contrary to the weight of evidence, but is totally without any evidence, direct or circumstantial, to support it.

The fact witness, being behind him, did not see the pistol until appellant turned around, does not show or tend to show he had it hid or secreted. On the contrary, considering the size of pistol, absence of a vest, the purpose for which the boys went on witness' place, which was to hunt, it is plain the pistol was not nor could have been concealed, but was stuck in appellant's belt, where a person in front of him could and would necessarily see it.

Wherefore, the judgment is reversed and cause remanded for a new trial.

The Kentucky Law Reporter.

EDITOR:
WALTER G. CHAPMAN, ... Frankfort, Ky.

VOL. 18. MARCH 1, 1897. No. 17

KENTUCKY COURT OF APPEALS.

TUTTLE V. COMMONWEALTH.

(Filed November 17, 1896—Not to be reported.)

1. *Homicide*—Upon the trial of the appellant for murder, there was evidence before the jury upon which to base their verdict finding him guilty of voluntary manslaughter; and the instructions correctly stated the law.

2. *Surprise as ground for new trial*—The fact that one of the witnesses for the Commonwealth had misinformed the defendant as to what his testimony before the jury would be, and thereby prevented his having witnesses present who would have shown that the witness had made a different statement, affords no ground for reversal.

W. D. Weaver, H. C. Eversole and Hazelwood & Parker for appellant.

W. S. Taylor for appellee.

Appeal from Laurel Circuit Court.

Opinion of the court by Judge DuRelle.

The appellant and Alexander Tuttle were indicted jointly for the murder of Speed Williams, and the appellant has been found guilty of voluntary manslaughter.

The grounds of the appeal are that the verdict is not supported by the evidence; that the court misinstructed the jury; and that a Commonwealth's witness misinformed the appellant as to what his testimony before the jury would be, and thereby prevented his having witnesses present who would have shown that the witness had made a different statement.

The evidence shows that Alexander and Simeon Tuttle went to the Williams house at night, after all the family had gone to bed. Both were armed, Alexander with a pistol, which he carried in his hand, and Simeon with a rifle. On being admitted the family rose from bed; Alexander Tuttle became very abusive and threatening in his language, and slapped a brother of the deceased, saying that he intended to kill the last damn one of the family, and that some-

body had to die with his boots on. Speed Williams, in his night-clothes, sat down on a trunk, by which a shotgun stood. Appellant went to the trunk, took the shotgun, and went out with it; as he did so Alexander Tuttle shot Speed Williams and killed him.

There had, it seems, been some trouble between Alexander Tuttle and Speed Williams about a woman, whose house Speed had been compelled to leave without his coat and hat. All three were related, and there had been no previous trouble between Speed and appellant.

But one witness for the Commonwealth testified that he saw Alexander and appellant that evening before the killing, and the latter stated that they were going to the Williams house and raise hell with them.

There was evidence also that appellant procured the pistol with which the shooting was done. Appellant, on his own behalf, swore that he took the shotgun at the request of Jane, the mother of Speed, which statement is contradicted by her. It appears further that he went for the doctor, and assisted in matters connected with the burial; but there was evidence before the jury on which to base their verdict, and we are not inclined to disturb it.

The instructions appear to correctly state the law, and the third objection is hardly a ground for reversal.

Judgment affirmed.

FENLEY V. TYLER, &C.

(Filed November 18, 1896—Not to be reported.)

Judicial sales—Jurisdiction to re-sell upon failure of purchaser to pay sale bonds Where one of several plaintiffs in an action for the sale of land and the distribution of the proceeds became the purchaser at the sale, but failed at the maturity of the sale bonds to pay them, and the court awarded a rule against him and his sureties to show cause why payment should not be made, the court had jurisdiction to order a re-sale of the land, although the rule was not served on the principal in the bond, who was a nonresident, as he, being the plaintiff in the action, was before the court for all the purposes of enforcing the collection of the bonds; and, if not, the service on the sureties gave the court jurisdiction. Besides, it was the duty of the purchaser, when the notes fell due, to come into court and make payment, and not that of the chancellor to hunt him up and inform him that his bonds were due.

O. A. Wehle for appellant.

Dodd & Dodd for appellees.

Appeal from Jefferson Circuit Court, Law and Equity division.

Opinion of the court by Chief Justice Pryor.

The land in this action was sold under a judgment of re-sale and purchased by the appellant, Oscar Fenley, who is now resisting the payment of the purchase money on the ground that W. C. Williams, who was interested in the land or its proceeds, was not before the court when the re-sale was ordered, and under which the purchase was made by the appellant, Fenley.

W. C. Williams and others interested with him were the original plaintiffs in the action under which the land was sold, and the first sale having been set aside, in accordance with the mandate of this

court, a re-sale was ordered, when one of the plaintiffs in the action, W. C. Williams, purchased the land for $5,900, and complied with the terms of sale by executing his three bonds for the purchase money, with C. L. Kerr and Addie Kerr as his sureties.

When the bonds matured the purchaser, Williams, and his sureties failed to pay them, and a rule was awarded against them to show cause why payment should not be made. The rule was served on the sureties, but not on Williams (the principal), he being a non-resident. The sureties are insolvent, and so state in their response. The court adjudged the response of the sureties insufficient and ordered the land re-sold, when the appellant, Fenley, became the purchaser.

Williams, the purchaser, being the plaintiff in the action, was before the court for all the purposes of enforcing the collection of the bonds, and, if not, those who united with him in the sale bonds were as much liable as Williams, the principal, and, the rule being served on them, gave the court jurisdiction to enforce the payment by a re-sale of the land; but, regardless of all this, it was the duty of Williams, when the notes fell due, to come into court and make payment, and not that of the chancellor to hunt him up and inform him that his notes were due. The object of the sale was to sell the land and distribute the proceeds. It was at his instance the judgment of sale was rendered, and the chancellor had jurisdiction of the parties until this money was paid and deed executed.

Judgment enforcing the payment of the purchase money is affirmed.

WILLIAMS V. COMMONWEALTH.

(Filed November 18, 1896—Not to be reported.)

Indictment—Limitation—Allegation as to time—Unless an indictment for a misdemeanor is returned within twelve months after the commission of the offense the statute of limitation operates as a bar to the prosecution; therefore, time is a material ingredient in the offense, and if the indictment fails to allege that the offense was committed within twelve months before the finding of the indictment, and the date alleged shows that it was committed more than twelve months before the indictment was returned, a demurrer should be sustained.

As the indictment in this case for pointing a deadly weapon at another was returned November 12, 1895, and alleges that the offense was committed "on the —— day of November, 1890," a demurrer should have been sustained.

Blanton & Berry for appellant.

W. S. Taylor for appellee.

Appeal from Harrison Circuit Court.

Opinion of the court by Judge Paynter.

The indictment charges that the defendant "on the -- day of November, 1890, in the county and State aforesaid, and before the finding of this indictment, did unlawfully and willfully point a deadly weapon, to wit, a pistol, at F. G. Brinker, etc."

The indictment was returned into court on the 12th day of November, 1895. It does not state the offense was committed within twelve months before the finding of the indictment.

Section 129, Criminal Code, is as follows, to wit: "The statement

in the indictment as to the time at which the offense was committed is not material further than as a statement that it was committed before the time of finding the indictment, unless the time be a material ingredient in the offense."

The offense with which the defendant is charged is a misdemeanor, and, unless the indictment was returned within twelve months after its commission, the statute of limitation operates as a bar to the prosecution. Therefore, the time is a material ingredient in the offense.

The indictment charges that the offense was committed about five years before the indictment was returned.

Subsection 5, section 165, Criminal Code, provides: "If the indictment contains matter which is a legal defense or bar to the prosecution" a demurrer is proper.

A Demurrer was filed and overruled. It should have been sustained. The demurrer admitted the facts stated in the indictment, and when we apply the law to them we find the right to impose the penalty has been barred by the lapse of time.

It is suggested that the grand jury, by the figures used in stating the time of the offense, meant 1895. To follow this suggestion we would have to conclude the figure "0" was a figure "5." This we can not do, as the figure used does not in the least resemble a figure "5," but is a very good figure "0." We must read the indictment as it is written.

The judgment is reversed, with directions that a new trial be granted the defendant, and that the demurrer be sustained to the indictment.

STURGEON V. COMMONWEALTH.

(Filed November 18, 1896—Not to be reported.)

1. *Indictment*—Objection to the indictment upon the ground that two offenses were charged was waived, no demurrer being filed.

2. *Arrest of judgment*—A motion in arrest of judgment can not be sustained if the indictment states facts constituting a public offense within the jurisdiction of the court, even though it might have been bad on demurrer.

3. *Evidence not prejudicial*—Upon the trial of appellant for the offense of drawing upon and pointing at another a pistol the action of the court in permitting the Commonwealth to prove that the wife of defendant said to the prosecuting witness while the difficulty was going on that "he had better go on away or her husband would shoot him," was not prejudicial to appellant, he having admitted in his testimony that he drew the pistol and pointed it in the direction of the prosecuting witness, but toward the ground. Whether the testimony objected to was competent it is not necessary to determine.

4. *Contradiction of witness*—The defendant having introduced testimony to show that the prosecuting witness "swore" at him, it was proper to permit the prosecuting witness to deny that he "swore" at defendant. This was not a contradiction on a collateral matter.

5. *Pointing pistol at another*—To draw a deadly weapon upon another is an offense, and it is likewise an offense to point a deadly weapon at another.

As the indictment in this case charges that defendant drew a pistol upon and pointed it at another, it was not improper to give an instruction to the jury authorizing them to find defendant guilty if they believed he drew the pistol upon or pointed it at the prosecuting witness.

6. *Same—Instructions*—The court, in submitting to the jury the question as to whether defendant had pointed the pistol, etc., did not err in failing to insert in the instruction the words "and not in his self-defense," the question of self-defense being fully submitted by another instruction.

Blanton & Berry for appellant.

W. S. Taylor for appellee.

Appeal from Harrison Circuit Court.

Opinion of the court by Judge Paynter.

The indictment charges that the defendant did draw upon and point at Dan King a deadly weapon, to wit, a pistol, etc. It is claimed that the additional allegations in the indictment constitute another offense; that two offenses are charged in the indictment. No demurrer was presented to the indictment, therefore the question was waived.

No motion was made in arrest of judgment, and such motion could not have been sustained, because the indictment states facts constituting a public offense within the jurisdiction of the court. When the indictment states a public offense, though it might have been bad on demurrer for some other reason, we can not disregard the verdict because the court might have sustained the demurrer for such other reason had one been presented.

It is insisted that the court erred in permitting the Commonwealth to prove that the wife of the defendant, while the difficulty was going on, said to the witness, King, that "he had better go on away, as her husband would shoot him," to which the witness replied "he only had one time to die, and would die looking it in the face."

It is not necessary to decide whether or not this testimony is competent. If it were not it could not have been prejudicial to the rights of the defendant. He admitted in giving his testimony that he drew the pistol and pointed it in the direction of King, but said it was towards the ground. The declaration of the wife did not in the least tend to prove that the defendant pointed the pistol at King.

It is contended that the court erred in permitting King to deny that he had "sworn," because, as it is claimed, it contradicts defendant on a collateral matter. The defendant claimed that his acts were in his apparently necessary self-defense. He testified in chief that King hollowed "to know what in the hell he had struck his buggy for."

Defendant also introduced another witness, who testified that King "swore" at the defendant. The purpose of this testimony was to aid in showing that King was the aggressor, and assumed a menacing attitude towards the defendant. The court did not err in permitting the contradiction.

The language in the instruction, "drew upon or pointed at Dan King," is that used in the indictment. To draw a deadly weapon upon another is an offense under the statute. Likewise it is an offense to point a deadly weapon at another. The indictment charges that he drew it upon and pointed it at another.

The court did not err in failing to insert in instruction No. 1, after the word "unlawfully," the words "and not in his self-defense." The court was submitting the question to the jury as to whether the defendant had pointed the pistol, etc. The court fully submitted the question of pointing the pistol in self-defense in another instruction.

The judgment is affirmed.

JACKSON V. COMMONWEALTH.

(Filed November 19, 1896—Not to be reported.)

1. *Instructions as to self-defense*—The instruction in this case as to self-defense, which is set out in the opinion in full, is not liable to the objection that the jurors may have thought from its language that they were required to believe "beyond a reasonable doubt" that the accused believed he was in danger of death or great bodily harm, in order to acquit upon the ground of self-defense.

2. *Evidence*—Although the defendant's father, who was a witness for the Commonwealth, stated upon his original examination that defendant told him when he met him a few minutes after the killing that he had shot deceased, the court properly refused to permit him to state upon cross-examination that defendant had also told him that he did the killing in self-defense, the first statement being a voluntary one on the part of the witness and not called out by the Commonwealth, and being excluded as soon as any question was made in regard to it.

3. *These statements were not competent as a part of the res gestæ.*

4. *Reversible error*—The mere fact that an improper question was asked is not a reversible error, the court refusing to permit it to be answered.

5. *Witness*—The cross-examination of a witness as to whether she was paid anything for coming from another county as a witness was legitimate cross-examination to the witness' credibility.

H. C. Eversole and W. S. Jackson for appellant.

W. S. Taylor for appellee.

Appeal from Laurel Circuit Court.

Opinion of the court by Judge DuRelle.

Appellant has been convicted of voluntary manslaughter.

It appears that he went from his father's residence to the house of his widowed sister-in-law, some four hundred yards away, about 8 o'clock in the morning. Some five minutes before Ed Chestnut, who was paying attention to Mrs. Jackson, had gone to her house. The evidence is contradictory as to whether appellant, from his window, could have seen Chestnut go to Alice Jackson's house, but, before he started to go there himself, he remarked to his father "that he had heard that Ed. Chestnut was keeping a loaded musket up at Alice Jackson's for him, and he believed he would go and see about it, and see if it was so." Dora Jackson, a daughter of Mrs. Jackson, was sweeping the porch as appellant came up, and informed her mother and Chestnut of his approach. It appears also that he came by an unusual route, so that he could not be seen from the window, a fact which he explains by stating that he was afraid Chestnut might be there and shoot him from the window. Chestnut, on hearing that appellant was coming, told Mrs. Jackson to tell him not to come in and that he had nothing against him. She went to the door and told appellant not to come in and have a fuss in her house. Appellant told Chestnut to get out of there, and thereupon drew his pistol and fired three shots past Mrs. Jackson at Chestnut, two of which took effect, one in the left arm and one in the head. Chestnut fell backwards in the room, with his feet about three feet from the door.

Appellant claims that Chestnut drew his pistol with his left hand, his right being crippled, and attempted to use it, having first drawn his pocket knife and dropped it. The shot which struck Chestnut's arm ranged upwards in such a manner as to indicate that his arm

was raised towards appellant, and his pocket knife was found on the floor half opened. But Alice Jackson testifies that she took Chestnut's pistol out of his left hand hip pocket after the shooting, and it appears from appellant's own testimony that but three shots were fired and that Chestnut did not shoot. Appellant testifies to an attack upon him by Chestnut, made some time previous to the killing; that Chestnut, upon that occasion, shot at him, and that threats by Chestnut had been reported to him.

Objection is made by appellant's counsel to the instruction upon the law of self-defense, upon the ground that the jury were not sufficiently informed, that if they believed from the evidence that, at the time of the killing, the accused "believed and had reasonable grounds to believe that he was in danger of death or the infliction of great bodily harm at the hands of the deceased, or that it was reasonably apparent to him that such danger existed, they should acquit."

The instruction given seems to us to fully meet the suggestion of counsel. It was this: "If the jury believe from the evidence that at the time the defendant shot with a pistol and wounded deceased, from which he died (if the jury do so believe from the evidence, beyond a reasonable doubt), he believed and had reasonable grounds to believe he was then and there in immediate danger of death or the infliction of great bodily harm at the hands of deceased, and that to shoot and kill deceased was necessary, or seemed to the defendant, in the exercise of a reasonable judgment, to be necessary to avert said danger, real or to the defendant apparent, then the jury will acquit defendant on the ground of self-defense and apparent necessity."

We see no error in this instruction as to self-defense, and we can not believe that, under this instruction, the jurors thought they were required to believe, *beyond a reasonable doubt*, that the accused believed he was in danger of death or great bodily harm, as contended by appellant's counsel.

It is further objected that Andrew Jackson, the father of appellant, who was called as a witness for the Commonwealth, stated that, when he met the appellant at Alice Jackson's gate, having gone there on account of hearing the shots, appellant told him he had shot Ed. Chestnut. On cross examination, appellant's counsel asked him if the accused "did not say that he had to kill the deceased in order to save himself; that deceased was trying to kill him." The Commonwealth's objection to this question was sustained, and the court thereupon excluded from the jury the former statement, which "was voluntary on the part of the witness, and not called out by the Commonwealth." It is claimed that, although this was a voluntary statement by the father of appellant, he was, notwithstanding, a Commonwealth's witness, and, as his statement of what his son said to him at the gate was allowed to go to the jury, his subsequent explanation should also have been permitted; and, further, that the whole statement was part of the *res gestæ*, and should have been admitted as evidence.

There was no objection to the original voluntary statement. Either the prosecution or the defense could have had it excluded at the time it was made, unless it was a part of the *res gestæ*. It was excluded as soon as any question was made in regard to it. It was not, in our judgment, a part of the *res gestæ*.

Immediately after the shooting appellant had some talk with Alice Jackson as to how she would testify, and told her she ought

not to talk the way she did. He appears, also, to have had some talk with her daughter as to making peace with Alice and Chestnut.

So, when he met his father at the gate, the *lis mota* may be supposed to have existed, he had time to consider and had actually considered the anticipated litigation, and his declaration was no part of the *res gestæ*, but a narrative of a past occurrence, and, therefore, hearsay and not admissible as evidence. (A. & E. Ency. of Law, volume 9, page 695, and cases there cited.)

It is insisted, also, that the question asked appellant about being indicted for injuring Chestnut's tombstone was incompetent and calculated to prejudice the jury. It is sufficient to say of this objection that all the objections to questions on this subject were sustained by the trial court, and the mere fact that an improper question was asked and ruled out can not be considered a reversible error.

The cross-examination of Hattie Million (which was also objected to), as to whether she was paid anything for coming from Madison county as a witness, seems to us to be legitimate cross-examination to the witness' credibility. The purpose of this examination was manifest, as it brought out the admission of a previous statement by her that appellant's brother told her if she would come to Laurel county as a witness she could get anything she wanted.

Judgment affirmed.

LOUISVILLE & NASHVILLE R. R. CO. v. BERNARD.

(Filed November 19, 1896—Not to be reported.)

1. *Railroads—Duty to trespassers—Punitive damages*—Even though a person be a trespasser upon a railroad train, the employes of the company are not justified in forcibly expelling him therefrom while the train is in motion, or in using undue or brutal means for his expulsion. But as the plaintiff in this case, who was a trespasser, had not actually boarded the train, but was simply attempting to get upon one of the cars, when the brakeman compelled him to desist by loosening his grasp upon an iron rod which ran along the side of the car, or by shoving him off the hub of the car wheel upon which his feet rested, the brakeman was not guilty of negligence, as the rate of speed of the train was at the time not more than four or five miles an hour. And in this action to recover for the injuries resulting from the car wheel running over the plaintiff's foot as he fell the court erred in instructing the jury in substance that they should find for plaintiff if they believed defendant, through its servants in charge of the train, by negligence ejected plaintiff therefrom while the train was in motion. The court should have instructed the jury, as requested, that they must find for the defendant if they believed that the brakeman used no more force than was necessary to prevent the plaintiff from getting on the train.

2. *Same*—As there was no evidence tending to show gross negligence, it was error to give an instruction as to punitive damages.

J. A. Mitchell, H. W. Bruce and Wm. Lindsay for appellant.

Goodnight & Roark for appellee.

Appeal from Simpson Circuit Court.

Opinion of the court by Judge Lewis.

Appellee, accompanied by eight or ten boys and young men, he being then about full grown, went from Franklin, where they resided, to Woodburn, a town about eight miles distant on the line of

appellant's road, where there was a colt show and picnic; but, failing to return on the afternoon passenger train, they about nightfall walked towards Franklin to a water tank, one and a half miles from Woodburn, in order to ride upon a freight train, the arrival of which they awaited three hours.

As that train, after taking water, was starting appellee attempted to board a car upon which was an oil tank, but was prevented by one of the brakemen; and either in his effort to get down or being shoved by the brakeman he fell, a car wheel ran on and partly tearing the flesh from one of his heels, and otherwise so injured him that he was confined at his home, unable to do work, for several months, besides suffering considerable pain.

According to his statement, which was corroborated by two or three of his companions, he had placed one foot upon the box of a car wheel, the other upon an iron bar under the car, and grasped with both hands an iron rod or rail which extended alongside of the oil tank car, in the effort, and was about to spring upon the top of it when the brakeman, without speaking to him, loosened his grasp upon the rod and shoved him down. The brakeman, however, testifies he merely put his hands upon appellee's arms and forbade his getting on the car, when he desisted.

That the purpose of appellee and his companions in going to the water tank was to get a free ride back to Franklin, with or without permission of the conductor in charge of the freight train, is plain. No one of them spoke to the conductor or was seen by him, for he was in the caboose at the rear end of the train, which was composed of twenty-five or thirty cars, and, therefore, two hundred or three hundred yards long. Besides, though it was stationary five or six minutes while taking water, neither appellee nor any of his companions attempted to get aboard the train until it was about to start, or was actually starting.

It is true he, while admitting on cross-examination that he did not have permission of the conductor to ride on the train, stated in a general way that he got permission from the brakeman; but that statement is utterly inconsistent with his previous one that nothing was said by either himself or the brakeman at the time he was shoved or made to get off the box of the car wheel. Besides, he knew if any other brakeman had given such permission it was done in violation of the rules of the company and in disregard of the authority of the conductor, who had charge of the train, for if he and his companions had intended to pay their fare they would have gone to the caboose, where the conductor was and whom they seemed to carefully avoid.

The evidence is satisfactory to us that when appellant attempted to get upon the oil-tank car he was in law and fact, as the lower court in instructions to the jury correctly assumed him to be, a trespasser, and as such he must be treated by this court in determining the relative rights and duties of the parties to this litigation.

The lower court, upon the state of facts as we have substantially stated them, instructed the jury to find for plaintiff in the action if they believed defendant, through its agents and servants in charge of and operating its train of cars, by negligence threw or evicted the plaintiff therefrom while it was in motion, and he was injured thereby, unless they should further believe plaintiff himself was guilty of negligence, which contributed to the injury to such an extent as that but for his own negligence the injuries would not have occurred.

The jury was further instructed that they might, in addition to

compensatory damages, find punitive damages in case they believed the plaintiff was injured by gross negligence of defendant, acting through any servant in charge of or operating its train.

There is nothing in this case tending to show the brakeman or other servant of appellant was guilty of gross negligence, and, consequently, the jury was not authorized nor ought to have been instructed they might find punitive damages; nor do we think the facts in this case authorized submission for the consideration of the jury of any other question than is contained in the following instruction asked for appellant but refused: "The court instructs the jury that the plaintiff, Bernard, in attempting to ride upon defendant's freight train, was a trespasser, and if the jury believe from the evidence that at the time the plaintiff was hurt the brakeman used no more force than was necessary to prevent the plaintiff from getting on said train, then, and in such event, the jury must find for defendant."

It is undoubtedly a just and well-established rule, heretofore recognized by this court, that, even though a person be a trespasser upon a railroad train, the employes of the company are not justified in forcibly expelling him therefrom while the train is in motion, or in using undue or brutal means for the expulsion. The reason for that rule is that the ordinary result of expelling a person from a train while in motion is bodily injury to him, danger of which is very little or very great, according to the speed at which it is moving; but in this case the trespasser had not actually boarded the train, clandestinely or otherwise, but was simply attempting to get upon one of the cars. And it is not unfair to assume that if the motion of the train had so recently begun, or was so slow as that appellee could safely climb upon it, which he says he would have done if not prevented, the brakeman was not guilty of any degree of negligence in loosening his grasp on the iron rod, whereby he was compelled to desist, or even in shoving him off the hub of the car axle, unless in doing so he used more force than was necessary, or did it in a brutal manner, for all the witnesses agree the train had moved but a short distance, and none of them put the rate of speed at more than four or five miles an hour when appellee ceased his effort to get upon the car, or was shoved off the places his feet rested upon.

There is enough evidence to satisfactorily show that immediately after the train began to move, for which appellee was evidently waiting, he commenced his effort to get upon the car, and, as it would have required a very short time for him to accomplish the feat, the train was manifestly moving slowly when the brakeman interposed; and, therefore, it would be an abuse of the term to say he was guilty of negligence or any illegal act in using necessary force to keep appellee off the train.

For the errors of the lower court in giving the instructions mentioned and refusing the one asked by appellant the judgment is reversed and cause remanded for a new trial and other proceedings consistent with this opinion.

FIELDS BROS. V. BLANE, &C.

(Filed November 20, 1896—Not to be reported.)

Tobacco warehousemen—Tobacco warehousemen having, in the usual course of business, received tobacco from one who was not the owner, they are not liable to the owner for its proceeds unless they were notified of his claim before the sale or before they had paid over or accounted for the proceeds; and in this action by the owner to recover the proceeds, the evidence as to the notice to defendants of his claim being conflicting, the court erred in taking that question from the jury by instructing them to find for plaintiff if they believed from the evidence that he was the owner.

Burnett & Dallam for appellants.

James T. Webb and R. E. Johnston for appellees.

Appeal from Graves Circuit Court.

Opinion of the court by Judge Landes.

The action was to recover the proceeds of a quantity of tobacco, which was prized by appellees, George Robbins and W. L. Blane, for appellee, W. E. Blane, and being in part the contents of three hogsheads, which were shipped to the appellants, tobacco warehousemen, by Robbins and Blane, in their name, and sold by the appellants for account of Robbins and Blane.

It was alleged in the petition that said Robbins and Blane and the appellants converted the entire proceeds of the tobacco, amounting to $130.38, to their own use, and that they had "failed and refused to pay said money to plaintiff, or any part of same, although often requested to do so."

Issue was joined, and under the peremptory instructions of the court the jury returned a verdict for Robbins and Blane, and the petition was dismissed as to them. The case was submitted to the jury, however, on the issue made by the appellants, on the evidence and the instructions of the court as to the law, and the jury returned a verdict for the appellee, W. E. Blane, against them for the amount claimed in the petition, upon which judgment was rendered, and this appeal is prosecuted from that judgment, motion for a new trial having been made by appellants and overruled.

It appears from the evidence that the appellants had advanced a large amount of money to Robbins and Blane, who were engaged in the purchase and handling of tobacco, to enable them to buy tobacco, all of which they agreed to ship to the appellants to be inspected and sold at their warehouse in Paducah, who were to make their usual charges for the storing and selling the tobacco, and to credit the proceeds of the sale to the account of Robbins and Blane. Under this arrangement Robbins and Blane shipped to the appellants about 130 hogsheads of tobacco, the tobacco in controversy, which was prized by them under contract with appellee, W. E. Blane, being in three of these hogsheads, and being part of the tobacco that was sold by the appellants for the account of Robbins and Blane. The proceeds of these shipments having been credited by the appellants to Robbins and Blane, it was found at the close of the transaction that the latter owed the appellants a balance of about $2,800 on account of money advanced under the arrangement between them. Meantime, Robbins and Blane, being insolvent, made an assignment for the benefit of their creditors, and the amount of the balance ow-

ing by them to the appellants was transferred to Robbins by the appellants for 50 cents on the dollar.

The appellants denied in their pleadings the charge that they had any notice that the tobacco in controversy was owned or claimed by the plaintiff, W. E. Blane, and the testimony on that issue was conflicting.

The appellants complain, first, that the court erred in overruling their demurrer to the petition, and claim that the petition was insufficient.

Although the petition might have been more definite in some essential particulars, yet it is sufficiently definite and plain to a common intent to make known to the defendants, not only the amount claimed by plaintiff, but also the grounds upon which it was sought to make them both liable to him. The demurrer was, therefore, properly overruled.

Further complaint is made that the court erred in the instructions given to the jury at the instance of plaintiff. The instruction complained of is in the following language: "The court instructs the jury that if they believe by a preponderance of the evidence that the plaintiff, W. E. Blane, was the owner of the tobacco sued for or any part of it, they must find for the plaintiff the reasonable cash value of the tobacco owned by him, not exceeding the value alleged in the petition, $49.27 for the lugs, or $81.11 for the leaf, or $130.38 for all."

It is the opinion of the court that the court below erred in giving this instruction. It may be true that the tobacco in controversy did belong to the plaintiff, and that his ownership of it was sufficiently established by the evidence, and yet upon the issues made that the appellants were not liable to him for the proceeds of it. Being warehousemen, and having come into the possession of the tobacco lawfully and in the natural course of business, they were not liable for the proceeds of it unless they were notified before the sale, or before they had paid over, or had accounted for the proceeds if they were paid over, or accounted for by them, to Robbins and Blane, that the plaintiff was the owner, or that he claimed to be the owner of the tobacco or its proceeds. (Abernathy & Long v. Wheeler, Mills & Co., 92 Ky., 320.)

The question of fact in issue as to whether the appellants had paid over the proceeds of the tobacco to Robbins and Blane, their principals, or accounted for the proceeds on a settlement with them, and that before that was done they had actual notice of the plaintiff's claim to the tobacco or its proceeds, was in effect taken by the court from the jury in the instruction complained of. The instruction was, in effect, a peremptory instruction to find for the plaintiff against the appellants.

The evidence on that question of fact being in conflict, the appellants were entitled to have it passed on by the jury, and the instruction complained of was erroneous and prejudicial to the substantial rights of the appellants on its merits. It is not necessary to refer to any other alleged errors. The principles of law applicable to such cases are well settled, and were fully stated in the case referred to.

For the error mentioned the judgment is reversed and the cause remanded, with directions to grant the appellants a new trial, and for further proceedings consistent with this opinion.

BALLOWE, &C. V. HILLMAN, &C.

(Filed November 21, 1896—Not to be reported.)

1. Right of plaintiff to introduce testimony after motion for peremptory instruction—There can be no reversal in this case because of the action of the court in permitting the plaintiff to introduce additional testimony after a motion had been made by defendant for a peremptory instruction, the trial court having a reasonable discretion as to that matter, and there being no abuse of discretion in this case.

2. Validity of land patent- A patent for 75,000 acres of land, giving the entire boundary and then excluding "all those surveys of land to which there is now a lawful title," without designating the boundaries excluded, is not void for uncertainty, but passes the title to all the vacant and unappropriated land within the boundary called for by the patent.

3. Same The fact that a patent embraces 10,000 acres of land, although calling for only 8,000 acres, does not affect its validity.

W. G. Bullitt for appellants.

Fenton Sims and R. A. Burnett for appellees.

Appeal from Trigg Circuit Court.

Opinion of the court by Judge Guffy.

It is substantially alleged in the petition that the plaintiffs below, appellees here, were the owners of and entitled to the possession of 200 acres of land in Trigg county and that appellants were in the unlawful and wrongful possession of the same, and had been and were damaging the same, and appellees sought to enjoin the appellants from further damaging the land, as well as to recover judgment for possession of the land and damages for the trespass, etc.

A demurrer of the appellants to the petition having been properly overruled, they answered. The substance of the answer is that appellant Ballowe is the real party in interest; that Stafford was merely his agent, and that the land was vacant land, and that the county of Trigg had a right to sell the same, and that said appellant bought the same and took out a county warrant therefor, but the county surveyor, who was an agent for appellees, refused to survey the land for appellant, therefore appellant took actual possession of said land with intent to improve it for himself; also denied that plaintiffs had any right or title to the said 200 acres; denied that it was inside of any legal patent or deed to plaintiffs.

The reply of plaintiffs traversed all averments adverse to appellees' title.

A trial resulted in a verdict and judgment in favor of appellees, plaintiffs below.

The appellants moved for a new trial and assigned nine different reasons or grounds therefor. The third ground complains of the failure of the court to give a peremptory instruction to find for the defendants, but, on the contrary, suggested to plaintiffs what additional testimony was necessary to their case, and in opening up the case for plaintiffs to introduce such testimony. The bill of exceptions does not show that the court made such suggestion; but does show that plaintiffs were allowed to introduce additional evidence.

The trial court should be allowed a reasonable discretion in such cases, and it does not appear that there was any abuse of discretion in this case, hence we conclude that the court below did not err in refusing the peremptory instruction.

It is also claimed that the court erred in allowing the patent from the Commonwealth of Kentucky to Edwin A. McCaughan, of date 18th April, 1853, for 8,000 acres of land to be read to the jury; also erred in allowing to be read the deed from McCaughan to Hillman, of date 28th January, 1853, for 3,753 acres. Other grounds are relied on, to the effect that the court erred in giving and refusing instructions, which need not be noticed at length.

The chief question presented for decision is as to the validity of the said 8,000-acre patent. Appellants contend that the patent is void because it includes land theretofore patented, and also void for uncertainty and because it includes 10,000 acres when only 8,000 were patented or named.

If the patent passed the title to the patentee to all the land included in the boundary except the parcels excluded, then it is pretty clear that appellees were entitled to recover, for they are certainly the remote vendees of the patentee.

It appears that the entire boundary given in the patent includes or embraces about 75,000 acres; but the patent "excluded all those surveys of land to which there is now a lawful title."

Such patents have been heretofore held by this court to be valid and to pass the title to all the vacant and unappropriated land within the boundary called for by the patent. (Hall v. Martin, 89 Ky., 9.)

It is clearly proven that the patent embraces and includes the land in contest, and the same is true of the subsequent deeds on down to the appellees; and these facts being established, appellees were entitled to recover. Hence it is not necessary to determine whether or not the court erred in giving or refusing other instructions, for the reason that such errors, if any, did not prejudice the substantial rights of the appellants. The fact that the patent embraces 10,000 acres of land, although calling for only 8,000, can not affect appellees' right to recover.

The proof conduces to show that appellants had actual notice of appellees' title before taking possession of the land in contest.

Judgment affirmed.

KALER, &C. V. GRADY.

(Filed November 24, 1896—Not to be reported.)

Statute of frauds—Where the land of a decedent, sold under decree of court to satisfy a lien upon it, brought less than two-thirds of its appraised value, any one of the heirs had the right to redeem, and certain of the heirs having refrained from redeeming upon the faith of the purchaser's promise that if they would not redeem he would pay to one of them the value of her interest in the land or convey to her a part of the land, that agreement, in so far as it related to the promise to pay the value of the particular interest in the land, was not within the statute of frauds, and is therefore enforcible, although not in writing. It is not necessary to determine whether the promise to convey a part of the land was within the statute of frauds, as that part of the agreement is not sought to be enforced.

E. F. Bullock and Thomas G. Poore for appellants.

J. M. Brummel & Son for appellee.

Appeal from Hickman Circuit Court.

Opinion of the court by Judge Landes.

A tract of about 50 acres of land, which was owned by W. B. Grady in his lifetime, was sold by a commissioner under a judgment rendered in the Hickman Circuit Court in an action commenced after his death by Dr. George Beeler, on a debt owing by him and secured by a lien on the land, against his administrator and his four children, who were his only heirs at law, the appellant, Mrs. Kaler, and the appellee being two of them. Previous to the sale the commissioner caused the land to be appraised as required by the statute, and the appraisers fixed the value of it at $1,000. The appellee was the purchaser of the land at a price less than two-thirds of its value so fixed, and it was therefore subject to redemption by any of the heirs of W. B. Grady, deceased.

It was alleged in the petition, in substance, that the plaintiffs, appellants here, had made arrangements to redeem the land, and that they were able and would have redeemed it within the period allowed by the statute for redemption, but that they were induced to and did relinquish their purpose to redeem it by the promise and undertaking of the appellee (not alleged to be in writing), that if they would not do so, but would allow him to pay the Beeler debt and take a conveyance of the land to himself from the commissioner, by virtue of his said purchase, he would pay plaintiffs the value of the interest of Mrs. Kaler as one of the heirs of W. B. Grady, deceased, in the land, after paying the Beeler debt, or that he would convey to Mrs. Kaler a quantity of the land sufficient to pay her for her said interest or portion, "and if they could not agree upon the price of the land, then he would pay her the money."

The meaning of the last sentence, which is accurately quoted from the petition as it is copied in the record, is somewhat obscure. But the object and prayer of the petition, as it relates to the alleged promise of the appellee, was to recover of him the value of the one-fourth interest of Mrs. Kaler in the land, after deducting one-fourth of the sum that was paid by the appellee in satisfaction of the Beeler debt and costs, it being alleged that the land was conveyed to the appellee by the commissioner, and a copy of the deed filed as an exhibit with the petition, and that the appellee had refused either to pay the appellants for Mrs. Kaler's part of the land or to convey to them any part of the land.

The court below sustained a demurrer to the petition and also to two successive amendments thereto, which were offered by the appellants, and, the petition having been thus disposed of by the judgment of the court, this appeal was prayed and prosecuted from that judgment.

It is contended by the learned counsel for the appellee that the promise, undertaking or contract set up in the petition is within the statute of frauds, and that this action on it could not be maintained because it was not alleged to have been made in writing.

It is not necessary for us now to decide whether the promise alleged to have been made by the appellee to convey a part of the land to Mrs. Kaler is within the statute of frauds or not. But the promise to pay Mrs. Kaler the value of her interest in the land, as one of the heirs of W. R. Grady, deceased, upon the conditions alleged in the petition and performed by the appellants, if true, as admitted by the demurrer, is not within the statute, and an action may be maintained on it, even though it does not appear to have been in writing. Such a promise or contract is not "for the sale of real estate," and therefore need not be in writing in order to be actionable. (Ky.

Stat., sec. 470, clause 6.) And upon that promise or contract this action was commenced and recovery was sought. The amount of appellee's alleged bid for the land at the sale of it by the commissioner was very littte more than one-third of its value as fixed by the appraisers, and it was manifestly very much to his advantage to prevent the appellants from redeeming it. The only interest that appellants had in redeeming it was to secure Mrs. Kaler's part of it, since, if it had been redeemed by them, it would have resulted in equal benefit to the other heirs of W. B. Grady, deceased.

The appellee, having secured to himself what he sought by the promise and undertaking alleged in the petition, must be held to performance on his part. (Green v. Ball, 4 Bush, 586.)

The petition contained a cause of action, and the court below erred in sustaining the demurrer to it. In our view the amendments offered were not necessary.

The judgment is, therefore, reversed and the cause remanded, with directions to overrule the demurrer to the petition, and for further proceedings consistent with this opinion.

E. H. TAYLOR, JR. & SONS V. GEORGE T. STAGG CO.

(Filed November 24, 1896—Not to be reported.)

Trade-mark—Right to account of profits—Although this court held upon a former appeal in this case that defendant should be enjoined from using the autograph signature of one of the plaintiffs as a trade-mark, yet as the court also said that upon the record as made out no account of profits should be taken, the chancellor properly refused upon the return of the case to entertain a motion by plaintiffs to have an account of profits, and also a motion to submit the question of damages to a jury.

Wm. Lindsay and George C. Drane for appellants.

Humphrey & Davie, D. W. Lindsey and John W. Rodman for appellee.

Appeal from Franklin Circuit Court.

Opinion of the court by Chief Justice Pryor.

When this case was heretofore in this court it was with some reluctance the court held that the right to use the autograph signature of E. H. Taylor did not pass under the contract between E. H. Taylor, Jr. & Sons and George T. Stagg Co., and, in holding that the right to use the name in the manner alleged was not within the terms of the sale, it was said that upon the record as made out "*no account of profits should be taken*," and further said: "The proof does not show any fraudulent intent on the part of the appellants or those under whom they claim. The use of the name E. H. Taylor, Jr., and his autograph by appellant, was in the nature of a license or permit, and we do not see that this has been abused or extended unreasonably. Relief, by way of damages, is frequently refused, when the right to the injunction is conceded."

There was a petition for rehearing filed by the appellees (now appellants) in which the court's attention was again called to the questions of *profits* and damages, and that petition was overruled.

When the case went back with the same record the appellees (now appellants) made a motion to have an account of profits, and also a

motion to submit the question of damages to the jury, and the court refused to entertain either motion. This, we think, was proper, as this court in its opinion had said in effect to the court below that, as the record stood, no profits or damages were recoverable.

The order of reference made in the case heard on the first appeal was, it is true, merely interlocutory, still, to avoid further litigation on the facts presented, this court plainly intimated, and in fact said, that all the relief the appellee was entitled to was the injunction to prevent the further use of the autograph signature of *E. H. Taylor, Jr.*

Judgment affirmed.

MOORE V. THOMPSON, &C.

(Filed December 4, 1896.)

Renewal of negotiable note—Effect on mortgage lien—Where the principal in a negotiable note executed a mortgage to indemnify his sureties, and the note was renewed and the renewals discounted from time to time, the mortgage continued in force to secure the last renewal, although the name of the principal was omitted from the renewals and there was a change as to one of the sureties, and, therefore, the mortgage lien is superior to the lien of an attaching creditor of the principal.

Bell & Bell and C. A. Hardin for appellant.

John B. Thompson for appellees.

Appeal from Mercer Circuit Court.

Opinion of the court by Chief Justice Pryor.

The facts of the record show that on the 4th day of April, 1888, John Charles Thompson, then living in Wyoming, executed to Forsythe, Magoffin and Simrall a mortgage to indemnify them as his sureties on three several notes, for $2,300 each, executed on the 4th of April of the same year.

The negotiation for raising the money was made through the appellee, John B. Thompson, to whom the notes were made payable and by him endorsed and the notes discounted by the Fayette National Bank, and the proceeds forwarded to John C. Thompson at his home in Wyoming. The notes were not paid at maturity, and when due were renewed from time to time, with the name of the *principal*, John C. Thompson, left off.

John B. Thompson, the endorser, was, as the proof shows, a mere endorser for the obligor, and as to him was a surety, but as to those who had signed the notes as sureties he agreed with them to stand as principal; so in fact all the parties to the notes were the sureties of John C. Thompson.

It is insisted that John B. Thompson was a joint obligor, or that the money on the notes was obtained for the use of both John and Charles Thompson in some joint or partnership enterprise, but the testimony is otherwise; but if, as insisted by appellant, a joint liability between the Thompsons, it does not affect the question involved here.

After the renewal of the notes for nearly two years in the Fayette National Bank the notes were again renewed, but discounted with the Boyle National Bank at Danville. On these notes John B. Thomp-

son was principal and the others as sureties, with perhaps a change as to one of the sureties, and these notes are still unpaid.

In January, 1891, D. L. Moore, having a debt against John C. Thompson, sued out an attachment and had it levied on the mortgaged land, and by amended pleading the beneficiaries of the mortgage, the sureties in the original transaction, were made defendants. They answered, setting up their mortgage lien, and claiming priority over the attaching creditor, while the latter claimed that the debt had been paid, or such novation as operated to release the lien. The mortgage is executed to Forsythe, Simrall and Magoffin, with the condition that "when the notes are paid and all the parties as sureties and endorsers saved harmless, and all renewals thereof," the mortgage to be void.

It is conceded that this liability of the sureties, who were adjudged priority in the court below, originated from the execution of the three notes to the Fayette National Bank in the year 1888, and each renewal shows the same liability, less the discount, continuing down to the last renewal in the Danville bank. In other words, the sureties renewed this paper from time to time, making it payable to the original endorser, and their liability for the same debt has never ceased to exist, and why their equity is not superior to that of an attaching creditor we can not well see. If they had paid the original liability at maturity the lien could have been enforced, and the evidence of the fact that these renewal notes were for the same debt and identified in such a way as to remove all doubt on that subject, the mere fact that the name of the original obligor was left off, or that of another surety added, did not have the effect of depriving the appellees of their lien secured by the mortgage. That instrument was properly authenticated and recorded; was notice to creditors and purchasers of the existence of the lien.

It was held by this court in Burdett v. Clay, 8 B. M., 295, where a note had been assigned, a *new* note taken by the assignee, payable to himself, was no release of his lien by mortgage. As in this case it is the same debt, and the lien has not been surrendered or discharged.

In the case cited the original debt secured by mortgage to Hyatt was renewed and made payable to Hyatt's son-in-law, and Burdett became bound as surety in the place of Letcher, with J. M. Myers, one of the original sureties, who had been secured by the mortgage in his liability, the mortgage also having been given to secure the debt. In that case, as in this, there was no intention or purpose to destroy or waive the mortgage lien, and the sureties were properly given priority in the proceeds of sale.

Judgment affirmed.

ASHER LUMBER CO. V. FRENCH.

(Filed October 3, 1896—Not to be reported.)

1. *Breach of contract for purchase of trees*—Under a contract between appellant and appellee, by which appellant agreed to pay appellee certain prices for timber, to be paid "when titles are examined and found good and the timber branded," if appellee tendered to appellant trees of the kind mentioned in the contract within a reasonable time after its execution, and if he had good title to the same, it was appellant's duty to receive and pay for them, and, if appellant refused to comply with the contract, appellee was not required after that time to make an actual tender of timber, but he might cease to buy or

procure any more under the contract, and sue and recover damages on account of appellant's failure to comply with the contract.

2. *An oral contract for the purchase of standing trees* to be speedily removed from the land is valid, provided the trees are so marked or described as to be easily identified.

3. *It was error to admit testimony* as to the statement of persons that appellee had bought trees from them. Nor was it proper to admit proof of statements made by witnesses who had testified unless proper grounds had been laid therefor.

4. *Title to real estate by adverse holding* may be proved by parol, but paper title, if denied, must be proved by the paper itself.

Beckner & Jouett for appellant.

J. M. Benton, L. H. Bush and E. W. Hines for appellee.

Appeal from Clark Circuit Court.

Opinion of the court by Judge Guffy.

This action was instituted in the Clark Circuit Court by the appellee, B. F. French, against the appellant to recover damages for an alleged breach of a contract of purchase of trees. The written contract sued on reads as follows:

"FORD, KY., Dec. 4, 1890.

"We will pay B. F. French for poplar, cucumber and ash, 7 feet in circumference 4 feet from the ground, $1.50 per tree. No culled timber to be taken, and for above 6 feet in circumference $1 per tree; paid for when titles are examined and found good, and the timber branded.

"B. F. FRENCH,
"H. L. ASHER."

The petition as amended substantially alleged that within a reasonable time after the execution of the contract appellee tendered to appellant more than 14,000 trees, to which he had good title, and that defendant failed to take up, pay for or brand same, thereby damaging him in the sum of $5,000.

The answer may be treated as a denial of all the averments in the petition except the execution of the contract sued on. A trial resulted in a verdict and judgment for plaintiff for $5,000. Defendant's motion for a new trial was overruled, and it now prosecutes this appeal.

If appellee tendered to appellant trees of the kind mentioned in the contract within a reasonable time after its execution, and if he had good title to the same, it was appellant's duty to have received and paid for the same; and if appellant refused to comply with the contract appellee need not after that time to have made an actual tender of timber, but he might cease to buy or purchase any more under the contract, and sue and recover damages, if any he had sustained on account of appellant's failure to comply with the contract, if it did fail.

Appellant insists that the court erred to its prejudice by remarking in substance, in the hearing of the jury, that appellee could acquire title to the trees by oral purchase.

It is true that an oral contract for the purchase of standing trees, to be speedily removed from the land, is valid, provided the trees are so marked or described as to be easily identified, and it may be that such was the meaning of the judge.

It is also insisted by appellant that incompetent testimony was

admitted, and that the verdict of the jury is excessive and not sustained by sufficient evidence.

Without going into details as to the evidence complained of, we deem it sufficient to say that the statements of parties made, to the effect that French had bought their trees, should not have been allowed to be proven in this action, nor should any evidence have been allowed as to statements made by witnesses who had testified, unless the proper grounds had been laid to authorize the same. Title to real estate by adverse holding may be proven by parol, but proper title, if denied, must be proven by the paper itself.

It is manifest that the verdict is not sustained by sufficient evidence. The other questions raised need not be discussed.

For the reasons indicated the judgment of the court below is reversed and cause remanded, with directions to set aside the verdict and judgment and award appellant a new trial and for proceedings consistent with this opinion.

BOARD OF COUNCILMEN CITY OF FRANKFORT, &C. V. BRAWNER, &C.

(Filed November 21, 1896.)

1. Power of city council to abolish office—An office not fixed by the Constitution, but established by statute, may be abolished by statute unless a contract right has been secured by the incumbent.

2. Same—A city council that has, in exercise of discretion given by the General Assembly, established a city office may at its pleasure abolish it; therefore, the common council of a city of the third class having, in the exercise of the discretion conferred upon it by section 3426 of the Kentucky Statutes, established a board of public works, a subsequent ordinance repealing the ordinance establishing the board had the effect to at once abolish the office, although the members of the board had been appointed for four years, the term fixed by the statute, but had served only a few months of that term. But inasmuch as the members of the board of public works, and those employed by them, appear to have in good faith performed the duties of their respective offices, and judgment in their favor in this action to determine their title was not superseded, they should receive compensation up to time the mandate of this court is entered.

3. A contract between the board of public works and a member of the fire department, who bound himself to perform the duties of his office for the stipulated salary, was not binding upon either him or the city any longer than the relation of employer and employe existed, which either might terminate at will.

W. H. Holt and W. H. Sneed for appellants.

T. L. Edelen and R. B. Franklin for appellees.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Lewis.

Section 3426, Kentucky Statutes, is as follows: "The common council of the cities of the third class *may*, by ordinance, establish a board of public works, to consist of three freehold electors of said city, and who have been *bona fide* residents of said city so establishing said board of public works for two years next before their appointment. Said ordinance shall require the mayor of said city to appoint said board of public works in one month from the passage

of the ordinance creating said board, and no two of said members of the board of public works shall be selected from the same ward. When no board of public works has been established the duties herein imposed shall be performed by the common council and such other employes and agents as said common council may elect or designate."

Section 3427 provides: "The members of said board shall enter upon the discharge of the duties of their office as soon as appointed, and shall hold office four years and until their successors are appointed and qualified."

February 1, 1896, there was submitted to the Franklin Circuit Court a controversy between Robert B. Franklin, D. C. Crutcher and John W. Pruett, claiming to be the board of public works of Frankfort, a city of the third class, and George A. Brawner, claiming to be pipeman of the fire department of said city, as plaintiffs against the common council of the city of Frankfort, and James F. Smith, claiming to be pipeman of the fire department, defendants.

It was agreed that October 22, 1895, an ordinance was passed by the then acting and qualified members of the board of councilmen "establishing a board of public works and defining the duties of the same;" that November 2, 1895, the plaintiffs were duly appointed members of said board of public works, and they were in due time qualified and entered upon the discharge of their duties; that November 26, 1895, various municipal officers were by said board of public works duly appointed, including George A. Brawner, appointed pipeman of the fire department, and who took the required oath and entered into a written contract binding himself to perform the duties of that office for the stipulated salary. It is further agreed that January 10, 1896, the council of said city, composed of members thereof, elected at the preceding November elections as successors of those composing the board of council, October 22, 1895, passed an ordinance repealing the one "establishing a board of public works and defining the duties of same."

It also appears that January 21, 1896, James F. Smith was, by the then existing board of councilmen, elected pipeman for the fire department, and thereafter, having taken the oath of office and executed the bond required, notified the captain of the fire department and said Brawner that he was ready to discharge the duties of that office but was refused.

Upon that agreed statement of facts the lower court rendered judgment, now appealed from, that Franklin, Crutcher and Pruett, notwithstanding the repealing ordinance mentioned, were still legal members of the board of public works, empowed to exercise all functions and receive emoluments thereof. It was further adjudged that Brawner was entitled to discharge the duties and receive compensation as pipeman of the fire department.

While powers and duties of the board of public works of a city of the third class are fully prescribed by the statute, and can not, while it exists, be restricted or interfered with by ordinance whether such board shall be established at all in a particular city of that class is by plain language of section 3426 made discretionary with the common council thereof, it is a well-settled rule of construction, always recognized by this court, that an office not fixed by the Constitution but established by statute may be abolished by statute, unless a contract right has been secured by the incumbent. (Standiford v. Wingate, 2 Duvall, 442.)

And we know no reason why a municipal legislature, that has, in the exercise of the discretion given by the general assembly, estab-

lished a city office, may not as well and at its pleasure abolish it. That the statute was intended to give such discretion to the common council of a city of the third class is made manifest, not only by the language of section 3426, but by section 3135, which, while giving the same discretion to the general council of a city of the second class to establish a board of public works, expressly provides such board, if established, shall not be abolished within six years.

In our opinion the ordinance of January 10, 1896, was valid and effectual to abolish the board of public works, and thereafter the duties imposed upon it by statute were to be performed by the common council and such other employes and agents as said common council might elect or designate.

We further think the contract between the board of public works and Brawner was not binding and enforcible upon either him or the city of Frankfort any longer than the relation of employer and employe existed, which either might terminate at will. But inasmuch as the members of the board of public works and those employed by them appear to have in good faith performed the duties of their respective offices, and judgment in their favor was not superseded, it seems to us they should receive compensation up to the time the mandate of this court is returned.

Judgment of lower court is reversed and case remanded for proceedings consistent with this opinion.

The court delivered the following response to petition for rehearing January 15, 1897:

The petition for rehearing in this case is based upon the theory that there is something analogous to contract right in the tenure by which the members of the board of public works of Frankfort hold their offices. There is no such analogy. They hold, as do persons holding offices created by the legislature, subject to the power of the body which created the office to abolish it. In each case the power is a delegated power. The municipal legislature derives its power from the legislature of the State, and the general assembly derives its power from the Constitution. In each case the power to create implies and carries with it the power to abolish. The general assembly is empowered by section 107 of the Constitution to create county and district offices for a term not exceeding four years. But it will hardly be contended that having created an office with a term of four years the general assembly may not abolish it in two. Nor is there any analogy between the case at bar and the illustration of counsel of an agancy to make a lease for a specified term. The principal through his agent *binds himself by a contract.* There is no contract right to a statutory office.

We can not agree to the contention of counsel that we can consider the alleged fact that the charters of cities of the various classes were drawn and adopted without any reference to each other. On the contrary, by a cardinal rule of construction, we are required to presume that when adopted by the general assembly they were intended to be parts of a harmonious body of law, and therefore the difference in the language used in the charters of the cities of the second and third classes must be given proper significance.

The case of Todd v. Dunlap, 18 KY. LAW REP., 329, has no application to this case. In that case the sole question was the power of the mayor to remove from office officers who had been appointed for a statutory term.

Petition for rehearing overruled.

LOUISVILLE & NASHVILLE R. R. CO. v. RICKETTS.

(Filed November 21, 1896—Not to be reported.)

1. Railroads—Injury to passenger from alighting on wrong side of train—Defectively lighted platform—Where a passenger in leaving a train at a railroad station left it on that side on which there was no platform, and which was not intended for the use of passengers, the railroad company is responsible for the injuries resulting from defective or dangerous arrangement of the premises upon the side on which he alighted if it was so dark on both sides that by the exercise of ordinary care the passenger could not discover the platform for use of passengers. On the other hand, if the platform on the other side was safe and commodious and so lighted that the plaintiff could, by the use of ordinary care, ascertain that the platform for use of passengers was on that side and to enable him to alight in safety on that side, but without examination he alighted on the other side, he did so at his own peril. And it was error to instruct the jury that it was the duty of the railroad company to so light its platform as to admonish its passengers that that platform was "exclusively used for passengers." Nor should the question as to plaintiff's knowledge of the use of the platform on the opposite side of the train from that on which he alighted have been injected into the instruction.

2. There is no obligation upon a railroad company to keep its train waiting until passengers can leave the platform, and it was error to instruct the jury that such a duty existed. It is sufficient if reasonable time is given passengers in which to safely get off the train and out of the way of the cars.

William Lindsay, Lisle & McChord and H. W. Bruce for appellant.

Samuel Avritt and John D. Fogle for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Judge DuRelle.

This case is now before this court for the third time on appeal (93 Ky., 116; 16 KY. LAW REP., 281). With one exception the facts proven on the two former trials appear to have been substantially the same as those appearing on the trial which resulted in this appeal.

The appellee, Ricketts, was a passenger on appellant's train from Louisville to Lebanon, which reached Lebanon about 11 o'clock at night. When the train reached the station he descended on the right-hand side, where no lights were kept, and walked beside the train in the direction of the engine, while the train was in motion pulling out of the station. He stumbled over a box which had been put around a water crane, nearly opposite the south end of the passenger platform, which was on the left-hand side of the track. In falling his left arm extended over the rail and was so crushed as to necessitate amputation. For the injury thus received this suit was brought.

The law laid down in the two former opinions of this court is the law of the case if the facts appearing on the trial are the same as on the former trials.

In both the former opinions it was held that when a railroad company "has a platform and other facilities for entering and leaving the cars with safety on the depot side of the track, the failure to have the opposite likewise prepared as a place for entering and leaving the cars can not be regarded as negligence. It may select and adhere to such arrangement of its depot and platforms as it may see fit if those are made safe and commodious."

In this case the company's passenger platform was and had been, since about 1883, on the left side of the track, and, so far as appears from the evidence, was safe and commodious. Upon each of the former trials it was by the pleadings admitted to be well lighted, and recovery was sought on the theory that it was the duty of the company to keep well lighted all parts of the depot to which the public had access; but after the second appeal, and over four years after the original reply was filed, an amended reply was filed, putting in issue the averment of the answer that the company had a well-lighted platform on the left of the train from which plaintiff alighted, and denying that either platform on either side of the train was well and properly lighted.

Appellee stated upon this point: "I saw no difference on the two sides of the car where I got off—there was no light on the side where I got off, and I saw no light on the other side. There was no light on either side except what come from the windows and doors of the cars." But he says elsewhere: "I got off on the right-hand side because it was more convenient for me, and nearer my mother's home." And again: "I always got off on right-hand side."

This would strongly indicate that no examination was made by him to ascertain on which side the platform was.

In the second opinion the court said: "The plaintiff himself testifies there was no light at all upon the right side, and as soon as he touched the ground found, if unknown to him before, that there was no platform there; and, independent of other features of the case, it was negligence on his part to attempt to leave the depot ground by going so near as he did to the train that he knew would soon be in motion."

Upon the last trial it is true that the plaintiff testified that after he got off the car he noticed that he was walking on a cinder platform, but what he calls a cinder platform was merely cinders spread upon the ground, at or below the level of the rails, as shown by the photograph, while on the left side was a plank platform, twelve to eighteen inches in height, upon which the other passengers alighted and the baggage was deposited.

In the former opinion this court said, and the language seems to us to be applicable here: "On the other hand the evidence makes it too plain for dispute that if the plaintiff did not know, the exercise of ordinary care would have enabled him to discover the platform for use of passengers was on the left side of the train. All passengers stopping at Lebanon got off on that side, including his traveling companion; the conductor and brakemen, with lanterns, were on that side; baggage was taken out on that side."

If it was so dark on both sides of the train that by the exercise of ordinary care plaintiff could not discover the platform for use of passengers, then the company is responsible for the injuries resulting from defective or dangerous arrangement of the premises upon the side on which he alighted, provided he was not negligent in alighting or in his subsequent conduct. On the other hand, if the platform on the left-hand side was safe and commodious, and sufficiently lighted that the plaintiff, by the use of ordinary care, could ascertain that the platform for the use of passengers was on that side, and to enable him to alight in safety on that side, but, without examination, he alighted on the other side, he did so at his own peril.

The instructions given on the trial appear to us to be fatally erroneous. Instruction No. 4 is as follows: "The court instructs the jury that it is the duty of defendant, in operating its passenger

trains, in stopping at stations to give passengers a reasonable time to safely get off said train and out of the way of said cars in safety before starting the cars; and if they believe from the evidence that defendant's employes failed to give reasonable time for defendant to alight from the cars *and leave platform* before starting the cars, and that plaintiff sustained injuries on account of such failure, the jury should find for the plaintiff."

The latter part of this instruction is clearly error. There is no obligation upon a railroad company to keep its train waiting until passengers can leave the platform. It is sufficient if reasonable time is given to them in which to get safely off the train and out of the way of the cars. Under the facts proven in this case this part of the instruction was peculiarly misleading, for it left the jury to conclude that the train should have waited until the plaintiff could walk the length of the depot to Main street.

Instruction No. 3 is also erroneous. It instructs the jury "that it was the duty of defendant to provide a reasonably safe, commodious and in the nighttime a reasonably well-lighted platform on one side of its road to enable passengers alighting from the cars to leave the railroad premises in safety; and if the evidence show that defendant failed to have its platform on the left-hand side of the railroad reasonably well lighted at the time plaintiff was injured or sufficiently lighted to admonish plaintiff that the platform on the left-hand side of the road was *exclusively* used for passengers, then defendant can not be excused from failing to keep the platform on the right-hand side reasonably safe and commodious for passengers leaving its depot premises, unless plaintiff knew that the left-hand side was exclusively used for passengers, or by the exercise of ordinary care could have known so; and if the preponderance of the evidence shows that defendant so failed to keep the platform on the left-hand side of the road reasonably commodious and well lighted, and that plaintiff did not know, or by the exercise of reasonable care could not have known, that the platform on the left-hand side of the road was exclusively used for passengers, and that plaintiff sustained injuries on account of running against an obstruction on the right-hand side because said platform was not reasonably safe and commodious for passengers leaving its depot premises, the jury must find for plaintiff."

The company is not required to so light its platform as to admonish its passengers that that platform is *exclusively used for passengers*. That would require the other side of the depot to be lighted so as to admonish the passengers that it was *not* used for passengers at all. All that is required is that it should be so lighted as that, by the exercise of ordinary care, the passengers can ascertain that it is the platform used for passengers. The other side not being lighted at all, is notice that it is not so used. Nor should that plaintiff's knowledge of the use of the platform on the right-hand side have been injected into the instruction.

In the language of the last opinion: "Whether, in language of the instruction, adoption of the platform on the left-hand side, in lieu of that on the right-hand side, was unknown to plaintiff is not material." * * *

For the reasons stated the judgment is reversed and the cause remanded, with instructions to grant appellant a new trial and for further proceedings consistent with this opinion.

PACE V. COMMONWEALTH.

(Filed November 24, 1896—Not to be reported.)

1. *Appeal—Motion for new trial*—This court can not review the action of the lower court in overruling a motion for new trial, a part of the evidence heard on the motion not appearing in the record.

2. *Change of venue*—The court properly overruled a second motion for a change of venue, as the statute expressly provides that not more than one application for a change of venue shall be allowed.

3. *Prejudicial error*—Defendant was not prejudiced by the admission of testimony as to certain acts and declarations of his son as the tendency of the testimony was rather to sustain defendant's defense that his son did the killing.

James Eversole and H. K. Rawlings for appellant.

W. S. Taylor for appellee.

Appeal from Leslie Circuit Court.

Opinion of the court by Judge Paynter.

The appellant, John W. Pace, was jointly indicted with two of his sons in the Leslie Circuit Court for the murder of Allen Lewis. He was found guilty of voluntary manslaughter, and his punishment fixed at fifteen years in the penitentiary.

The homicide occurred on the 6th of March, 1896. The indictment was returned in the same month. At the March term of the court the defendant moved the court for a change of venue. In support of the motion filed some affidavits.

In the order overruling the motion the court says: "After hearing proof upon the kinship and character of the witnesses to the affidavits supporting the petition, and being advised, etc." The bill of exceptions fails to show what proof the court heard on the motion. All the evidence which the court heard on the motion not appearing in the record, we can not tell whether or not the court erred in overruling it.

At the ensuing June term the appellant, John W. Pace, made another motion for a change of venue. The court overruled it upon the ground that he had made a previous *application* for a change of venue.

Section 1118, Kentucky Statutes reads as follows: "Not more than one change of venue or application therefor shall be allowed to any person or the Commonwealth in the same case."

The court followed the plain requirement of the statute, and refused the application for a change of venue. There was testimony tending to establish the defendant's guilt. The jury were the triers of the facts, and we can not invade the province of the jury and disturb the verdict.

It is urged that the court erred in admitting the testimony of Bigley, Moggard, Charles Daniel and Evaline Daniel.

The theory of the defense was that Abe Pace, the son of the accused, had killed Miller. Some of the testimony, which it is claimed was objectionable, was to the effect that Abe Pace was, on the day Miller was killed, trying to borrow a pistol, and he had ill-will against the deceased.

Charles Daniel testified that Abe Pace said he wanted a pistol because George Steele wanted to kill his (Abe's) father, and also that during the day of the killing Abijah Pace said to his brother Abe: "You have got pap's pistol."

Abe Pace was not on trial. The court told the jury such testimony

was not evidence against the appellant. Although the evidence may have been inadmissible, yet we fail to see how he was prejudiced thereby. The tendency was rather to sustain his defense that Abe Pace had done the killing.

The judgment is affirmed.

NEEL V. CARSON, &C.

(Filed November 24, 1896—Not to be reported.)

Surcharge of receiver's settlement—In this action to surcharge a settlement made by defendant as receiver of a fund which belonged to plaintiff, the complaint being that defendant was improperly allowed credit by the amount of a note which he had failed to collect, the order of court confirming the settlement and discharging defendant can not be disregarded, especially when the fund was all the while in the custody of the court and defendant acting as the mere receiver; but even if defendant had been a trustee there was no such laches as would authorize a surcharge of the settlement made under the eye of the chancellor and confirmed.

W. S. Taylor for appellant.

Edward W. Hines and W. A. Helm for appellees.

Appeal from Butler Circuit Court.

Opinion of the court by Chief Justice Pryor.

This action in equity by the appellant, E. J. Neel, is to surcharge a settlement made by the appellee, Carson, as the trustee or rather as receiver of a fund that belonged to her, the result of a litigation between herself and her husband. Her brother was first appointed to take charge of the fund, and, being removed, a man by the name of Skillen was appointed in his stead. Skillen resigned or made an assignment for creditors, when the appellee, Carson, was made receiver of the trust fund. It appears that when Phelps was removed and settled his accounts as trustee he passed over to Skillen a note on one Humphrey for $707 as a part of the trust fund, or if not a part of the fund in discharge of what he owed.

Skillen accepted it, and when he settled he delivered over the note to Carson. Carson then settled under an order of court his accounts as receiver, showing that the note on Humphrey was worthless and was credited by the balance due upon it because of the insolvency of Humphrey, the obligor. The settlement was made by the court's commissioner and reported to court, and the report confirmed, and Carson's resignation accepted.

The settlement made with Carson was of a period over which the court had complete control and made at the instance of the beneficiary of the trust. There is no evidence that Carson was ever ordered to collect the Humphrey note, but on the contrary the obligor had been paying ten per cent. interest on it from time to time, and the interest applied to the beneficiary, and, when the land upon which a mortgage was given to secure the note had declined in value by reason of waste alleged to have been committed by the owner, the receiver is sought to be made liable. There is no evidence of bad faith or of fraud on the part of Carson, and under such circumstances it is difficult to perceive how the order confirming the settlement with Carson and his discharge is to be disregarded and

the receiver of this fund made liable, and that, too, when the fund was all the while in the custody of the court and Carson acting as the mere receiver; but if trustee we see no such laches as would authorize a surcharge of the settlement made under the eye of the chancellor and confirmed.

Judgment affirmed.

KIRK, SHERIFF V. WESTERN OIL & GAS. CO.

(Filed November 25, 1896—Not to be reported.)

Taxation of gas and oil leases—Section 4039, Kentucky Statutes, which makes "coal, oil or gas privileges by lease or otherwise," on the lands of another, taxable in the county in which the property is situated, makes an exception to the general rule that personal property is taxable in the county of the residence of the owner; and as that statute did not take effect until August 15, 1894, such property was taxable for the year 1893, under the general rule, in the county of the residence of the owner, and was taxable not under items Nos. 66 and 67 of the schedule (Kentucky Statutes, section 4058) applying to "mineral products" and "coal mines, oil, gas and salt wells," but under item 74, "property not mentioned above."

Kirk & Kirk for appellant.

A. Copley for appellee.

Appeal from Martin Circuit Court.

Opinion of the court by Judge DuRelle.

This suit was brought to restrain the appellant from collecting taxes as sheriff for the year 1893 assessed against appellee upon certain so-called gas and oil leases of lands in Martin county, the contracts while in form leases giving the company the right to drill for oil and gas upon the lands described, and to erect such machinery and buildings as may be necessary for the purpose, with a right of way over the lands so far as may be necessary to effect the object desired, nevertheless retain to the grantors the possession and use of the lands.

The question presented is whether these taxes are collectible under section 4039, Kentucky Statutes. That statute was enacted March 19, 1894, and did not take effect until August 15, 1894. It consequently could not apply to any taxes for 1893. This statute makes an exception to the general rule that personal property is taxable in the county of the residence of the owner, and makes coal, oil or gas privileges by lease or otherwise on the lands of others taxable in the county on which the property is situated. Prior to the enactment of section 4039 such property was taxable, not under items Nos. 66 and 67 of the schedule (Kentucky Statutes, section 4058) applying to "mineral products" and "coal mines, oil, gas and salt wells," but under item 74 "property not mentioned above," but was of course taxable in the county of the residence of the owner.

Judgment affirmed.

McLaughlin v. Louisville Electric Light Co.

(Filed November 25, 1896.)

1. *Duty of electric light company to insulate wires—Instruction*—It is the duty of an electric company to make the insulation of its wires perfect at places where people have a right to go for business or pleasure, and to use the utmost care to keep it so, and for personal injuries resulting from its failure in that regard it is liable in damages. Very great care as to the protection of wires at such points is not sufficient.

In this action against an electric light company to recover damages for personal injuries to plaintiff, resulting from his coming into contact with one of defendant's live wires attached to a house which he was painting, the court erred to the prejudice of plaintiff in instructing the jury that it was defendant's duty to make its wires "reasonably" free from danger to persons who might come in contact with them. The word "reasonably" should have been omitted from the instruction.

2. *The court should have instructed the jury*, as asked by plaintiff, that if they believed from the evidence that the wire with which plaintiff came in contact had all the appearance of having been properly insulated this was an invitation or inducement to plaintiff to risk the consequences of contact with the wire in the performance of his work.

3. *The court erred in refusing to instruct the jury*, as requested by plaintiff, that "contributory negligence means the failure to observe that degree of care which ordinarily careful and prudent persons usually observe under the same or similar circumstances to protect themselves from injury, and by reason of such failure helps to cause or bring about the injury complained of."

4. *Instructions drawing attention to particular facts* or evidence are not favored in law, and such instructions were properly refused in this case.

James C. Klein for appellant.

Gibson & Marshall, O'Neal, Phelps & Pryor and Phelps & Thum for appellee.

Appeal from Jefferson Circuit Court, Common Pleas division.

Opinion of the court by Judge Guffy.

It is alleged in the petition in this action that "the plaintiff is and was on the 8th day of July, 1893, a painter by trade, and followed the same for a livelihood, and was on said 8th day of July, 1893, engaged in painting a house on the east side of Fourth street, in the city of Louisville, between Market and Main streets, and numbered —; that on said 8th day of July, 1893, and long prior thereto, the defendant, its agents and servants had erected and maintained one of its electric wires, charged with electricity, on the side of said house facing Fourth street; that the said wire on said 8th day of July, and long prior thereto, was insufficiently, carelessly and negligently insulated, and that defendant, its agents and servants were well aware of said want of insulation, or could have been aware of same by the exercise of proper diligence; that plaintiff on said 8th day of July, 1893, while in the discharge of his duties as painter aforesaid and without fault on his part, came in contact with said wire which at the said time was heavily charged with electricity by the defendant, its agents and servants, whereby he was severely shocked and rendered insensible, and that he remained insensible and unconscious for twenty minutes and more; that he suffered severe pain, both physically and mentally, by reason of said shock, and that the flesh on his left hand was burnt and blistered to such an extent as to render the said hand useless, and that ever since and now said

plaintiff is unable to use said hand in the performance of his vocation as a painter; that plaintiff is rendered less able thereby to make a living at his trade as a painter; that the said injuries received by the plaintiff are permanent, and his entire nervous system, by reason of said shock, is unbalanced, causing plaintiff much and severe pain; that the said injuries complained of herein were caused wholly by the gross negligence of the defendant, its agents and servants; that the plaintiff has been damaged, by reason of said injuries, in the sum of two thousand five hundred dollars. Wherefore, plaintiff prays judgment against the defendant for the sum of two thousand five hundred dollars, and for his costs and for all proper relief."

The defendant filed a demurrer to the petition which was overruled by the court.

The first paragraph of the answer substantially denies all the averments in the petition which show any right to recover.

The second paragraph of the answer is as follows: "Further answering this, defendant says that the injuries received by the plaintiff, and set forth in the petition, were received wholly and entirely because of his want of proper care and caution in looking out for his own safety, and by reason of his carelessness in coming in contact with an electric light wire which he knew, or by the exercise of ordinary care for his own safety could have known, was then and there charged with a current of electricity, making it dangerous to life for any one to come in contact with the said wire. Defendant says that by the exercise of ordinary care for his own safety, and such as circumstances and surroundings made it apparent was necessary, the said plaintiff could have avoided coming in contact with said wire, and could have escaped all injury therefrom. Defendant says that plaintiff came into contact with said wire by failing to exercise that degree of care which he knew, or ought to have known, under the circumstances was necessary to be exercised by him to avoid injury from said wire. Wherefore, having answered, defendant prays to be dismissed."

The reply of plaintiff traversed the allegations of the answer. The jury found for the defendant, and his petition was dismissed.

Appellant relied on these grounds for new trial, viz:

1st. That the court erred in refusing to instruct the jury as requested by plaintiff in instructions Nos. 1, 2, 3, 8 and 9.

2d. That the verdict of the jury is not sustained by sufficient evidence.

3d. That the court erred in not excusing a juror, William Pryott, for cause, he being a stockholder in the Louisville Gas Co., and it being the owner of the stock in the defendant company.

The motion for new trial was overruled, and plaintiff has appealed.

The plaintiff below (appellant here) testified in substance as follows: "S. T. McLaughlin testified that he was twenty-two years of age, and a house painter by trade; was a contractor in that line, and had the job, in conjunction with Asa Carr, of painting the front of H. C. Green's hotel, known as the Fourth Avenue Hotel, and had almost finished the work on the 8th day of July, 1893, when he came in contact with one of the defendant's electric wires, near the side of a window, and received a shock; that the defendant had two wires running from the west side of Fourth street, in Louisville, Ky.; that these two wires were fastened to brackets attached to the side of the wall between the first and second windows of the hotel, counting from the north; these windows were on the second floor of

the building; the first floor was occupied by business firms; that these brackets were fastened to the wall about six inches from each window and about five feet above the sill of the windows; that defendant had an iron box, called a converter, attached to the side of the hotel building, midway between these two windows; that this box was about a foot above an iron cornice, running the full length of the building, immediately below the windows, about six inches below; that these two wires ran from the brackets to the top of this converter or box; that plaintiff was shocked by the wire next to the north side of the second window, at a place where the wire was joined together, and about halfway between the bracket and the converter; that this wire ran down from its bracket along the side of the window, and six inches from the window, for about two feet, and then turned over north to the converter; that the iron cornice was about twelve inches wide, space enough for a man to stand on conveniently and paint; that he and his men had to use this cornice to work from, as there were wires preventing the staging or swinging ladder from being let down between them; when he had painted down to the bracket and wires he pulled the staging up out of the way, and painted around the wires and iron box, while standing on the iron cornice; the window sill was outside, about five inches by five inches, and rested on the iron cornice inside of wood, about a foot wide; that he had put several coats of paint on the house, and was through, with the exception of touching up the right hind ear of the iron box; that he was in the act of getting out of this second window on the cornice to touch up this ear when he received the shock; that he had taken his brush full of paint in his right hand, and nothing in his left, and was on the sill of the window, turning back out onto the cornice, when he used his left hand to steady himself against the north side of the window opening, when his hand came in contact with the wire and he received the shock which rendered him unconscious, and he did not know anything more for about a half an hour, when he was revived, and found himself inside of the house, with Asa Carr, W. J. Cody, his employe, and Mr. H. C. Green working with him to revive him; that his left hand was burnt and blistered on the third and fourth fingers, and at the edge of the palm at base of small finger; that he suffered a great deal at the time of the shock and long afterward; that he went home and went to bed for a week; that he has never fully recovered the full use of his left arm and hand; that he has not been able to work at his trade or calling on account of the weakness of his hand; that he can not properly handle the brush and ropes; that in his trade it requires strong hands and arms to hoist and lower oneself on the staging; that he has not had any work at his trade at all; that he did and is working as a hand on the steamer ————, plying between Louisville an Cincinnati; has worked about two months; that there was no sign or anything else to warn him of a danger about or near those wires."

On cross-examination said S. T. McLaughlin testified that "no one warned him at any time about those wires; that he did not know Squire Green but did know Mr. Green, proprietor of the hotel; that Squire Green did not tell him to keep away from those wires; did not see Squire Green around the building the day before the accident; Squire Green did not offer to cut the wires if he wanted it done, nor did he tell Squire Green he could get along without the wires being cut; that no one told him that the wires were alive or dangerous; that he knew electric wires were dangerous, but that he had been working around the wires all the week and all seemed to be in-

sulated, and yet he was not hurt; that he did not know electricity was turned on; that it was about noon of the 8th day of July, 1893, that he was hurt; that he saw no lights about the building; that he came up to the office of the defendant one Sunday night, whether the first Sunday after the accident or not he did not remember; was there because Mr. Smith had sent for him; did not tell Mr. Smith or anyone else that he was not hurt or was scared more than hurt, and did tell him then and there that he was hurt, and showed him his hand and pointed out the places where it was burned; that he did not meet Squire Green every other Sunday on Third and Jefferson streets. Witness then showed his hand to the jury, pointing out the only indications of the burn at edge of palm; that what appeared to be a wart there was not a wart. It was not there when he was shocked. It came there afterwards when it healed up."

Wm. J. Cody testified: "Was working there on the 8th day of July, 1893, the day on which Sam McLaughlin was hurt; that he was standing on the first window inside of same stirring some paint; the work of painting the building was finished, with the exception of a little space below the second window sill and one of the ears of the iron box on the side of the house between the first and second windows; that McLaughlin got his brush full of paint and was going out to paint this ear, and while I was at the first window he started to get out of the second window with his brush in his right hand; had nothing left in his left; he had hardly gotten into the window opening when I heard a groan, followed immediately by a second one, and I then leaned out of the window and looked in the direction of the groans and saw McLaughlin have hold of the electric wire between this iron box and a bracket, right on the joint of the wire; I quickly ran to the second window, put my right arm between him and the north side of the window out around his body, then reached out over his head and took hold of the wrist of his left hand and jerked it loose from the wire and lifted him into the building and laid him down on the floor. About that time Asa Carr came into the room and then Mr. Green, of the hotel. We all rubbed him, walked him and slapped him for fully twenty minutes before he was revived. At the time I pulled his hand loose from the wire I received a shock myself, but not enough to hurt me. McLaughlin, when I reached him, was doubled up, partly on the window sill and one leg out on the iron cornice below the window. He suffered a great deal; was unconscious for fully twenty minutes; examined the joint he had hold of immediately after we got him to himself; found the joint very loose and rotten. One end of the stuff used in wrapping it was hanging down about two inches. The wires all seemed to be covered with insulation. The place McLaughlin had hold of this wire was very near the north edge of the north side of the second window. The bracket to which it was fastened was within six inches of the edge of the window. These windows were about three feet apart. The sills were of wood and stone. The stone was five inches wide and thick, and rested on an iron cornice running above the storerooms on the first floor. This iron box or converter was placed against the wall between the first and second window in the middle, and about a foot above the iron cornice. This wire entered at the top of the box on the side. The wires come from across the street from the west side, and run over to these brackets, and then down to the box. Whenever we had painted to the top down to these wires we pulled the staging up out of the way and stood on this iron cornice and painted from there. The cornice is twelve inches wide; had worked around the very same wire several times; had experienced no shock, nor did.

he notice anything wrong with the wire; all seemed insulated; did not remember seeing Squire Green around there; did not hear him nor anyone else warn McLaughlin to beware of the wires. Nothing was said about the wires being dangerous."

Other witnesses testified as to the injury.

John M. Bunscomb testified as follows: "John M. Bunscomb testified that he is an electrician; have run similar plants to that of defendant; knows the defendant's plant well and its power; formerly an employe when the defendant was at Third street several years ago. Electric wires are always insulated—that is, covered with a material that is a nonconductor. This is done to prevent a waste of power as for safety. There are different grades of insulation. The insulation is put on at the factory. Whenever it is desired to join two ends of different wires the ends are scraped of all insulation. The clean ends are then twisted around each other closely in order to make close connection. After the joint is then soldered together, this makes a perfect connection. Then to protect this joint it is wrapped usually with a rubber tape about an inch wide, putting on five layers, which is considered by the underwriters as a sufficient insulation. This rubber tape adheres to itself, and if pressed and wrapped on tightly it will not come off easily. This is the method of wrapping joints in high tension wires, which is the character of the defendant's electric wires. These joints, as well as the regular insulation on the wires, is apt to rotten and wear off. The action of weather has something to do with this. The rubber will rotten in time, and in case a layer or two is thus rotten it will more easily catch moisture, which renders the joint dangerous. All wires are more or less dangerous when wet, as in raining weather, and if in such case a good ground was had I would not risk any of them. Iron cornice, as usually used above store buildings, form an excellent conductor, and standing on it and holding a wire charged with electricity of high tension, even though insulated and in dry weather, is risky. Also most certainly so in bad weather. Stone is not as good a conductor as iron in wet weather. Using it instead of iron I would not risk it. There is absolutely no perfect insulation, except at a great cost, which prevents it being extensively used. All insulation is effected by the changes in weather. Rubber, for instance, gets wet, and then it is dried by the sun. This soon wears it out. If a joint has on it less than five layers of wrapping it is just as much or more apt to be dangerous. The smallest pin hole is sufficient to let the electricity of these high tension wires escape in force enough to be fatal. If a joint is wrapped loosely it will catch the rain and moisture and rotten sooner than if wrapped tightly and evenly. A joint with an end of the wrapping hanging down a couple of inches would be considered dangerous. The iron box referred to is a converter. It reduces the force of the current. The wires entered the converter are called the primary wires, and those leaving the box the secondary wires, which are not dangerous, because they carry a light current. Otherwise if a heavy current it would burn out the lamps. The full power or volt of the plant is used on those arc lights we see in the streets, and only a small part is used for lights inside the stores and offices; have seen men apparently receive 2,000 volts of electricity without serious results. The amount taken though is mostly guess work—so many conditions enter into the estimation of amount actually received. Some men seem to be able to stand more than others; would not tempt even the best of insulation if I were standing on a good conductor, especially in wet weather."

At the conclusion of plaintiff's testimony the defendant asked the

court to instruct the jury to find for defendant, which motion was overruled by the court.

The testimony of defendant conduced to show that defendant had used reasonable care, and that plaintiff was not severely injured. It also contends that plaintiff was guilty of contributory negligence.

The following are the instructions offered by plaintiff and refused by the court:

"1st. The court instructs the jury that it is the duty of the defendant, the Louisville Electric Light Co., to so insulate or protect its wires as to make them free from danger to those who may be brought in contact with them; and if they shall believe from the evidence that the said company failed to so insulate or protect the wire with which S. T. McLaughlin came in contact, and that his injuries were caused by the reason of such failure, then the law is for the plaintiff, and they should so find, unless they shall further believe from the evidence that the said S. T. McLaughlin, by his own negligence, contributed to cause his injuries, and that he would not have been injured but for his contributory negligence, if any there was.

"2d. If the jury shall believe from the evidence that S. T. McLaughlin came in contact with said wire while in the act of climbing out of the window, and that the said wire was not so insulated or protected as to be free from danger to him, and that his injuries were caused thereby, they ought not to find him guilty of contributory negligence unless, in so doing, he failed to exercise that degree of care which ordinarily careful and prudent persons usually exercise under the same or similar circumstances.

"3d. That the injury to the plaintiff is conclusive proof of the defective insulation of the said wire and of negligence of the defendant.

"5th. Contributory negligence means the failure to observe that degree of care which ordinarily careful and prudent persons usually observe under the same or similar circumstances to protect themselves from injury, and, by reason of such failure, help to cause or bring about the injury complained of.

"8th. That if they believe from the evidence that the said wire had all the appearances of having been properly insulated at the time plaintiff received his injuries, this was then an invitation or inducement to plaintiff to risk the consequences of contact with same in the performance of his work in painting the house to which said wire was attached.

"9th. That if the jury believe from the evidence that the plaintiff was not cautioned especially as to the dangerous condition of said wire before the accident occurred, then they are not to find him guilty of contributory negligence."

The instructions given are as follows:

"1st. The court instructs the jury that it is the duty of the defendant, the Louisville Electric Light Co. to so insulate or protect its wires at places where they may be dangerous to human life as to make them reasonably free from danger to persons who may come in contact with them; and if they shall believe from the evidence that the wire with which the plaintiff came in contact was not insulated or protected at the point where he caught it, and that he received the injuries of which he complains because thereof, then the law is for the plaintiff, and they shall so find unless they shall further believe from the evidence that he contributed to cause his injury by his own negligence, and that he would not have been injured but for his contributory negligence, if any there was.

"2d. But unless they shall believe from the evidence that the defendant's wire at that point, mentioned in instruction No. 1, was not so insulated or protected as to make it reasonably free from danger, and that the plaintiff was injured thereby, the law is for the defendant, and they should so find.

"3d. Or if they shall believe from the evidence that the plaintiff was negligent, and thereby contributed to cause the injury of which he complains, and that he would not have been injured but for his contributory negligence, if any there was, then the law is for the defendant, and they should so find.

"4th. If the jury find for the plaintiff they should award him such a sum in damages as they may believe from the evidence would fairly compensate him for the mental and physical suffering endured by him by reason of his injuries, and for loss of time and capacity to earn money at his trade and occupation. If they shall find from the evidence that the injuries of S. T. McLaughlin were caused by the negligence of the defendant, and shall further believe from the evidence that the negligence, if any there was, was gross, then they may, in their discretion, award him such a further or additional sum as punitive damages as they may deem right and proper under the evidence and these instructions, not exceeding in all the sum claimed in the petition."

Gross negligence means the absence of slight care.

"5th. Ordinary care means that degree of care which ordinarily careful and prudent persons usually observe under the same or similar circumstances."

Negligence means the failure to observe ordinary care.

"6th. Contributory negligence means the failure to observe that degree of care which ordinarily careful and prudent persons usually observe under the same or similar circumstances to protect themselves from harm, and by reason of such failure helped to cause or bring about the injury complained of."

To the giving of instructions Nos. 1 and 2 the plaintiff excepted.

The demurrer to the petition was properly overruled, as was also the motion for instruction to the jury to find for the defendant. It also seems to us that William Pryott had a disqualifying interest in the action, and should have been excused for cause. But by far the most important question involved is the law applicable to the case.

Electricity is a powerful and subtle force, and its nature and manner of use not well understood by the public, nor is its presence easily determined or ascertained. Its use for private gain is very extensive, and becoming more and more so. The daily avocation of many thousands of necessity bring them near to this subtle force, and it seems clear that the electric companies should be held to the use of the utmost care to avoid injuring those whose business or pleasure requires them to come near such a death-dealing force.

In the case of Clements and wife v. Electric Light Co., 44 La., 695, *et. seq.*, the court said: "The deceased Clements was lawfully on the gallery roof. He was engaged in a service that necessarily required him to run the risk of coming in contact with defendant's wires, either by stepping over them or going under them. It is probable that the latter mode was the most convenient, and there is no evidence that in so doing he incurred any greater risk. The wires were visible, and to all appearances were safe. The great force that was being carried over the wire gave no evidence of its existence. There was no means for a man of ordinary education to distinguish whether the wire was dead or alive. It

had all the appearances of having been properly insulated. From this fact there was an invitation or inducement held out to Clements to risk the consequences of contact. He had a right to believe they were safe, and that the company had complied with its duties specified by law. He was required to look for patent and not latent defects. Had he known of the defective insulation and put himself in contact with the wire he would have assumed the risk. The defect was hidden, and the insulation wrapping was deceptive. It is certain, had it been properly wrapped, Clements would not have been killed. His death is conclusive proof of the defect of the insulation and the negligence of defendant.

"He exercised reasonable care in going under the wire in the performance of his duty, as he had a right to believe, from external appearances, that the wire was safe. His action was such as not to tend to expose himself directly to the danger which resulted in the injury. In fact there was no apparent danger. * * * *

"It can not be said that when Clements went on the roof to repair it he went into the presence of known danger and assumed the hazards of the employment. The employment was not dangerous. The wires, if properly insulated as above stated, would have been harmless. It was only a remote danger which he had to risk, and this depending upon the fact whether or not the defendant company had done its duty as specified by law. The external appearances, the only indication of performed duty to which Clements' attention could be fixed, were guarantees that the defendant company had done its duty. These appearances assured him that in the performance of his work in sweeping the roof it was not dangerous for him to risk going over or under the wire. (Bomar v. Railroad Co., 42 An., 983.)

"Even in the presence of known danger to constitute contributory negligence it must be shown that the plaintiff voluntarily and unnecessarily exposed himself to it, unless it is of that character that the plaintiff must assume the risk from the very nature of the danger to which he is exposed. From the appearance of the wire, its wrappings with insulated tape, and the known duty of the defendant to protect the insulation at this particular splice or joint, Clements had no reason to anticipate danger, except from the fault of the defendant company. This fault was the cause of his death, and his act in passing under or over the wires was too remote to give it the character of contributory negligence."

The case of Haynes v. Gas Co., 114 N. C., 211, was an action to recover for death caused by a boy taking hold of a live broken wire that was in the street. We quote from the decision of the court as follows: "It is due to the citizen that electric companies that are permitted to use for their own purposes the streets of a city or town shall be required to exercise the utmost degree of care in the construction, inspection and repair of their wires and poles, to the end that travelers along the highway may not be injured by their appliances. The danger is great, and care and watchfulness must be commensurate to it. Passengers on railroad trains have a right to expect and require the exercise by the carrier of the utmost care, so far as human skill and foresight can go, for the reason that a neglect of duty in such a case is likely to result in great bodily harm and sometimes death to those who are compelled to use that means of conveyance. 'As the result of the least negligence may be of so fatal a nature, the duty of vigilance on the part of the carrier requires the exercise of that amount of care and skill in order to prevent accidents.' (Ray on Negligence, *supra*, page 53.) All the reasons that

support the rigid enforcement of this rigid rule against the carrier of passengers by steam apply with double force to those who are allowed to place above the streets of a city wires charged with a deadly current of electricity or liable to become so charged. The requirement does not carry with it too heavy a burden. Human skill can easily place wires and poles so that they will not break and fall unless subjected to some strain that could not be anticipated, and it can as readily prevent the possibility, under ordinary circumstances, of the contact of wires that should not be allowed to touch one another."

The evidence in this case conduces to show that appellant was at work at his regular trade, and was where he had a right to be, and the joint of the wire being apparently insulated was to some extent at least a guaranty that there was no danger. But independent of that fact the situation of appellant, his work in hand and the proximity of the wire were such that he might without negligence have unthoughtedly taken hold of the wire, because he seemed to need support, and besides it was hardly to be expected that the current was on the wire at about noon, the wire being used wholly to supply incandescent lights or lamps.

It seems clear to us that appellee should have been required to have had perfect protection on its wire at the point and place where appellant was injured. The fact that it was very expensive or inconvenient is no excuse for such failure. Very great care might be sufsufficient as to the wires at points remote from public passways, buildings or places where persons need not go for work or business, but the rule should be different as to points where people have a right to go for work, business or pleasure. At the latter points or places the insulation or protection should be made perfect, and the utmost care used to keep it so.

Instructions Nos. 1, 2, 5 and 8, asked by appellant, should have been given. The others refused were not important, and tended to draw attention to particular facts or evidence. Such instructions are not favored in law.

It results from the foregoing views that the court erred in giving instructions numbers 1 and 2 marked as given. The other instructions given by the court were not excepted to, hence need not be discussed.

For the errors indicated the judgment of the court below is reversed and cause remanded, with directions to set aside the verdict and judgment, and for a new trial upon principles consistent with this opinion.

BRASHER, &C. V. TANDY.

(Filed November 25, 1896—Not to be reported.)

Attachment—The evidence in this case was sufficient to authorize the judgment of the chancellor sustaining an attachment sued out upon the ground that the defendant did not have enough property to satisfy the debt sued on, and that its collection would be endangered by the delay in obtaining judgment and return of "no property," for while the lot upon which the note sued on was a lien, and which was all the property owned by defendant, sold after the judgment for more than the debt, yet it is manifest from the proof that the appellee had reasonable grounds to believe that his debt was in danger from the delay in obtaining judgment and that the property of defendant was not sufficient to satisfy the demand, the residence upon the lot having been burned, and the object of the attachment being to garnish the insurance money.

A. H. Clark for appellants.

J. I. Landes for appellee.

Appeal from Christian Circuit Court.

Opinion of the court by Chief Justice Pryor.

The only question made on this appeal arises from the order of attachment which the appellants contend was not justified by the facts.

The debt was due and owing by the appellants, and they had the money with which to satisfy the demand and refused to pay. The note sued on was for purchase money of a lot of five or six acres, sold by the appellee to the appellants. The appellants after the purchase sold from time to time, in small parcels, all the ground but about one-half acre, and the appellee released his lien so as the purchasers from his vendees might acquire a perfect title.

On the half-acre improvements were erected by the appellants, and those improvements were destroyed by fire, and the ground, with a small outbuilding, was all the appellee had to secure the balance due of the purchase money.

The buildings on the premises having been destroyed, the testimony shows the realty unimproved was, in the opinion of many, insufficient to pay the debt. An insurance had been obtained on the buildings and household effects, still the appellants refused to pay the debt on the ground that the insurance money could not be subjected to its payment.

While the lot sold after the judgment for more than the debt, it is manifest from the proof that the appellee had reasonable grounds to believe that his debt was in danger from the delay in obtaining judgment, and that the property of the defendants was not sufficient in value to satisfy the demand. These facts were found by the chancellor, and we are not disposed to disturb his judgment.

Judgment affirmed.

BROOKS V. COMMONWEALTH.

(Filed November 28, 1896.)

1. *Practice in criminal cases—Continuance*—The killing on account of which the accused was indicted for murder having occurred on the first day of the term at which the indictment was found, and the indictment returned on the second day and the case set down for trial for the fourth day of the term, the court should, when the case was called for trial on that day, have granted a continuance, it appearing from the affidavits of the accused and of counsel appointed by the court to defend him that there had not been sufficient time to prepare for the trial, there being great excitement in the community on account of the killing, and the accused being unable on account of his nervous condition to give his counsel the names of the witnesses by whom he could sustain his plea of self-defense. While the accused was in custody when the indictment was found, yet the court should, in the exercise of the sound discretion conferred by the law, have granted the continuance, such a course being in harmony with the intent of the provisions of section 187 of the Criminal Code and with the fundamental principles of the law that entitle all persons accused of crime to a fair and reasonable opportunity to procure the attendance of witnesses in their behalf.

2. *Evidence of general threats upon trial for murder*—Upon a trial for mur-

der. general threats by the accused to commit such an offense. although having no reference to any particular individual, are admissible in evidence to show malice, being proper to indicate the grade of the offense rather than to establish the fact of guilt.

W. W. McGuire and Hobbs & Scott for appellant.

W. S. Taylor for appellee.

Appeal from Morgan Circuit Court.

Opinion of the court by Judge Landes.

The appellant was indicted by the grand jury of Morgan county for the murder of Gus McKenzie, and upon trial was found and adjudged guilty as charged, and is now under sentence of death therefor. A motion for a new trial having been made and overruled, this appeal is prosecuted from that judgment.

The killing occurred in the town of West Liberty on the first day of the June term, 1896, of the Morgan Circuit Court, about one hour before sunset. The appellant was promptly arrested and imprisoned, and by about 10 o'clock A. M. of the next day the indictment was returned by the grand jury. On the same day the court ordered the case to be set down for trial on the fourth day of the term, and, the appellant being unable to employ counsel, the court appointed two of the attorneys of the court to defend him.

When the case was called for trial on the fourth day of the term the appellant, who had been confined in jail ever since the killing, made affidavit and by his counsel moved for a continuance of the case until the next term of the court to enable him to prepare for trial, without having had any witnesses summoned to testify in his behalf.

While no witnesses were named in this affidavit by whom the appellant expected to be able to prove any material facts in his defense, it was stated in substance that the killing was done while both he and the deceased were under the influence of strong drink, and while they were engaged in a dispute and in the midst of great excitement, which was still prevailing in the county, and that he shot the deceased in self-defense; but so great was the excitement surrounding him, and such was his condition, that at the time he did not know who was present or by whom he could prove the facts to sustain his plea of self-defense; that he had not had time sufficient to prepare for his defense, and that, ever since the killing, he had been in such a condition of worry, excitement and prostration that he had been unable to tell his attorneys anything about his case.

Both of his attorneys made statements in support of the motion for a continuance, showing that they had neither sufficient time nor opportunity to make suitable preparation for the defense. One of them, who had been for many years in active practice both in criminal and civil cases, stated that the appellant was not able, on account of his nervous condition, to tell him who was present at the killing, and that, "on account of the state of public opinion and the additional facts, neither he nor his associate counsel knew the facts of the killing, and the defendant can not tell at this time who does know. He thinks it impossible to obtain a fair and impartial trial for the defendant at this term of the court." He further stated that he believed that "by the next term of the court the defendant can have the facts of his case understood," and that "a trial of this case at this term of the court is to him a leap in the dark, and that he can

not do the defendant justice in his defense if forced to try at the present term."

The motion for a continuance was overruled by the court and, exceptions having been properly taken, this is here complained of as error prejudicial to the substantial rights of the appellant.

It can hardly be said that the facts upon which the motion for a continuance in this case was based, as set forth in the affidavit of the appellant and the statements of his counsed, were technically legal grounds for a continuance. At the same time they were of such a character as would have warranted action by the lower court upon the motion favorable to the appellant in the exercise of a sound discretion conferred by the law.

Section 185 of the Criminal Code provides that if the defendant is in custody or on bail when the indictment is found "the trial *may* take place at the same term of the court, at a time to be fixed by the court."

In every prosecution, before a trial can be lawfully had, the defendant must be "before the court" in some way or by some process, usually before the commencement of the term of court at which it is proposed the trial shall be had (Criminal Code, section 187); but the conditions provided for by the section quoted is where a defendant is "before the court" on some charge before or at the time "the indictment is found." And the object of these provisions is to secure as speedy a trial in all cases as may be consistent with the allowance of reasonable time for preparation, both for the Commonwealth and the accused.

In this case the crime with which the accused was charged was committed after the commencement of the term of the court at which the indictment was found, and he was indicted while in custody, and, therefore, "before the court" on the charge, but without any previous inquisition.

There is nothing in the record to show that the learned judge of the trial court, in overruling the motion for a continuance, was actuated by other than a high sense and purpose of fairness and duty, both toward the Commonwealth and the accused, yet, under the circumstances surrounding and growing out of this deplorable tragedy, and considering the pitiable condition in which the accused was found, we are of the opinion that he or his counsel, who were officers of the trial court and had undertaken the burden of defending the accused in obedience to its order, and whose statements ought to have had great weight with the court upon the question of continuance, did not have sufficient time to prepare, and in fact that they could not have made the proper preparation for the trial of the case at the June term of the court. In this view of the case the continuance asked for ought to have been granted by the trial court. This, we hold, would have been in harmony with the intent of the provisions of the Code, to which reference has been made, and with the fundamental principles of the law that entitle all persons accused of crime to a fair and reasonable opportunity to procure the attendance of witnesses in their behalf. (Wills v. Commonwealth, 12 KY. LAW REP., 111.)

Over the objection of the appellant testimony was admitted by the trial court in behalf of the Commonwealth of general threats made by the appellant on the day and a short time before the difficulty in which the killing occurred, and the object of this testimony was to establish malice.

Henry Rose testified that about a half hour before the killing the appellant came to the store where he was clerking, and that he asked

him if he wanted anything, and that his answer was: "Yes; he wanted some damned man to jump on him so that he could kill him. He had tried Jess Blair and James Blair, and they would not stand in."

Coon Rose testified that from twenty to thirty minutes before the killing the appellant came by where he was, about one hundred yards from the place where the killing occured, and said he would "blow some damned man's lamp out."

Dan Caskey testified that a half hour or an hour before the killing the appellant came where he was, with James Blair, and said: "Boys, stay in town to-night; I am going to kill some damned man."

Grant Caskey testified that about an hour before the killing the appellant passed up the street by him, going in an opposite direction from the place where the killing took place, and said "he did not give a damn for hell; the West was his home."

It is claimed that the court erred in admitting this testimony. It was error, under the circumstances prejudicial to the substantial rights of the accused, to admit the testimony of Grant Caskey, the last-named witness. What the accused said, as testified to by this witness, may have been an expression of his sentiments and feelings at the time, and yet the words used were not of the kind that indicated either motive or purpose to commit crime. But according to the weight of authority the testimony of the other witnesses of general threats made by the accused or of his purpose to do an act which would be criminal, the like of which followed, was admissible in order to establish "general malice and purpose to injure or kill some one," of which the deceased became the victim. (Whitaker v. Commonwealth, 13 KY. LAW REP., 504.)

And in such cases it is not necessary to show that the threats had reference to any particular individual.

In Hopkins v. Commonwealth, 50 Penn. St., 9; 88 Am. Dec., 518, the rule is stated in the following language: "Nor was it necessary that the premeditated malice should have selected a victim. If the jury believe that the prisoner had formed the deliberate design to kill somebody, and in pursuance of that purpose, within an hour after declaring it, did kill McMarity, the Commonwealth had the right to insist upon his conviction of murder in the first degree, and that they might thus insist they had a right to prove his declaration an hour before the deed.

Blackstone ranks "antecedent menaces" and "former grudges" as evidence of malice prepense; and he tells us, morever, that "malice prepense is not so properly spite or malevolence to the deceased in particular case, or any evil design in general, the dictate of a wicked, depraved and malignant heart." There are many other authorities to the same effect, a few only of which need be referred to. (Am. & Eng. Ency. of Law, volume 4, page 866; Sparks v. Commonwealth, 89 Ky., 644; State v. King, 9 Mont., 445; Hodge v. State, 26 Fla., 11; Note to Wilson v. State (Florida), 17 L. R. A., 662.)

But it may be observed that such evidence is proper to indicate the grade of the offense rather than to establish the fact of guilt, which is the view of Mr. Wharton, as expressed in 1 Wharton's Criminal Law, section 727. The trial court, therefore, did not err in admitting the testimony of Henry Rose, Coon Rose and Dan Caskey as to general threats made by the appellant before the killing.

But for the reasons we have indicated the judgment is reversed and cause remanded, with directions to set aside the verdict of the jury and to award a new trial, and for proceedings consistent with this opinion.

OWENSBORO, FALLS OF ROUGH & GREEN RIVER R. R. CO. v. BARKER.

(Filed November 25, 1896—Not to be reported.)

Railroads -Construction of road upon different strip of land from that granted—In this action against a railroad company to recover a parcel of land alleged to be in possession of defendant without the consent of plaintiff, in which defendant relied upon a deed from plaintiff conveying a strip of ground "66 feet in width lying along and including the established line of railway to be constructed by said railroad company," the reasonable conclusion is that a right of way along the route which had then been surveyed and marked was what was asked and given, nothing else being said, and, the company having constructed its road over a different part of plaintiff's land, the jury were authorized to find for plaintiff, the instructions given containing the law of the case and being as favorable to defendant as it was entitled to have.

J. A. Dean for appellant.

Sweeney, Ellis & Sweeney for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Guffy.

This action was instituted by the appellee to recover a certain parcel of land alleged to be in the possession of the appellant without the consent of appellee.

The appellant relied upon a deed executed by appellee. The appellee in his reply denied that the deed mentioned embraced the land in contest, but appellant alleged that it was so intended, or in other words that it conveyed and was intended to convey a right of way through appellee's land at such point as the road should be finally located. Issue being joined, the jury found for plaintiff, and judgment was rendered in appellee's favor for the land claimed, describing the same.

Appellant's motion for a new trial was overruled, and it now prosecutes this appeal. Seven grounds were relied on for a new trial. The first, second and third grounds are objections to instructions 1, 2 and D. The fourth is that the court erred in rendering judgment on the verdict for the recovery of the land; fifth, that the court erred in rendering any judgment on the verdict; sixth, that the verdict is vague, indefinite and uncertain; seventh, that the judgment is not supported or authorized by the verdict.

We quote from the deed as follows: "A strip of or parcel of ground sixty-six (66) feet in width, lying along and including the established line of railway to be constructed by said railway company, and extended along said line the same width, with all proper and necessary grades, slopes on either side, over, through and across the real estate in Daviess county, Kentucky, known and described as follows, viz: Commencing at Barker's eastern line and running through his said land a width of sixty-six (66) feet to Gillum's line, and containing —— acres." * * *

The contention of appellant is that the conveyance does and was intended to convey to it a right of way across appellee's land, wherever the road should be finally run or located, while appellee contends that he only gave the right of way where the line was then marked. That route is called the Alsop survey. It so happened that the road was not built on the Alsop survey, but located perhaps from forty to seventy yards from it.

The sole question in the case was as to appellee's right to recover the land sued for here. We think the verdict sufficiently definite, and that the judgment entered upon the verdict was legal and proper.

The proof conduces to show that a survey of the route for the railway had been made, stakes driven down and trees marked through appellee's land. Mr. Triplett seems to have been acting for the railway company, and had with him a deputy clerk for the express purpose of taking acknowledgments of land owners of the right of way, and appellee testified that he only donated the right of way as surveyed, and that the route as run and built upon damaged his land much more than the Alsop route would have done, and he is strongly corroborated by other witnesses, and this proof is not, as we view it, so much in conflict with Capt. Triplett's testimony as counsel seems to think, except as to specific statement that the deed was for the right of way along the exact route of the Alsop survey.

The survey having been marked, nothing else being said or specified, the reasonable conclusion would be that a right of way along that route was what was asked and given. If it had been intended that a right of way was to be given on any route thereafter selected the deed or contract should have been so made.

It also appears from the proof that appellee, when he found that another route had been selected, notified the company that he had not given consent to that survey, forbid the construction of the road on the line on which it was finally built.

The first and second instructions contain the law of the case, and are as favorable to appellant as it was entitled to. Instruction D contains a general proposition of law, but need not to have been given in this case, but did not and could not have prejudiced the substantial rights of the appellant.

Judgment affirmed.

SNOW V. MORSE & WILLIS.

(Filed November 24, 1896—Not to be reported.)

1. Action to quiet title—To maintain a bill of peace one must show a right or title at law.

2. Land patents—Location shown by parol testimony—It being clear there is an error in the calls of a patent under which defendants claim, they had the right to show the actual location of the patent by parol testimony.

3. Same—Patents issued by authority of Kentucky warrants, which issued by authority of the act of 1835 and amendments thereto, are void so far as they interfere with previous surveys or actual settlers and no further. Therefore, a partial interference does not render the whole patent void.

Robert J. Breckinridge, jr., for appellant.

Stone & Stone for appellees.

Appeal from Casey Circuit Court.

Opinion of the court by Judge Paynter.

Snow brought this action to quiet the title to 229 acres by virtue of a patent granted by the Commonwealth of Kentucky in May, 1869, to him.

Morse & Willis claim that they are the owners of certain bounda-

ries of land embraced in the boundaries of two certain patents, one of which was granted to Geo. L. Owsley in 1849 by the Commonwealth of Kentucky for 125 acres, and the other to one Barnett in 1856 by the Commonwealth of Kentucky for 150 acres. They claim to have acquired the title of the patentees by regular conveyances.

There can be no question that the 229-acre grant interferes with the 150-acre patent to the extent of about 56 acres, and if the 125-acre tract is located where appellees claim it to be, then the 229-acre tract interferes with it to the extent of some 65 acres. To maintain a bill of peace one must show a right or title at law. (Scott v. Means, 80 Ky., 460.)

As to the interference with the 150-acre tract the patent is void to the extent of such interference. Snow did not acquire any title thereto by his patent, and has not since done so by possession, hence he has failed to manifest any right or title to the land embraced in such interference.

The boundary to the 125 acre tract is described in the patent and survey upon which it was issued as follows: Beginning at a chestnut, James Owsley's corner to a 200-acre tract; thence N. 86 E. 282 poles to a white oak, J. B. Barnett's corner; thence with his line E. 130 poles to two poplars and hickory; thence north 112 poles to a black oak; thence S. 72 W. 434 to the beginning."

The contention of the appellees is that the calls of the patent are incorrect in that they do not correspond with the survey as actually made, located and marked by the surveyor who made the original survey.

The calls of the patent of the 125-acre tract do not embrace the land in dispute. Neither are there any lines or corner trees to be found corresponding with such calls. Instead of running to the Barnett corner called for it runs in the opposite direction. The Barnett corner is west, not east, of the beginning corner. To run the first call of the patent a westerly instead of an east course, and the last call an easterly instead of a west course, the patent approximately covers the land as claimed by appellees. To thus run it the surveyor (Gefford) found the lines and corners thus called for in the patent, and that they corresponded in age with the date of the patent. The chestnut, James Owsley's corner, is well known. Likewise are the corners and line of Barnett, called for in the patent. These facts are supplemented by the testimony of the surveyor who surveyed and located the patent boundary and marked off the lines and corners thereto, and who testifies that he marked the lines and corners found by Gefford when the warrant was laid.

It is perfectly clear there is an error in the calls of the patent, and it is as equally clear that the survey of the 125-acre tract was made, located and marked as claimed by appellees. It covers part of the land in dispute.

We deem it unnecessary to cite any of the numerous decisions of this court to sustain the claim that appellees had the right to show the actual location of the patent by parol testimony. About one-half of an acre, embraced by the 125-acre patent, is covered by a senior patent granted John Carpenter. Appellant, therefore, claims that, under the act of 1835 and subsequent amendments, the fact that the interference of the one-half acre rendered the whole patent void. McMillan's heirs v. Hutcheson, &c., 4 Bush, 611, is cited to sustain his contention.

In that case the whole of the junior patent boundary was embraced in the senior grant, and of course the court held that the patent was void. Patents, issued by authority of Kentucky warrants,

which, issued by authority of the act of 1835, and amendments thereto, are void so far as they interfere with previous surveys or actual settlers and no further. (Little, &c. v. Bishop, 9 B. M., 246.)

The judgment is affirmed.

GAITHER V. DOUGHERTY.

(Filed December 9, 1896—Not to be reported.)

1. Agreement to arbitrate—The general rule is that an apreement to refer a case to arbitration will not be regarded by the courts, and that they will take jurisdiction and determine the dispute between the parties, notwithstanding such agreement. The exception to that rule applicable in cases where the same agreement which creates the liability qualifies it by providing that before any right of action shall accrue certain facts shall be determined or amounts and values ascertained does not apply in this case.

2. Attorney's fee—Evidence—In this action to secure an attorney's fee under an agreement to pay a "reasonable fee," no fraud or mistake in the contract being alleged, it was error to allow the defendant to state that his understanding of the contract for the fee was different from the plain language of the writing.

3. Same—It was error prejudicial to plaintiff to permit the schedule of fees adopted by the Elizabethtown bar for services rendered in that county to be given in evidence; nor was the amount of legal business the plaintiff had on hand at the time relevant, the question being solely as to the value of the services plaintiff rendered to defendant.

Hobson & O'Meara for appellant.

S. H. Bush and J. D. Irwin for appellee.

Appeal from Hardin Circuit Court.

Opinion of the court by Judge DuRelle.

Appellant went to California as attorney for appellee under the following contract:

"JUNE 10, 1884.

"For legal services concerning the estate of Benj. Dougherty, deceased, I agree to pay James E Gaither a reasonable fee, in proportion to what I actually get, to pay his expenses to Ukiah, California, and return, he agreeing to go by excursion, the railroad fare being about one hundred and seventy-five dollars ($175.)

"Z. G. DOUGHERTY."

Appellant remained in California nearly two weeks, exclusive of the time of travel. There is dispute as to the amount and value of the service he rendered while there, but it is not necessary to go into that question. After his return he was paid $150 by appellee. In May of the year following the appellant, with appellee as his surety, executed his note to the Bank of Elizabethtown and borrowed $500. After one or two renewals the bank brought suit and obtained a judgment for the amount of the note, which was then paid by the appellee. Appellee then brought suit against appellant for the amount thus paid, alleging that the money obtained was used by appellant for his own benefit. Appellant pleaded an agreement to arbitrate the unsettled matters in relation to the fee for services in California, and that no arbitration had been had, and to this plea a demurrer was properly sustained. This agreement comes within the

general rule that an agreement to refer a case to arbitration will not be regarded by the courts, and that they will take jurisdiction and determine the dispute between the parties, notwithstanding such agreement. The exception to that rule, applicable in cases where the same agreement which creates the liability qualifies it by providing that before any right of action shall accrue certain facts shall be determined or amounts and values ascertained, does not apply in this case. (Story's Equity Jur., 1457.)

Appellant then pleaded a set-off of $750, being the fee claimed by him for legal services on the California trip, and the jury rendered a verdict against him for $325.

It is unnecessary to go into the facts in detail, as we are of opinion that the court erred to the prejudice of appellant in the admission of evidence. There was no plea of fraud or mistake in the contract relied on by appellant. It was, therefore, error to allow appellee, against objection, to state that his understanding of the contract for the fee was different from the plain language of the writing, and that he understood that he agreed to pay only $175 for appellant's entire expenses and services. It was also prejudicial error to permit the schedule of fees adopted by the Elizabethtown bar for services rendered in that county to be given in evidence. The only issue was what was a reasonable fee for the services rendered on the California trip, and this might have been proved by persons familiar with the value of such services. Nor does it seem to us that the amount of legal business appellant had on hand at the time is relevant, as the question is solely as to the value of the service which he rendered to appellee.

For the reasons given the judgment is reversed, with directions to grant a new trial and for further proceedings consistant with this opinion.

FINK, &C. V. LEISMAN.

SAME V. HOBLITZER.

(Filed December 5, 1896—Not to be reported.)

Construction of devise—Under a devise by a testator to his wife of all his property, "personal, mixed and real estate" during her lifetime, with full power and authority to sell if she sees proper, the testator further providing that after her death all his property, real personal and mixed, "what may have been left," shall be divided among his children, the widow had the power to pass the fee by a sale of the property, real or personal.

Samuel J. Boldrick for appellants.

O'Neal & Pryor for appellees.

Appeal from Jefferson Circuit Court, Chancery division.

Opinion of the court by Chief Justice Pryor.

In the two consolidated cases there is involved the question of title to the realty sold by Anna M. Fink to the appellees. The power of sale is derived from the will of her husband, Simon Fink. He gives to her all of his "*personal, mixed* and real estate property during her lifetime, with full power and authority to *sell* property if she sees proper," etc. He further provides that after her death he wants all his property, real, personal and mixed, "what *may have been* left,"

divided between his children, showing clearly an intention on his part to vest in her the power to pass the fee by a sale of the property, real or personal.

Such being the judgment below it is affirmed.

FORD LUMBER CO. V. ARVINE.

(Filed December 5, 1896—Not to be reported.)

Judgment supported by evidence—In this action to recover of defendant the amount of a check given him while acting as agent for plaintiff to pay off certain employes of plaintiff, as it is shown that defendant paid the amount of the check, less a small sum conceded to be due him, to one who was agent of plaintiff, and as such authorized to discharge defendant from employment and to receive back from him the check, and that plaintiff in fact received the benefit of the money, a verdict for defendant was authorized by the evidence.

Riddell & Riddell for appellant.

Grant E. Lilly and White & Smith for appellee.

Appeal from Estill Circuit Court.

Opinion of the court by Judge Lewis.

The issue was squarely presented in an instruction to the jury whether Noland was agent of plaintiff, and as such authorized to discharge defendant from employment and receive back from him the check for $151.47 drawn in his favor by plaintiff; and as proceeds of that check, less $24 conceded to be due defendant, now deposited in bank to the credit and at the request of Noland, and by him subsequently paid to other employes of plaintiff, we do not see any cause of this action; for the agency of Noland having been found by the jury to be an existing fact, and there being no evidence whatever that defendant appropriated more than $24 that was owing him, plaintiff was not injured, but on the contrary got and accepted the full benefit of the check or proceeds of it.

Judgment affirmed.

GEORGETOWN WATER CO. V. CENTRAL THOMPSON-HOUSTON CO.

(Filed December 10, 1896—Not to be reported.)

Appellate practice--Withdrawal of opinion—While a court should have the power to correct an erroneous opinion during the term at which it is delivered, even after the time for filing petition for rehearing has expired, yet this should not be done unless the case is one that leaves no doubt as to the necessity for the court of its own motion to take back the opinion. An opinion will not be set aside upon facts outside the record which properly constitute the subject of a bill of review.

Bell & Bell, R. P. Jacob, Thomas Turner and C. C. Turner for appellant.

Tyler & Apperson and J. R. Morton for appellee.

Appeal from Scott Circuit Court.

Opinion of the court by Chief Justice Pryor.

The purchasers of the water plant sold under the judgment in this case have been in the possession some three years. The case has been brought to this court with no supersedeas, and, after the expiration of the time for filing the petition for a rehearing, the modified opinion is asked to be set aside, not upon the facts of the record but upon a state of case that, if it exists at all, is the subject of a bill of review, and not within the jurisdiction of this court.

While the court should have the power to correct an erroneous opinion during the term at which it is delivered, no such precedent should be established unless it is a case that leaves no doubt as to the necessity for the court, of its own motion, to take back the opinion. If the rule is otherwise established there would be no end to litigation and the labors of the court never over, but in this case the court is satisfied the modified opinion is correct.

The counsel asking for the relief, or to have the modification made, was not the original counsel in the case, and seems to have overlooked, as this court did in the original opinion, the facts conceded by the water company and upon which the judgment of sale was based, and if the facts stated by the defense are true, then the water company could not have been prejudiced by the sale, and there was no other alternative but to have it sold, as asked for by both parties. The petition stated a cause of action, and could not be dismissed. The contention is that if this sale is upheld it will result in a great sacrifice of the rights of the company and its property. The petition alleges that $35,000 of bonds had been issued and negotiated, and a mortgage given to secure their payment, with the interest.

The water company in its answer, where the claim against it was asserted and the mortgage asked to be foreclosed or the property sold subject to the mortgage, stated that it had no property but its franchise and plant; that its income was only $350 per month, and that all of its available assets would not pay over $25 per month above running expenses; that the interest on its bonded indebtedness was $2,100 per annum, payable semi-annually. The defendant then proceeds to ask for a sale of the entire plant, subject to the mortgage. It also asks that the petition be dismissed, but, if this could not be done, it wanted the whole plant sold. This is called alternating pleading, and is immaterial to the question here, if it be such.

There was no exception to the sale because of the inadequacy of price, and, on the showing of the water company, a sale had to be made, its plant yielding no income with which to pay. The trust company with its bonds, or whoever holds them, can go into court and have them enforced. The plant and everything connected with it was valued at only $17,000 and sold subject to the mortgage of $35,000.

This is what the record shows, and what equity the defendant has, if any, from facts out of the record, it must go into some other court for relief, and not by motion in this court.

There is no reason for disturbing the modified opinion, and, if there was, this court would not modify it unless it could be ascertained to what extent the purchasers would be affected by it.

Motion overruled.

The Kentucky Law Reporter.

EDITOR:
WALTER G. CHAPMAN, ... Frankfort, Ky.

VOL. 18. MARCH 15, 1897. No. 18

KENTUCKY COURT OF APPEALS.

GRUBBS & MORANCY v. COLUMBIA FIRE INS. CO.

(Filed November 20, 1896.—Not to be reported.)

Parties to appeals -This is a motion to make those parties appellees who were not parties to the original action. or parties to the petition of the appellants, who are seeking to be made parties in the original action, to enable them to withdraw a part of the fund under the control of the court. *Held*—That the petition should have been allowed to be filed as other parties are required to be made.

Grubbs & Morancy and John W. Rodman for appellants.

Phelps & Thum for appellee.

Appeal from Jefferson Circuit Court, Common Pleas division.

Opinion of the court by Chief Justice Pryor.

This is a motion to make those parties appellees who were not parties to the original action, or parties to the petition of the appellants, who are seeking to be made parties in the original action to enable them to withdraw a part of the fund under the control of the court. The appellants also ask the case to be advanced. The case is in no condition to be heard on its merits.

The petition should have been allowed to be filed, and on the return of the case it should be amended, making the sureties parties, that the question desired to be raised may be heard.

Reversed and remanded for further proceedings consistent with the opinion.

The court delivered the following response to petition for modification December 3, 1896:

If the petition on its face did not present a cause of action as to both claims the court would have said so. Other parties are required to be made. The record has not been examined, but the court below when the parties are before the court, can determine their legal and equitable rights.

FAGAN V. COMMONWEALTH.

(Filed December 4, 1896—Not to be reported.)

[*Degrees of offense of rape*—Under an indictment for rape the defendant may be convicted of the offense of detaining the woman against her will with intent to have carnal knowledge with her.

F. M. Hutchison for appellant.

W. S. Taylor for appellee.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge Paynter.

The indictment charges that the defendant, on the 24th day of August, 1896, in Henderson county, did make an assault on the body of Nannie Robertson, a female under twelve years of age, and against her will and consent did ravish and carnally know her. The testimony showed that the defendant did not rape her, and the court told the jury to find him not guilty on that charge.

The testimony did tend to show that the defendant, on the day mentioned in the indictment, stopped Nannie Robertson, put his hands under her clothes, unbuttoned her drawers, put his hand on her person and wanted her to go with him in the cornfield. She cried, and the defendant let her alone. This was done against her will.

The court instructed the jury upon the question of detaining Nannie Robertson against her will, with intent to have carnal knowledge of her, and also told the jury that if they did not find him guilty of unlawfully detaining her, etc., then they could, if the evidence warranted it, find him guilty of an assault. The jury found him guilty of detaining Nannie Robertson against her will, with intent to have carnal knowledge of her himself.

It is insisted that under an indictment for rape it was error for the court to give the instruction in question. The indictment charges the particular circumstances as to time, place, person, motive and intention to constitute the offense of rape. The proof showed that he was not guilty of rape, yet the acts of the defendant were such, at the time and place mentioned in the indictment, that he was guilty of detaining the infant, Nannie Robertson, against her will, with intent to have carnal knowlege with her. The offense of rape comprehends and includes the lesser of which he was found guilty. (Fenston v. Commonwealth, 82 Ky., 549.)

The accused was advised by the indictment that he was charged with rape on Nannie Robertson on the 24th of August, 1896. To have been guilty of it the Commonwealth would be required to prove acts which would constitute the detention of Nannie Robertson against her will, with intent to have carnal knowledge with her.

The offense of which he was convicted is less than the one for which he was indicted, and is included in it.

Judgment affirmed.

EAVANS' ADM'R V. CLEAVER.

(Filed December 11, 1896—Not to be reported.)

Trespass—In this action by an administrator to recover damages for a trespass alleged to have been committed at defendant's instance and request, the alleged trespass consisting in the forcible removal of the furniture of plaintiff's intestate from her house and the placing of another in possession of the house even if a cause of action in any event exists against defendant manifestly none exists unless the acts alleged to have been done at his instance were unlawful, and it was, therefore, sufficient for him to deny in his answer that the plaintiff's intestate was at the time in the rightful possession of the land, or that the person alleged to have done so forcibly and without right took any of the furniture out of her house. And as it is shown that the acts complained of were done under a writ of possession, which so far as appears was legally issued, defendant is not liable.

Winfield Buckler for appellant.

Thomas Owens for appellee.

Appeal from Nicholas Circuit Court.

Opinion of the court by Judge Lewis.

According to the evidence in this case the lower court did not err in peremptorily instructing the jury to find for defendant, and the only ground relied upon for reversal is insufficiency of the answer of defendant.

The act complained of in the petition is that Eliza A. Eavans, plaintiff's intestate, being in possession of a tract of land described, one G. W. Sparks forcibly and without right took all her furniture out of her house and placed Perry Lytle in the possession of the house, who has held it ever since, whereby she was damaged $325. But neither Sparks nor Lytle are defendants, Frank Cleaver being alone sued for the only cause, as stated in the petition, that said wrongful act of Sparks and Lytle was done at his instance and request, and he approved the same.

It is not certain that a cause of action against Cleaver in any event exists or is stated in the petition, but manifestly there is none unless the alleged acts of Sparks and Lytle were unlawful. It was, therefore, pertinent and sufficient for Cleaver to deny in his answer, as he did do, that plaintiff's intestate was at the time in the rightful possession of the land, or that Sparks forcibly and without right took any of her furniture out of the house; for thus, independent of his further denial, the alleged wrongful acts were done at his instance or request was an issue made and inquiry rendered proper by what authority, if any, Sparks did in fact remove the furniture, if he did do so, and that inquiry developed the fact that the intestate of Cleaver had, prior to his death, recovered a judgment against the plaintiff for the land, and that Sparks removed her furniture as an officer, acting under a writ of possession, so far as this record shows, legally issued, and as a consequence it was not unlawful for the defendant, Cleaver, to request the writ executed if he did do so.

Judgment affirmed.

FOSTER V. GIBSON, &C.

(Filed December 11, 1896—Not to be reported.)

1. Deceit—Personal liability of bank directors for false statement—In an action for deceit against the directors of a bank to recover damages against them individually on account of a false statement published by them as to the condition of the bank, whereby the plaintiff has been induced to purchase stock of the bank and pay for it more than it was worth, the plaintiff must allege in his petition that the representations or statements were false, and so known by the defendants, and made with the intention to deceive. And while the evidence to support such averment may consist in the failure on the part of the directors to exercise proper care in ascertaining the condition of the bank before making such a statement, yet the want of care must be so reckless as to evidence knowledge of the condition of the bank on the part of the directors, and that the statements were made to induce others to part with their money.

In this case, as there is no evidence of bad faith on the part of the directors or of their knowledge of the insolvency of the bank, but, on the contrary, there is evidence conducing to show the directors believed the bank was in good condition, and the court has so found, the judgment for defendants will not be disturbed.

2. The defects in the petition, if any, were cured by the answer.

J. W. Alcorn and D. B. Logan for appellant.

Humphrey & Davie and Warren Montfort for appellees.

Appeal from Bell Circuit Court.

Opinion of the court by Chief Justice Pryor.

This is an action against certain directors of the Pineville Banking Co. to recover damages for the fraudulent and deceitful representation made by them to the appellant, Foster, of the condition of the bank, upon the faith of which he was induced to purchase and did purchase its stock, amounting to $———.

The falsity or deceit relied on consists in the written annual statement made by the cashier of the bank, to which he affixed the signature of three directors. That statement showed the bank to be in a prosperous condition, when in fact, and the testimony so shows, it was insolvent.

It is insisted in argument that the petition is defective, but there was no demurrer interposed, and the answer cured the defects, if any.

In actions for deceit it must be alleged that the representations or statements were false and so known by the defendant, and made with the intention to deceive, and the evidence necessary to support such an averment in a case like this may consist in the failure on the part of the directors to have exercised proper care in ascertaining the condition of the bank before making such a statement. The want of care must be so reckless as to evidence knowledge of the condition of the bank on the part of the directors, and that the statement was made to induce others to purchase or part with their money.

In the case of Prewitt, trustee v. Trimble, 92 Ky., 176, this court held that where one induces another to enter into a contract with him and made statements in regard to the subject-matter of the contract that were false, and in regard to which it was his duty to know, he was made liable in damages for the false representation. That was an action where the president of the bank made statements as to the bank's condition that were false, and were or should have been.

known to him to be false, and not only so but reaped the benefits of the contract. See also Trimble v. Reid, 17 KY. LAW REP., 494.

"In order to sustain an action for damages for deceit where the plaintiff was induced to buy stock, it is necessary to prove the statements were made or acts done that were fraudulent; that the person charged knew they were fraudulent and the plaintiff acted on them, etc." (Cook on Stockholders, page 355.)

This is not an action for the careless management of the affairs of the bank, but an attempt to make the three directors individually liable for the value of the stock that was worth less when the plaintiff purchased. A jury was waived, this being a common-law action, and the law and facts submitted to the court. There was no evidence of bad faith on the part of the directors, or of their knowledge of the insolvency of the bank, but on the contrary there is evidence conducing to show the directors believed the bank was in good condition. The court having so found, the judgment will not be disturbed.

Affirmed.

BAILEY, &C. V. FISHER, &C.

(Filed December 12, 1896—Not to be reported.)

Construction of devise—A devise of land by a testator to his widow for life, and at her death to his son and heirs, but providing that the testator's other heirs, naming them, were to have an equal part out of the proceeds of said land, is not void for uncertainty, but vested in the son the legal title to the land, with power to sell and divide the proceeds with the other heirs, and the son having exercised this power the purchaser from him acquired a perfect title, and can not be disturbed by the other heirs.

Wm. Low for appellants.

Weller & Hays for appellees.

Appeal from Bell Circuit Court.

Opinion of the court by Judge White.

This litigation arises out of the construction of the will of Wm. Burns, sr., who died in the year 1879, and whose will was probated and admitted to record on January 15, 1879. This instrument being short, we copy the whole of it.

"I, Wm. Burns, of the county of Bell and State of Kentucky, being by proper mind, doth make, ordain and publish this my last will and testament, revoking all former wills heretofore made by me.

"1st. After payments of my debts and funeral expenses I give and bequeath unto my wife, Sarah Burns, my farm and all my land, including the mansion house and all other buildings, together with mill and all other personal property of every description whatsoever during her life, and after her death I give the land and mill, including all the buildings, to may son, Daniel Burns, and his heirs; but the other several heirs, to wit, Elizabeth Huchins, Mahala Huchins, Mary Fisher, Sarah Johnson, Jane Johnson, Catharine Burns, *Malinda* Burns, Vina Burns, Margaret Burns and Elizabeth Nunn, are to have an equal part out of the proceeds of said land and all of the personal property whatsoever, including all minerals on said land. I further give unto my daughters, Catharine Burns, Malinda Burns, Vina Burns, Margaret Burns and Elizabeth Nunn, all my

notes and accounts, to be equally divided between them at my death, should there be any owing to me at that time.

"Third and lastly, I appoint." * * * Signed and witnessed.

The estate of Wm. Burns was finally settled up, and all the personal property was used in the payment of his debts and nothing was left. Sarah Burns, the widow, died about the year 1880. The land devised by the will consisted of a tract of land, containing about 200 acres, on which was situated a mill. Daniel Burns claimed this land under the will of his father, and on the 11th day of November, 1879, sold and conveyed the same to appellant, Elijah Wilson, for the consideration of $500, which was paid. Said deed was recorded in the Bell county clerk's office in February, 1880, and on February 16, 1893, Wilson sold and conveyed this land to appellant Bailey for the consideration of $2,000, which was paid by Bailey to Wilson. Wilson took possession under his purchase and held the same until he sold in 1893 to Bailey. He has held the possession of the land ever since.

The appellants claim that by the will of Wm. Burns they are entitled to an equal interest in this land with appellant Bailey, and seeking to have a division of the same, and also asking a construction of the will of Wm. Burns.

The cause was submitted to the court, and the circuit judge adjudged that the will of Wm. Burns was void for uncertainty, and that the land descended to Daniel Burns and the appellees as children and heirs of Wm. Burns, and not by devise, but the land was held as coparceners or tenants in common by the heirs of Wm. Burns, and that Mary Fisher and the other appellees are entitled to one-eleventh of said land each, and from this judgment the appellants appeal to this court and ask a reversal.

We are of the opinion and so adjudge that the will of Wm. Burns vested in his son, Daniel Burns, the legal title to said land, with power to sell and divide the proceeds with the appellees, and having exercised the power by a sale and conveyance of the land the legal title became vested in Wilson, the vendee of Daniel Burns. Wilson sold and conveyed this land to appellant Bailey for a valuable consideration.

We feel satisfied that this was the intention of the testator, and it is a fair conclusion from the language of the will. If appellants have any right in this matter they must look to Daniel Burns, of which we do not express any opinion.

The case is, therefore, reversed and remanded, with directions to the court below to set aside the judgment, and for proceedings consistent with this opinion.

BAILEY V. KELLEY.

(Filed December 12, 1896—Not to be reported.)

Forcible entry.—A warrant sued out for a forcible entry may be amended before trial or issue joined.

Unthank & Montfort for appellant.

N. B. Hays and N. J. Weller for appellee.

Appeal from Harlan Circuit Court.

Opinion of the court by Judge White.

The sole question in this case, on the very imperfect record, is, can an amendment be made to a warrant sued out for a forcible entry.

Appellant, W. N. Bailey, sued out a writ of forcible entry, charging that appellee had forcibly entered upon his land, failing to state in the warrant that he (appellant) was, at the time of such entry, in the peaceable possession of said land so entered on by defendant. On the day of the trial in the country appellee moved the court to quash the warrant on account of this defect in it, which motion the county judge overruled and refused to quash the warrant. Appellant then moved the court to amend the warrant by inserting in its proper place the words "which was in the peaceable possession" of W. N. Bailey at the time, to which motion defendant objected, but the court overruled his objection and permitted the amendment to be made. Exception was taken by appellee in the court at the time. A trial seems to have been had, and a finding against the appellee, Kelly, although no verdict or judgment is copied in this record.

The judgment in the county was traversed to the circuit court. The warrant being lost, we suppose the judgment was lost with it. The appellee filed in the circuit court a copy of the original warrant as sued out, and moved the court to quash the warrant and dismiss the proceedings. The circuit court in its judgment finds the facts to be that the warrant so filed by appellee was a copy of the warrant on which the judgment was rendered in the country, with the exception that before the trial and judgment in the country the writ was permitted to be amended by the court over the objection of defendant by inserting the allegation that the plaintiff was, at the time of defendant's entry, in the peaceable possession of the premises, and the case was submitted on appellee's motion to quash the warrant, which the court sustained, and dismissed the proceeding at appellant's cost, from which judgment appellant has appealed to this court, and asks a reversal of the judgment of the lower court.

It is evident that the court was of the opinion that the warrant of forcible entry could not be amended before trial in the country. After issue joined and trial there could be no amendment made or permitted, but under our Code of Practice, section 134, great liberality is allowed in all pleadings and proceedings in the perfecting of causes of action imperfectly stated.

It would be, we think, exceedingly technical to say that this warrant could not be amended to make it conform to the form laid down and required by the Code of Practice, as it was offered before trial or issue joined, as in all probability it was a mere oversight in the officer that drew up the warrant. We are satisfied that the county judge, who permitted the warrant to be amended, did not err by permitting the amendment and trial. There is no complaint that appellee was taken by surprise on account of this amendment perfecting the warrant.

Wherefore, the judgment is reversed, with directions to set aside the order quashing the warrant and dismissing the proceedings and for further proceedings in accordance with this opinion.

DEHAVEN, &C. v. OGLESBY, &C.

(Filed December 15, 1896—Not to be reported.)

Construction of devise—Where a testator by the residuary clause of his will directed that the balance of his estate be divided into five shares, and one share allotted to each of his brothers and sisters, naming them, for life, and then pro-

vided that at the death of these life tenants, or any of them, the share of the one thus dying should be equally divided "between all my nieces and nephews, share and share alike; and if any of my nieces and nephews be then dead, leaving children or child, such issue are to take the share of the parent," a brother of the testator having died before the execution of the will, leaving children, who were also dead at the time the will was executed, the children of the nieces and nephews who had thus died take the shares which their parents would have taken if living, there being no distinction between the children of nieces and nephews who were dead when the will was executed and the children of those who died after that time, but before the termination of the life estate.

Stone & Sudduth, A. A. Hazelrigg and W. A. DeHaven for appellants.

Burtt & Taggart and W. O. Harris for appellees.

Appeal from Oldham Circuit Court.

Opinion of the court by Chief Justice Pryor.

This case is here upon a construction given by the court below on the residuary clause of the Hon. Samuel DeHaven's will. The clause reads: "The balance of my estate is to be divided into five equal shares, one share to be allotted to my sister, Mary Oglesby, for life; one share to my sister, Elizabeth Skinner, for life; one share to my sister, Jane Peyton, for life; one share to my sister, Mary Root, for life; and one share to my brother, Christopher DeHaven, for life. At the death of these life tenants, or any of them, then the share of the one thus dying is to be equally divided between *all* my nieces and nephews, share and share alike; *and if any of my nieces and nephews be then dead, leaving children or child, such issue are to take the share of the parent.*"

When the will was written two of the children, to wit, William Oglesby, who left a son Orville, and Mary Peyton, who left a daughter, Maud Baiseh, were dead. William Oglesby and Mary Peyton, one the nephew and the other the niece, are the children of Warren DeHaven, who was the brother of the devisor, and the nephew and niece, as well as their father, Warren DeHaven. All died before the testator and prior to the execution of the paper, and the appellees, the great nephew and niece of the testator, are claiming to take under the residuary devise, and the chancellor below adjudged them to take what their parents would have taken if living at the date of the publication of the will.

By the rule of the common law a devise to one who was at the time dead was void, and one living when the will was made, by dying before the testator, the devise went back to the estate, but in a *devise to a class*, as in this case, where one of the class died before the testator, his interest passed to those of the class surviving.

Several statutes have been enacted to cure what was a harsh rule of the common law, and, by a statute in force when this will was made, it was provided: "When a devise is made to several as a class, or as tenants in common or as joint tenants, and one or more of the devisees shall die before the testator, and another or others shall survive the testator, the share or shares of such as so die shall go to his or their descendants, if any; if none, to the surviving devisees unless a different disposition is made by the donor." (Kentucky Statutes, section 2064; see also Revised Statutes.)

This court, in reviewing the authorities based on the common-law rule as well as the statute referred to in the case of Chenault v. Che-

nault, 88 Ky., 83, held "where the testator desired the remainder of his estate to be equally divided *between the children of my brothers and sisters*, except in the case of my two living sisters, etc." One of the brothers was dead at the making of the will. It was held that the son took his father's interest in the estate under the statute, and, not only so, that such was the intention of the testator.

The entire body of testator's will shows a purpose to produce equality in the division of his estate, and the expression "if any of my nieces and nephews be then dead, leaving child or children, such issue are to take the share of the parent," shows clearly such an intion.

The devisor, it is true, first provided for his nephews and nieces, and then to their children, if any, should his nieces or nephews or such as might be dead at the termination of the life estate. The testator doubtless knew, as is contended by the appellant, that his brother Warren was dead, but also believed (a contention denied by the appellant) that the clause of the will giving an interest to the child of his nephews or nieces that might be dead when the remainder was to vest included the descendants of his brother Warren, as it is evident he was attempting to make no distinction in the distribution between the offspring of his brothers and sisters, and he no doubt had all of the descendants of his brothers and sisters in view when the will was written.

In Giles v. Giles, 8 Sim., 360, the testator devised the residue of his estate in trust for all his children living at the decease of his wife (who had a life estate) as tenants in common, and if any such children or child should be deceased before his wife, and should leave issue, then the children of such, his son or daughter, should be entitled to the portion of his son or daughter who might die before his wife, with a proviso, etc.

The testator, at the date of his will, had four sons and one daughter, and another daughter who was then dead, leaving children, and it was held that those children were among the objects of the devise. (Jarman on Wills, volume 3, page 634; *In re* Sibley's Trust, volume 3, page 635.)

The authorities, regardless of the statute, sustain the opinion below. It is now affirmed.

CHENAULT, TRUSTEE V. MADISON COUNTY COURT.

Filed December 16, 1896—Not to be reported.)

Allowance to trustee—Where negotiable bonds issued by a county for $250,000, the amount of a subscription to the capital stock of a railroad company, were placed by the county in the hands of a trustee to be safely kept by him until the conditions of the subscription had been complied with by the company, and one-half the bonds were delivered to the company upon the completion of a certain part of the road as provided by the contract, and the company failing to comply with the conditions entitling it to the other half, they were returned to the county court for cancellation, a judgment allowing the trustee two thousand dollars for his services is not flagrantly against the evidence and will not be reversed either upon the appeal of the trustee or the cross appeal of the county court.

Bennett & Chenault for appellant.

W. B. Smith for appellee.

Appeal from Madison Circuit Court.

Opinion of the court by Judge Hazelrigg.

In 1888 the county of Madison subscribed the sum of $250,000 to the capital stock of the Richmond, Nicholasville, Irvin & Beattyville Railroad Co. Negotiable bonds of the denomination of $1,000 each were issued and placed in the hands of the appellant, who had been appointed master by the county court, to be safely kept by him until the terms and conditions of the subscription had been complied with by the company.

These conditions were substantially as follows: When the company should complete its independent line of road of standard guage from a point in the line between the counties of Woodford and Jessamine, near Keene, across the county of Jessamine and the Kentucky river, at a point within one mile of the mouth of Paint Lick creek or Tate's creek, or some place between these two points, and thence across the county of Madison to the city of Richmond, and should place its line from Richmond to the Estill county line under contract, with a sufficient number of workmen upon same to guarantee its speedy completion, and should grade the roadbed to the Estill county line, and cause a train of passenger cars, drawn by a steam engine, to be run from the city of Richmond and across the counties of Madison and Jessamine, through Nicholasville, over its own road, to the Woodford county line, and thence over the Louisville Southern Railroad and its connections to the city of Louisville, then the trustee was to deliver to the company 125 of the bonds. The other 125 were to be delivered when the company completed its road from Richmond across the counties of Madison, Estill and Lee to a point on the Kentucky river at or near Beattyville, in Lee county, and caused a train of passenger cars to be run over this route.

The company was also required to complete its line to Richmond within two years and one-half from the date of the subscription, and to complete its road to its terminus at or near Beattyville within four years from the date of subscription.

The trustee was also to see that coupons for interest due before the company was entitled to the bonds should be detached and not delivered to the company. For the faithful performance of his duties the trustee was required to and did execute a bond in the sum of $500,000.

When the company had complied with the conditions upon which it was to receive the first 125 bonds, they were turned over to it, and not having complied with the conditions entitling it to the remaining bonds, they were returned to the county court for cancellation. The trustee faithfully performed all his duties, and the sole question before us is what should be his compensation. The county court, composed of the county judge and the magistrates, allowed him $750. He thereupon sued the county, claiming the sum of $7,500. The circuit judge allowed him $2,000. Both parties complain of this, the trustee by original appeal and the county by cross appeal. The trustee shows the reasonableness of his claim by a number of bankers, chancellors, master commissioners, railroad men and officials of trust companies, and this testimony is entitled to great weight.

The county also introduces an array of witnesses of excellent business qualifications and capacity for estimating the value of the service rendered, and these sustain the action of the county court in allowing only $750.

We have no reason to doubt that the learned trial judge—himself having much experience in matters of the kind here involved—gave due weight to all the proof, and we see no reason for saying that his finding is flagrantly against the testimony. A review of the proof would be unprofitable for any purpose.

Judgment on the original and on the cross appeal affirmed.

CAMPBELL, &C. V. EVERSOLE, &C.

(Filed December 17, 1896—Not to be reported.)

Dismissal of action—Right of defendants to rescission of order appointing receiver—In this action by appellees against appellants, widow and children of a decedent, to enforce a covenant of the decedent for conveyance of title to a tract of land, the action having, upon motion of appellees, been dismissed as to appellants, the court should have rescinded a previous order putting the land in posseesion of a receiver of court, as appellants were entitled to be placed in the same position they had in respect to the land when the action was commenced.

J. B. Marcum for appellants.

W. C. Eversole for appellees.

Appeal from Perry Court of Common Pleas.

Opinion of the court by Judge Lewis.

This is an action by appellees, heirs at law of J. C. Eversole, to enforce a covenant given, or alleged to have been given, by John E. Campbell, deceased husband and father of appellants, for conveyance of title to a tract of land; but, although the action was on motion of appellees dismissed as to appellants, the lower court refused to rescind a previous order appointing and putting the land in possession of a receiver of court.

Restoration of possession of land or other property, of which defendants have by order of court been deprived during the pendency of an action, would seem to necessarily follow an order dismissing that action; and as there is nothing in the record affording sufficient reason for making an exception to that rule in this case, we think the court ought to have made an order placing appellants in the same position they held in respect to the land when the action was commenced.

The judgment is, therefore, reversed for proceedings consistent with this opinion.

LUCAS' HEIRS V. LUCAS' ADM'R, &C.

(Filed December 17, 1896—Not to be reported.)

Trusts--Judgment sustained by evidence—Upon an issue as to whether all of a large number of heirs were entitled to share alike in a tract of land conveyed to only a portion of the heirs, the contention of appellants being that the grantees held the land in trust for certain of the heirs, the judgment of the chancellor to the effect that no trust existed is supported by the evidence.

Hill & Brock for appellants.

C. F. Burnam for appellees.

Appeal from Madison Circuit Court.

Opinion of the court by Judge Guffy.

It is substantially alleged in the petition in this action that Wade Lucas died unmarried, childless and intestate, and that John Lucas was duly qualified as his administrator, and that the personal estate of decedent was not sufficient to pay his debts; and that he died the owner of one undivided third of a tract of land in Madison county, which one-third was worth not more than $500.

It appears that there were then living twelve brothers and sisters of decedent, eight of whom united in the petition for settlement of the estate of decedent and for sale of the said land to pay the debts, and the residue, if any, to be divided between the brothers and sisters equally.

The appellants answered, and in substance alleged that William Lucas, the father of the female appellants as well as of the other heirs of Wade Lucas, died in Laurel county the equitable owner of a tract of land in Jackson county worth $2,000, but the legal title was in his vendor, and that the executors of said vendor conveyed the entire tract to Sarah Lucas and her heirs, widow of William Lucas and the mother of appellants, which deed was considered by all the parties hereto as conveying the land to Sarah Lucas and her children. Soon afterwards said Sarah Lucas and the children united in a deed to George Lucas for part of the said land then worth $600; that in the year 1881 all of the parties hereto and Sarah Lucas agreed that the remainder of the land might be sold, and that the money should be invested in another tract, which is the tract mentioned in the petition, and all of the parties did sell the same to Edwards & Hazelwood, and all united in the deeds, and that the consideration was $1,300, and was paid over to Samuel, James, George and Wade Lucas, who, for plaintiffs and defendants, did actually purchase said land in the petition mentioned for the sum of $1,500, and used the said $1,300, and took the deed to themselves instead of to all the parties aforesaid, and the said Sarah Lucas and others lived upon the land until her death in 1890.

It is also alleged that the said grantees in the deed took and held the title as trustee for all the said children. It is also claimed that decedent, Wade Lucas, only had one-thirteenth interest and one-third of one-thirteenth in said land. Appellants finally prayed for a sale of the land, and for a distribution of the proceeds in the ratio above indicated.

It is alleged in the reply of plaintiff that the land bought by their ancestor was not worth more than $1,000 or $1,200, but that before his death he sold about 100 acres of the land to J. W. Mullins, and that said William Lucas owed a considerable part of the purchase money on his purchase, and that his widow, Sarah Lucas, borrowed the money and paid it off; that the executors of William Lucas' vendor had power to convey the land, and did convey it to the widow, who conveyed to Mullins the 100 acres which he had bought, and that about 200 acres of the said tract was by order of court sold to pay William Lucas' debts, selling at $1.75 per acre; also recites the sale to George Lucas.

It is further alleged that all the heirs agreed to the sale to Edwards & Hazelwood, and also agreed that the money should be paid over to the boys in consideration that they would take care of the mother, and because by their labor the land had become valuable before it

could be sold. The reply also traverses the averments of the answer, showing appellants' right to recover. The rejoinder may be treated as a traverse of the reply in so far as it undertakes to affirmatively show a right to recover.

The court below adjudged in favor of the appellees, and appellants have appealed. The testimony conduces to show that the Jackson county tract of land purchased by William Lucas contained 640 acres,and was worth at that time about $1,000, and that he paid all the purchase price except $80 or $100, and that he sold 100 acres to Mullins; 200 acres were sold under judgment of court to pay debts of William Lucas, and 100 acres seem to have been given by general consent to George Lucas, thus leaving about 240 acres, which the widow conveyed to Edwards & Hazelwood, the children also signing and acknowledging the deeds, although not appearing as grantors, and part, if not all, the purchase price was used to pay for the land in contest.

It is claimed by appellants, and denied by appellees, that the title to the land should have been taken to all the heirs, or, at any rate, that they should all share alike in the land. Without reciting the evidence in detail, it is sufficient to say that the contention of appellants is not sustained by the proof.

It is not necessary to determine what interest the appellants had or might have obtained in the Jackson county land, the question in this case being whether or not the grantees in the deed to the Madison county land hold the same in trust for the other heirs of William Lucas, and as to that question we think that the judgment of the court below is sustained by the law and facts in this case, and that judgment is, therefore, affirmed.

BARKLEY v. BRADFORD, &C.

(Filed December 17, 1896.)

1. Introduction of testimony—Prejudicial error—This court will not reverse because of a violation of the provision of subsection 4 of section 606 of the Civil Code, that "no person shall testify for himself in chief in an ordinary action after introducing other testimony for himself in chief," if it appears that the party appealing has not been prejudiced.

In this case the plaintiff was not prejudiced by the action of the court in permitting the defendant to testify for himself in chief after reading to the jury the deposition of another witness, especially as the testimony of that witness was uncontradicted, and the jury would have been compelled to find as they did, even if his testimony had not been supplemented by that of the defendant.

2. Evidence---Upon an issue as to whether defendants were sureties in the note sued on or were jointly bound as principals with another obligor, whose liability as principal was conceded, statements made by that other obligor to the payee were not competent as evidence, the statements being made in the absence of defendants, and the party making them being interested to fix the liability of defendants as principals instead of sureties.

Thomas H. Hines, Wm. H. Holt and George Doniphan for appellant.

H. C. Weaver for appellees.

Appeal from Bracken Circuit Court.

Opinion of the court by Judge Lewis.

The only question in this case is whether W. J. Irwin and S. W. Bradford were merely sureties of Geo. L. Bradford in the note sued on, for if they were the statute of limitation bars a recovery against them; and as the jury found in their favor under proper instructions of the court the only inquiry is whether, as contended, there was error of court in respect to admission or exclusion of testimony.

It appears Geo. L. Bradford, who was dead when the action was tried, gave his deposition, in which we think he stated distinctly they were sureties. But it is argued that the court erred in permitting S. W. Bradford, one of the defendants, to testify after having offered and caused read in his own behalf the deposition of Geo. L. Bradford.

The Civil Code, subsection 4, section 606, provides that "no person shall testify for himself in chief in an ordinary action after introducing other testimony for himself in chief, nor in an equitable action after taking other testimony for himself in chief."

But that is a rule of practice, not of right, and if a party appealing has not been prejudiced by violation of it this court would not, upon that ground alone, reverse a judgment in other respects regular and proper.

Appellee S. W. Bradford testified only to a fact that Geo. L. Bradford had, before the trial, stated in his deposition was true, and we do not see how he obtained an undue advantage, or appellant was prejudiced by reading the deposition before instead of after the party himself testified; for Geo. L. Bradford being unimpeached and uncontradicted, the jury would have been bound to find as they did, even if his testimony had not been supplemented by that of S. W. Bradford.

We think it was not competent for appellant, payee, to testify in regard to statements made to him by Geo. L. Bradford in regard to the attitude of Irwin, then dead, and S. W. Bradford on the note, and in the absence of both of them, for it was to the interest of Geo. L. Bradford to fix the liability of Irwin and S. W. Bradford as principals instead of sureties, whereby his own responsibility would be lessened, and competency of the testimony can certainly not be based upon the fact that Geo. L. Bradford was agent of S. W. Bradford and Irvin, for the plain reason that fact had to be either assumed or else shown by his statements without their presence.

Judgment affirmed.

EVENING POST CO. v. HUNTER.

(Filed December 18, 1896—Not to be reported.)

1. Libel—It is libelous to publish in a city newspaper concerning a married woman that, having come to the city to visit friends, she "is mysteriously missing, and the police have been asked to search for her," as such a publication tends to injure her good name and reputation.

2. Same—Plea in mitigation of damages—In an action for libel, based upon such a publication, the defendant company had the right to plead, in mitigation of damages, that it made the publication in good faith upon information furnished by the police, and as a matter of kindness to the plaintiff and her friends, in order that she might be quickly found and the anxiety of her friends relieved, and while the error of the court striking such allegations from defendant's answer might have been cured if defendant had been permitted to prove the facts alleged in mitigation of damages, yet, as the court refused to allow that to be done, a judgment in favor of plaintiff must be reversed.

George S. Fulton and John A. Fulton for appellant.

Nat W. Halstead for appellee.

Appeal from Nelson Circuit Court.

Opinion of the court by Judge White.

The appellee, Laura Hunter, filed her petition in the circuit court of Nelson county, in which she stated she was the wife of Geo. W. Hunter, and that she had resided with her husband for a number of years in Bardstown, Nelson county, Kentucky, and that the defendant, the Evening Post Co., is a corporation organized under the laws of the State of Kentucky, with the right to sue and be sued, and owns and publishes in the city of Louisville a certain newspaper, called the *Evening Post*, which circulates throughout this State and other States and counties.

The plaintiff avers that on the 15th day of October, 1894, defendants published of and concerning her in its said newspaper, which is circulated throughout said county and State of Kentucky, and in other States and counties, a certain libel as follows:

"MYSTERIOUSLY MISSING.

"Laura Hunter, of Bardstown, has disappeared from her sister's home on First street.

"Laura Hunter, who came here from Bardstown several days ago, and has been staying with her sister at 1023 First street, is mysteriously missing, and the police have been asked to search for her."

Defendant thereby meaning that plaintiff had committed some crime or other disgraceful act which was injurious to her fair name, and plaintiff was injured in her reputation, and for which she sues. To this petition the defendant demurred, and the court overruled the demurrer. Defendant excepted. The court properly overruled the demurrer to the petition. We think the publication of this article about a married woman tends to injure her good name and reputation, for which an action will lie.

The defendant filed his answer, in which he admitted the publication of the matter complained of, but denies that same was maliciously done, defendant averring further that it was the owner of a daily newspaper, being the same paper in which the matter complained of was published, and published it as a part of its duty to the public and its patrons as a chronicler of current events, etc., and particularly is it one of the functions of said paper and its duties to the public, as is usual and customary with all newspapers, to ascertain and publish an account or notice of all persons who may be lost or abducted or misteriously missing, in order that the friends and relatives of such persons, the public and the police authorities, may be advised of such loss, abduction or disappearence, and prompt measures adopted for the restoration of such persons to their relatives and friends; and in pursuance of such policy and purpose aforesaid defendant is always promptly notified by the police authorities of the city of Louisville when such loss, abduction or disappearance occurs, that public notice thereof may be given in the columns of its paper; says that on the day of the publication complained of in the petition it was informed by the aforesaid authorities that one Laura Hunter, of Bardstown, was lost and missing from her sister's home at 1023 First street in said city, and that the police had been asked to search for her, and, in good faith believing

same to be true, it published said item in persuance of its policy and duty and as a matter of kindness to said Laura Hunter, her friends and relatives, that the information of her loss or abduction might be widely and quickly disseminated, and she be speedily restored to her friends and relatives and their anxiety and distress of mind concerning her be quickly relieved, and said publication was made for no other purpose and in no other spirit. All of this matter as set out was, on motion of plaintiff, stricken out of the answer, and to this defendant excepted. Defendant's attorney thereupon prepared an amended answer, setting up the matter so stricken from the original answer, and asked to file the same in mitigation of damages and plaintiff objected, and the court refused to permit the amendment to be filed, and defendant excepted to the rulings of the court.

We are of opinion that this ruling of the court below in striking out the matter set forth in the answer and refusing to let the amendment be filed was error. Parties, when sued for publishing a libel, may admit the publication and plead any matter in mitigation of damages and to rebut the presumption of malice. The defendant, by its managing editor, offered to prove the matter set up in the amended answer, being the part of the answer stricken, and to this plaintiff objected, and the court sustained the objection. The error might have been corrected if defendant had been permitted to prove the facts as set up in mitigation of damage. The defendant offered to prove these facts on the trial, and the court refused to let the same be proven, and defendant took the proper exception.

For these reasons the judgment of the court below is reversed, with directions to grant appellant a new trial, and for further proceedings consistent with this opinion.

BONNER V. COMMONWEALTH.

(Filed December 19, 1896—Not to be reported.)

Instruction as to self-defense—Upon the trial of appellant for murder the court, in instructing the jury as to what would constitute such a bringing on of the danger by defendant as would deprive him of the benefit of the law of self-defense, erred in singling out and making too prominent the facts proved on the trial, and also in not requiring the jury to believe "to the exclusion of a reasonable doubt" that those facts existed, thus authorizing the jury in a certain state of case to convict upon a mere preponderance of the evidence.

George Denny, jr. for apppellant.

W. S. Taylor for appellee.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge White.

The grand jurors of Fayette county indicted the appellant, Ed. Bonner, charging him with the crime of having killed and murdered one Newton Lynch, in the county of Fayette, in July, 1896, by shooting and wounding said Lynch with a pistol, from which shooting and wounding the said Lynch died in a day thereafter, and at the September term, 1896, of said court defendant was tried and convicted of the offense of voluntary manslaughter and sentenced to be confined in the penitentiary for eight years, and, having filed

his reasons and moved the court for a new trial and the court having overruled his motion for a new trial, he has appealed to this court and asks a reversal, and complains that the evidence was not sufficient to sustain the verdict.

From an examination of the evidence, as appears in the bill of exceptions, we think that the evidence is amply sufficient to sustain and uphold the verdict, as this court can not reverse on that ground alone unless there is no evidence to support the verdict.

Defendant also objected and excepted to the instructions given by the court, and assumes as a reason because the court selected particular portions of the testimony, and directed the attention of the jury to particular evidence given in the case.

The instruction to which defendant refers was numbered 2. The court also gave the instructions Nos. 1, 3, 4 and 5, but we think these instructions (1, 3, 4 and 5) were correct and presented the law, and were not prejudicial to the rights of the accused. No objection to either of these instructions has been pointed out by the able counsel for defendant.

Instruction No. 2 is as follows: "If the defendant did shoot and kill Newton Lynch, but at the time he did so the defendant believed, and had reasonable grounds to believe, that he was then and there in danger of death or of suffering some serious bodily harm at the hands of said Lynch, and it was necessary, or to the defendant reasonably appeared to be necessary, to shoot said Lynch to avert the danger, or what reasonably appeared to the defendant to be such danger, this was a shooting and killing in self-defense, unless the defendant by his own wrongs, as is hereinafter explained in this instruction, brought about such danger, or what appeared to him to be such danger. If the defendant armed himself with a deadly weapon, and sought out Newton Lynch with a purpose of having a hostile meeting with said Lynch; and if defendant, with such purpose, went to the place where said Lynch was, and, in the presence and hearing of said Lynch, intentionally menaced said Lynch, with present danger to him at the hands of the defendant; or if the defendant, in the presence or hearing of said Lynch, used said language to said Lynch as was culculated to and was designed by the defendant to cause said Lynch to assault the defendant; and if said Lynch, upon said menace, or the use of said language, if said menace was made or said language was used, did immediately assault the defendant, the danger arising from such assault was brought about by defendant's own wrong, and defendant had no right to shoot the deceased to repel such assault until the defendant had in good faith attempted to retire from the conflict, but if danger did arise to defendant through his own wrong, as above explained, and the defendant attempted in good faith to abandon or avoid any conflict with the deceased, and after said attempted danger existed or arose to defendant, or he reasonably believed that such danger existed or had arisen, the defendant had the same right to defend himself against such danger, or what he believed to be such danger, as if he had been guilty of no fault or wrong."

Proper exceptions were taken to this instruction by defendant. This instruction is subject to two serious objections:

1st. The circuit judge made too prominent the facts that were attempted, or were actually proven on the trial of the case in the construction of the hypothecated case, to explain a state of facts that would deprive defendant of the law of self-defense.

2d. The circuit judge failed to tell the jury that the facts recited,

there took from defendant his right of self-defense, must be proven beyond all reasonable doubt.

And by this failure the jury was only required to believe from the weight of evidence that the accused brought on the difficulty. They were left to act upon a preponderance of testimony, and could find that defendant did all the acts set forth in said instruction, without believing it to the exclusion of a reasonable doubt, although it was a matter upon which his guilt or innocence in a certain state of case depended. (Allen v. Commonwealth, 86 Ky., 642; Scott v. Commonwealth, 16 KY. LAW REP., 702.)

This instruction was prejudicial to defendant, and should not have been given.

Wherefore, the judgment is reversed and cause remanded, with directions to the circuit court to set aside the verdict and judgment and award the defendant a new trial.

LOUISVILLE & NASHVILLE R. R. CO. v. MCELROY.

(Filed November 20, 1896.)

Compromise—Rescission for fraud—Necessity for tender of amount received—One who has accepted a certain sum in settlement of an unliquidated claim for damages can not pursue his remedy for the damages on the ground that the settlement was procured by fraud, or is not binding upon him, unless he tenders to the defendant the amount which he received under the contract of settlement which he seeks to rescind. And the plaintiff in this case having failed to make such a tender the court should have given a peremptory instruction to find for defendant.

H. W. Bruce, W. J. Lisle, Thompson & McChord and B. D. Warfield for appellant.

Lafe S. Pence for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Paynter.

This action was brought by McElroy for injuries which he received on the 10th day of May, 1893, while a section hand in the employ of appellant. James Roller, as foreman, was in charge of the section men.

While deepening a ditch, near Nelsonville, the beam to the plow, which was operated by an engine, broke, making it necessary to secure another beam; to secure which the foreman, with McElroy and Lev. Shreve, proceeded with an engine, operated by its fireman, to a point where there was a switch cross-tie, proposed to be used as a plow beam. It was placed on the pilot of the engine to be carried to the point where needed. It was a square piece of timber, about sixteen feet long. Roller stood near the middle of the pilot of the engine, while McElroy stood at one side and Shreve at the other to steady the timber. Roller's face and McElroy's and Shreve's backs were to the point to which the engine was being run. While the engine was running six to eight miles an hour the end of the timber struck a switch stand. McElroy was either thrown from the engine or jumped off in the effort to save himself from his peril. At any rate he fell in front of the engine, which passed over and crushed his ankle, necessitating the amputation of his leg. The timber lacked only about one inch of clearing the switch stand.

The accident, as stated, occurred on the 10th day of May, 1893, and the amputation took place on that night. On the 12th day of May, 1893, the appellant made a compromise and settlement of the claim which is the basis of the action. The receipt which appellee gave is in language and figures as follows, to wit:

"Received of the Louisville and Nashville Railroad Co. seven hundred dollars ($700), in full settlement or all claims and demands on account of injuries to the person and damage to and loss of property sustained by me at or near Nelsonville, Ky., on the 10th day of May, 1893, while a section laborer on said company's railroad.

"Witness my hand at Lebanon, Ky., this 12th day of May, 1893.

His
"ALFRED X MCELROY."
Mark.

"Witness:
His
"ALFONSO X CHANDLER,
Mark,
"B. D. WARFIELD,
"JOHN MCCHORD."

The appellant pleaded the compromise and settlement of the appellee's claim for damages, and further that he has never tendered or offered to pay back the $700 which he received.

The appellee seeks to avoid the compromise and settlement. He alleges that, shortly after receiving the injuries set out in his petition and before he had recovered from the shock resulting from the injuries and amputation of his leg, and while he was in great agony, both of mind and body, when his system was filled with opiates to such an extent that he was not conscious of what he was doing and not able, mentally, to fully understand the purport of the contract, after repeated importunities by appellant's agents, he signed the contract copied above; that he did not understand its contents; that appellant's agents represented to him that the company was not liable to him for the injuries he had sustained; that he would not get anything unless he signed the contract. In short, it is alleged that the company took advantage of his physical and mental condition and, by fraud and false representations, procured the paper to be signed by him and induced him to accept the $700; that the contract was signed by him "under a mistake of law and of fact as to his legal rights, and the money was so received" by him.

The foregoing is sufficient of the substance of the reply to show the grounds upon which he seeks to disregard the compromise and maintain his suit on the original cause of action.

The company denied all the allegations which tended to show the compromise was obtained by fraudulent conduct or that the plaintiff did not have the mental capacity to make the compromise, etc.

In fact the decided weight of the testimony shows that the plaintiff fully understood that he was receiving the $700 in full for his claim for personal injuries, and fully understood the nature and effect of the transaction. We will, however, assume, for the purposes of the further consideration of the case, that the company took advantage of plaintiff's physical and mental condition and fraudulently obtained his signature to the paper, and had him accept the $700 in compromise of his claim for personal injuries.

The money which he received was placed in bank to his credit by the man who was waiting on him. There is no claim that he was not in his usual mental condition when he afterward drew the money and spent it. There is not the slightest evidence tending to prove

that the money was paid for anything except in compromise of claims for personal injuries.

By this action the plaintiff seeks a disaffirmance of the contract of compromise, and at the same time fails to repay or tender the money he received to effect a restoration of the *status quo*.

Fraud may vitiate or avoid all contracts. Contracts obtained by fraud are voidable at the election of the defrauded party. (Bigelow on Fraud, pages 73–4.)

The general rule is that when one has received money or property under a contract that is voidable for fraud or other reason, he must repay the money or tender the property before he is entitled to have the contract rescinded. There are exceptions to this rule.

There are cases where a court of equity would rescind a contract without a repayment or tender by the injured party. For instance, a case which involved the sale of property, wherein the court had control over the property and the distribution of its proceeds. In such cases the court can determine what are the rights and equities of the parties, and adjust them.

This is not a case where this court has any control over the money which the company paid the plaintiff, nor of any property belonging to the plaintiff, out of which the court could enforce a repayment of it. Either the company paid the money to avoid the risk of a greater damage being awarded against it in the event of litigation, or it paid the money in the belief that the expense of the litigation, though it defeated a recovery, would amount to as much or more than the sum paid. It sought to buy its immunity from damages and expense of having the question of its liability determined.

It is not reasonable to suppose that the company would have paid the money if the right of the plaintiff still existed to maintain its action upon the original cause of action. There is no pretense that the company paid its money as a credit on its supposed liability. It paid it to extinguish its liability, if such existed.

If upon the trial of the case the verdict had been for the company because the injury was not the result of the gross negligence of the foreman, or the party operating the engine, then the plainitff would have the money and the company the expense of the litigation which it sought to avoid, and the court powerless to enforce a return of the money.

This statement illustrates the correctness of the well-recognized rule which required a repayment or a tender of the money before bringing the action.

We think the reasoning of the learned judge who delivered the opinion in Vandervelden v. Chicago & N. W. Ry. Co., 61 Fed. Rep., 54, is unanswerable, and it sustains the conclusion we have reached.

We also cite the case of the East Tennessee, Virginia & Georgia Ry. Co. v. Hayes, 88 Ga., 588.

We will briefly review some of the cases cited to sustain the opposing view.

In Bliss v. New York, &c., R. R., 160 Mass., 456, the injury was to the clothing and to the person of the plaintiff. The receipt taken by the company covered the injuries to his clothing and to his person. It was claimed the receipt was procured by fraud, and that by the terms of the compromise only the injuries to his clothing paid for. The action was for the injury to his person. The court held that if the plaintiff was induced to execute the receipt by fraud, releasing for both injuries upon being paid a small sum which was understood by him to be compensation merely for the injuries to clothing, he need not return the money so received before bringing

an action for personal injuries. The claim for injuries to clothing alone was compromised, and the money paid to cover damages to it. The court was of opinion that it was not necessary to return the money so received before bringing a suit for injuries to the person, for, as a matter of fact, nothing had been paid to compromise that claim.

The inference to be drawn from the opinion is that the court would have decided that a repayment would have been necessary before suit had the money been paid to compromise the claim for injury to the person.

In Stewart v. Chicago R. R. Co., &c., 141 Ind., 61, the court said: "If as alleged the money received was a previous donation and in no way supplied the consideration of the release, there was no duty to return it any more than to have returned previous earnings."

In that case the plaintiff claimed the money was for certain work, while the company claim it was paid in settlement of claims for personal injury.

In Stone v. Chicago & West Mich. Ry. Co., 66 Mich., 83, there was an offer to return the money and duebill which the party had received on the compromise of the claim for the injuries for which the suit was brought.

In the case of the Union Pacific Railway v. Harris, 158 U. S., 331, the railway company claimed the money was paid in compromise of all matters, while the plaintiff claimed that it was for "expenses of sickness and loss of time for two weeks."

The trial court instructed the jury that if they accepted "plaintiff's account of the negotiation between them as against that of the agent of the railway company, then it would appear that the plaintiff at least did not understand the subject-matter of the negotiation," etc.

The trial court further told the jury that "if the settlement was made with a full understanding of the rights of the parties, the plaintiff then being in a state of health to enable him to transact such business, and upon that you may say the settlement is binding upon the plaintiff," etc.

Chief Justice Fuller, in delivering the opinion, and without quoting from the instruction on the question of tender, said: "And the court further charged the jury that if they made an allowance to the plaintiff they should deduct from it what he had received. The question of the necessity of a tender of the money received before suit is not discussed in the opinion. We can easily see if the money was paid to cover expenses of illness and loss of time why a tender is not necessary to maintain an action for personal injuries, but we are unable to understand, if it was so paid, why the court should have directed it credited on the allowance to the plaintiff."

O'Brien v. Chicago, M. & St. P. Ry. Co., 89 Iowa, 644, and Railway Co. v. Doyle, 18 Kansas, 64, appear to support the contention of the plaintiff.

In the Kansas case the court said: "He signed a writing which was voidable for want of capacity on his part to execute. Not until the suit was *tried* was he fully informed of the circumstances under which he made his mark thereto, and *hence* we hold that under the facts stated in such reply it was not necessary for him to tender the money back."

The court based its decision on the ground that the plaintiff was not fully informed of the circumstances under which he made his mark to the writing. Without stopping to discuss whether or not the court in our opinion was justified in making the exception to the general rule requiring a tender, it is sufficient to say that in this case

the plaintiff knew the circumstances under which the writing was executed, and that the money was paid alone for the injury to his person.

Another case relied upon by plaintiff is Mullen v. Old Colony R. R. Co., 127 Mass., 86. This case fully sustains the conclusion which we have reached in this case. The receipt which the company's agent procured from the plaintiff covered personal injuries. In speaking of the money paid the court said: "If it was paid for the support of the plaintiff till his case should be tried or for a year as a gratuity it is clear that the defendant can not insist on repayment."

The court also said: "And if, after accepting a certain sum in settlement of an unliquidated claim for damages under a contract, one seeks to pursue his remedy for the damages on the ground that the settlement was procured by fraud, or is not binding upon him, he must first repay the amount received (Brown v. Hartford Ins. Co., 117 Mass., 479). The principle on which these decisions rest is just, but it applies to those cases only where that which was received and which must be returned was the consideration of the contract or settlement which the receiver intended to make and understood that he was making, and which he seeks to avoid by reason of fraudulent practices of the other party which led him to agree to its terms. It does not apply to cases where a party holds out that he gives the consideration for one thing and by fraud obtains an agreement that it was given for another thing."

The court, upon the facts, should have told the jury to find for the defendant.

We have not deemed it necessary to consider the questions raised as to other instructions which the court gave or refused to give the jury.

The judgment is reversed, with directions to grant the appellant a new trial and for proceedings consistent with this opinion.

LOUISVILLE & NASHVILLE R. R. CO. V. SHREVE.

(Filed November 20, 1896—Not to be reported.)

Compromise—Rescission for fraud—Necessity for tender of amount received—In this action to recover damages for personal injuries, the plaintiff having failed to tender the defendant the amount received by him in settlement of the claim, which settlement he alleged was procured by fraud, the court should have sustained a motion made by defendant for judgment on the pleadings after a verdict for plaintiff had been returned by the jury.

H. W. Bruce, W. J. Lisle, B. D. Warfield and Thompson & McChord for appellant.

Lafe S. Pence for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Paynter.

Shreve was injured at the same time and under the same circumstances as McElroy.

The compromise was alleged to have been made under the same kind of circumstances as those under which the McElroy compromise was made.

The facts and conclusions of the court are fully stated in the opinion

of the court this day delivered in the case of the L. & N. R. R. Co. v. McElroy (*supra* 730).

Shreve failed to repay or tender the money he received on the compromise. This is pleaded and not denied. In this case the defendant, after the verdict, moved for judgment on the pleadings. This motion should have been sustained.

The case is reversed, with directions that the court sustain the motion.

LOUISVILLE & NASHVILLE R. R. CO. v. BELL.

(Filed December 2, 1896.)

1. *Railroads—Passenger on freight train—Evidence*—In this action against a railroad company to recover damages for personal injuries received by plaintiff while a passenger on one of defendant's freight trains the court did not err in permitting plaintiff to testify that "he did not see very well," as the connection in which the statement was made shows that it was not intended to convey the impression to the jury that plaintiff's vision was materially defective except as it may have been incidentally affected by the darkness surrounding him at the time and place he was speaking of in his testimony.

2. *Same*—It was not competent for the plaintiff to prove that there had been on the route a quarrel between other passengers in the caboose and the trainmen, as such testimony, even if it could be competent in any event to show malice, was not competent in this case, because there was nothing to show that the trainmen who had the qurrrel had anything to do with the switching of the cars which resulted in the injury to plaintiff.

3. *While a passenger on a freight train assumes the additional risk*, if any, in excess of the risk of traveling on a passenger train, the carrier owes to a passenger on one of its freight trains as high a degree of care as if he were riding on a passenger train.

4. *Passenger carriers can not by contract relieve themselves from liability* for personal injuries to passengers caused by the negligence of the carriers or their servants, such contracts being against public policy.

5. *A passenger on a freight train under a contract for transporting his stock*, for which he has paid the freight charges, must be regarded as carried for hire.

6. *Punitive damages*—It was error to give an instruction authorizing the jury to award punitive damages if they believed the acts of defendant's employes were willful or malicious, there being no competent evidence to justify a finding upon either of those grounds.

J. A. Mitchell, H. W. Bruce and Wm. Lindsay for appellant.

S. M. Payton and Thomas H. Hines for appellee.

Appeal from Hart Circuit Court.

Opinion of the court by Judge Landes.

In October, 1894, the appellee shipped over the road of appellant company a car load of stock from Horse Cave, in Hart county, to Louisville.

By the stipulations of the contract of transportation the appellee undertook to load and unload the animals at his own risk, and feed, water and attend to them at his own expense and risk while they were in the stockyards of the company awaiting shipment, and while in the cars or at feeding or transfer points, or where they might be unloaded for any purpose. As a part of the contract the appellee was furnished transportation by the company for himself to enable him to accompany his stock to the point of destination without any

charge therefor over what he paid for carrying his stock, and executed what was termed a "release," recited to be "in consideration of the free passage" granted him by the company, whereby he agreed that the company should not be liable to him "for injury or damage of any kind suffered by us while in charge of said animals."

The train of cars reached South Louisville about 1 o'clock A. M. of the day after the shipment, the appellee and other stockmen being carried in the caboose that was attached to the train. At that point the caboose was detached, and during the necessary switching and transferring of the freight cars several of them were run back to the caboose for the purpose of attaching it again, but they struck the caboose with considerable force and knocked it back, and the shock produced by the concussion caused the appellee, who was on his feet, to be thrown against the front end and door of the caboose, breaking the glass that was in the door, injuring and bruising him slightly about the shoulder, and causing a painful and serious cut on one of his wrists, which came in contact with the broken glass. To recover damages for his injuries from the appellant company this action was brought by the appellee.

The ground upon which the claim for damage is based was alleged in the petition to be that in switching the freight cars the appellant company, its agents and employes "did unlawfully, willfully, maliciously, negligently and carelessly * * * run a number of heavy-laden freight cars with great force and violence against" the caboose, by reason of which the appellee "was precipitated and thrown from his position against the door and door-post," whereby the injuries were inflicted on the appellee. Issue was joined by traverse and plea of release and of contributory negligence. The case was submitted to a jury, and the result was a verdict and judgment against the appellant company for $1,000 damages. A motion for a new trial was made and overruled, and the case is before us by appeal from that judgment.

It is alleged for appellant as error that the court admitted incompetent testimony to be introduced in behalf of the appellees. First, with reference to the appellee's capacity to sue, and second with reference to some trouble between the trainmen and stockmen in the caboose before the train reached South Louisville.

1st. In his testimony the appellee stated in substance that when the caboose was detached at South Louisville, and while the cars were being switched, one of the stockmen went out of the caboose to look after his stock, and that he and other stockmen started to follow him for the same purpose, but when they got to the door they concluded not to get off and turned back. In giving his reasons for not getting off he stated that "he did not see very well," and it was dark and he did not feel safe in going out. Objection was made to his statement that he "did not see very well," but the objection was overruled.

We are not able to see that this statement was incompetent or that it was either prejudicial in any degree to the appellant or beneficial to the appellee. In the connection in which the statement was made it does not appear to have been intended to convey the impression to the jury that his vision was materially defective, except as it may have been incidentally affected by the darkness surrounding him at the time and place he was speaking of in his testimony. There was no error, therefore, in permitting this statement to go to the jury.

2d. Over the objection of counsel for the appellant the court permitted several witnesses to testify that there was a quarrel between some of the trainmen and stockmen (not the appellee) in the caboose

on the route between Horse Cave and South Louisville. This testimony was incompetent and prejudicial to the appellant. It was not a part of the *res gestæ*, and the petition did not seek to recover damages from the company for alleged insults or abuse or mistreatment of the appellee on the part of the servants of the company. The object of such testimony was doubtless to furnish the ground for punitive damages, and it was likely to influence the jury in that direction to find that the servants of the appellant company were actuated by malice, and that the cars were handled by them in switching with the intent and purpose of injuring the stockmen in the caboose. But if this kind of testimony were competent at all, or generally in cases like this there was no testimony here connecting the servants of the appellant company, who handled the locomotive and cars in switching, with the alleged quarrel with the stockmen in the caboose. In addition to this nothing occurred at South Louisville, from the testimony of the witnesses, that tended to show that those who handled the locomotive and cars in switching willfully or intentionally caused the concussion or shock by which the appellee was injured.

The court below erred in admitting this testimony, and the judgment must be reversed on account of this error.

Since the case will have to be retried, it is proper for us to pass upon some of the questions raised on the exceptions to the instructions given to the jury at the instance of plaintiff's counsel.

In the first instruction the court submitted to the jury the want of ordinary care on the part of the defendant company's servants in handling the cars while switching, together with the absence of contributory negligence on the part of the defendant, as a basis upon which the defendant might be held liable for the injuries sustained by the plaintiff.

The law in this regard was correctly and fairly stated by the court, but the court also told the jury in this instruction that, notwithstanding the release executed by the plaintiff and endorsed in the contract for transportation which has been referred to, "the defendant, its agents and employes in charge and conduct of the train were bound to the exercise of ordinary care and precaution to carry and protect him against injury."

This, we hold, was proper, and was a correct statement of the law so far as it was intended to declare that the defendant was not released, by the term of the "release" executed by plaintiff, from liability to plaintiff for injuries that he may have suffered by reason or in consequence of the negligence of the servants of the defendant company.

The doctrine has been heretofore frequently recognized by this court that, although common carriers may by special contract limit their common-law responsibility as insurers of property delivered to them for carriage, they can not relieve themselves by contract from liability for the loss of or injury to property resulting from their own negligence or that of their servants or employes. (L., C. & L. R. R. Co. v. Hedges, 9 Bush, 645; Rhodes v. L. & N. R. R. Co., *Ib.*, 691.)

Such contracts are held to be against public policy, and we hold that the same doctrine applies to contracts which are intended to relieve common carriers from liability for injuries sustained by passengers while being carried by them either on freight or passenger trains. And while a passenger on a freight train assumes the additional risk, if any, in excess of the risk of traveling in a passenger train, the carrier owes to a passenger on one of its freight trains

as high a degree of care as if he were riding on a passenger train. (Ohio Valley Ry. Co. v. Watson's adm'r, 93 Ky., 654.)

In this case the plaintiff, having been a passenger on a freight train under a contract for transporting his stock, for which he paid the freight charges, must be considered to have been carried for hire. The doctrine here recognized, that carriers of passengers can not by contract release themselves from liability for personal injuries sustained by their passengers, by reason of the negligence of themselves or their employes or servants, is supported both by principle and authority. (Missouri Pacific Ry. Co. v. Ivey and others, 37 Am. & Eng. Railway Cases, 47; Carroll v. M. P. Ry. Co., 26 *Ib.*, 268; O. & M. Rv. Co. v. Nickless, 71 Ind., 271; Graham v. Pacific Ry. Co., 66 Mo., 536; N. Y. Cent. Ry. Co. v. Lockwood, 17 Wall., 357.)

The second instruction is objectionable because it submits the question of punitive damages in part on the alleged willful and malicious acts of the defendant company's employes when there was no competent evidence to justify a finding upon either of those grounds. The same may be said of the third instruction.

In the fourth instruction it was for the same reason improper to refer to the alleged willful and malicious acts of the defendant's servants.

The fifth instruction is not objectionable, as it was substantially the same as the first instruction with reference to the negligence of the defendant and the contributory negligence of the plaintiff.

For the reasons indicated the judgment is reversed and the cause remanded, with directions to set aside the verdict and award the appellant a new trial and for proceedings consistent with this opinion.

ILLINOIS CENTRAL R. R. CO. V. MIZELL.

(Filed December 5, 1896.)

1. Railroads—Failure to give signal for crossing—Proximate cause—The failure of the servants in charge of a railroad train to blow the whistle for a crossing was the proximate cause of the injury to a traveler on the highway who in ignorance of the approach of the train attempted to make the crossing and was thrown from her horse, which was frightened by the train.

2. Same—Pleading—It was not necessary for the plaintiff to plead that the failure to give the signal was in violation of law, the statute requiring the signal to be given being a general one, and, therefore, not required to be specially pleaded.

3. Contributory negligence—The fact that the plaintiff did not come to a full stop to listen for the train, but brought her horse to a slow walk in order to listen, was not *per se* contributory negligence.

4. Same—The question of contributory negligence was properly submitted by the instructions.

5. A verdict for $2,000 for the injuries received and suffering and loss of time caused thereby was not excessive.

George L. Husbands for appellant.

J. M. Brummal & Son and W. G. Bullitt for appellee.

Appeal from Hickman Circuit Court.

Opinion of the court by Judge DuRelle.

The appellee was riding on horseback along a public highway which crossed the railroad of appellant. At the intersection the

railroad and the highway as well passed through cuts which prevented persons on the highway from seeing approaching trains until they were within a few feet of the rails.

According to her statements she was riding very slowly, and was listening for the signal by bell or whistle of the approach of a train. She heard no signal and did not see the train until she was on the track at the crossing, and the train, which was a freight train and going at a rapid rate, was, according to her statements, within fifteen or twenty feet from her when she saw it. Her horse became frightened at the train, ran with her some hundred yards or more, and in turning a curve in the road threw her and dragged her a short distance. She was badly bruised by the fall, and her shoulder was injured to such an extent that at the time of the trial it was an inch and a half lower than the other shoulder. By reason of the injury and her subsequent confinement to her room she was unable to secure a position as a teacher, for which she was at the time an applicant.

For the injuries received and the suffering and loss of time caused thereby, she brought suit against the appellant and the jury awarded her $2,000. The basis of her complaint is that the alleged failure to give the signal required by law for the crossing was the cause of her attempting to make the crossing and of her horse being frightened and the consequent injuries.

It is not pleaded that the failure to give the signal was in violation of law, and we do not think it was necessary to so plead it. The statute is a general one, and is not required to be specially pleaded.

The principal ground relied on by appellant is that the alleged negligence in failure to blow the whistle was not the proximate cause of the injury; but if by reason of that failure the appellee went upon the track and her horse was there frightened by the approaching train the jury, if they believed appellee's witnesses, had evidence from which they were entitled to find that the negligence was the proximate cause of the injury, and that the damage followed as a continuous and natural sequence from the negligent act, and was a result which might have been foreseen and expected as the result of the conduct complained of, for it was to be expected that passengers on horseback might be traveling along the highway. (3 Parsons Contracts, 179.)

The question of contributory negligence was properly submitted to the jury by the instructions. In our judgment the fact that appellee did not come to a full stop to listen for the train, but brought her horse to a slow walk in order to listen, was not, *per se*, contributory negligence.

There was evidence of other witnesses who corroborated her statement that the signal was not given, and the question was properly left to the jury.

Instruction B, the refusal of which is complained of by appellant, does not appear in the record.

The instructions given appear to correctly state the law. We can not say, under the evidence in this record, that the verdict is excessive.

Judgment affirmed.

LEBUS V. POINDEXTER.

(Filed December 9, 1896—Not to be reported.)

Amendment of pleadings—Failure to verify—So much of the petition in this case as sought to specifically state a cause of action against the appellee having been stricken out, an amended petition offered at the ensuing term alleging that certain terms of the contract sued on, which imposed a liability upon appellee, had been omitted by mistake from the writing evidencing the contract, should have been permitted to be filed. And while the amendment was not verified, and the right to refuse amendments is in the sound discretion of the court, yet as it is manifest that the amendment was not refused because it was not verified the judgment is reversed, with direction to permit the amendment to be filed upon proper verification.

Simon & Cason for appellant.

Blanton & Berry for appellee.

Appeal from Harrison Circuit Court.

Opinion of the court by Judge Guffy.

The appellant brought this action against W. McTurney and J. W. Poindenter, as partners, doing business under the firm name of Turney & Poindexter, and David B. Veach. A sale of one-half interest in a horse to appellant is alleged to have been made by Veach & Turney, who were then partners.

It is also alleged that said Veach & Turney undertook to do certain things, and among them to pay appellant $400, money loaned to them by appellant, which contract was in writing and is filed with the petition.

Appellant also alleged that Veach sold his interest in the horse and transferred all his right, interest and liability under said contract to Poindexter, who assumed the place of said Veach in the contract, and that said Turney & Poindexter, by their written acceptance in the contract, assumed the same for the year ending July 1, 1894, and that Veach did in writing guarantee the performance of the contract by Turney & Poindexter. The sale of the horse was alleged, and a credit of $185.69 given on the $400 loaned money debt, and judgment was asked against the defendants for the remaininder of said $400.

The contract and endorsements read as follows:

"CYNTHIANA, KY., April 13, 1891.

"We have this day sold to C. Lebus a one-half interest in our bay stallion, known as Carter's King William, for the sum of four hundred dollars, the receipt of which is hereby acknowledged.

"The profits or loss, together with the seasons of said horse, are to be divided equally between the firm of Veach & Turney and C. Lebus.

"C. Lebus has also loaned us this day the sum of four hundred dollars, the receipt of which is hereby acknowledged, due January 1, 1894, but in the event of the sale or death of said stallion before that date then to become due at once, and we are to keep, feed and otherwise attend to said horse free, which is to offset the use of the four hundred dollars loaned us by said Lebus.

"VEACH & TURNEY."

"We assume the above contract for the year ending January 1, 1894. TURNEY & POINDEXTER."

"We guarantee and bind ourselves that Turney & Poindexter will fulfill the within contract. D. B. VEACH."

On motion of appellee Poindexter, so much of the petition as sought to specifically state a cause of action against him was stricken out. At the ensuing September term of court appellant offered and moved to have filed an amended petition, to the filing of which appellee objected, and the court refused to permit the filing thereof but leave was given to further amend, but upon the offering of a second amended petition appellee again objected to the filing thereof, and the court sustained the objection and the action was dismissed as to appellee Poindexter, and from that judgment this appeal is prosecuted.

It is substantially alleged in the amendments that about the — day of ——, 1893, the defendant, Veach, by verbal contract sold to said Poindexter his interest in the horse, as well as his interest in the firm of Turney & Veach, and in consideration of that and the sale of other property Poindexter took the place of Veach in said firm's business, and formed and constituted the firm of Turney & Poindexter, and agreed and undertook with Veach and plaintiff that he would assume the place of Veach in said contract and pay plaintiff Veach's part of the money due on the contract, to wit, the $400, and plaintiff agreed to accept and did accept him in place of Veach, with the condition that Veach would guarantee the performance of said contract, and that at the time of said trade Turney & Poindexter undertook by their written endorsement to assume all the obligations of Turney & Veach under said contract, but by mistake of the draftsman the endorsement was made as before shown.

It seems to us clear that the pleadings offered show a cause of action against appellee, but appellee contends further that the amendment was not sworn to, and that the right to refuse amendments is within the sound discretion of the court. It is pretty evident that the amendments were not rejected because not verified. It might well be argued that if the horse had died or been sold during the year ending January 1, 1894, by the very terms of the endorsement Poindexter would have been bound for the 400; for by the terms of the contract it would then have been due and did become due in January, 1894.

In our opinion the court erred in refusing leave to file the amendments offered by appellant, and for the reasons given the judgment appealed from is reversed and cause remanded, with direction to permit the amendments, upon proper verification, to be filed and for proceedings consistent with this opinion.

WILSON V. WILSON.

(Filed December 12, 1896—Not to be reported.)

Divorce—In this action by the wife, seeking a divorce from the husband upon the ground of cruel and inhuman treatment and upon the ground of the husband's aversion to her to such an extent as to destroy her peace and happiness, as the evidence shows that the husband is a thriftless man, furnishing no means of support for himself or his wife, living from place to place without payment of board, and treating the plaintiff not as a wife, but as one not worthy of his position, the court should have granted the divorce, as these facts show a treatment worse than blows.

J. C. B. Sebree for appellant.

Appeal from Scott Circuit Court.

Opinion of the court by Chief Justice Pryor.

This is an action for a divorce, brought by the wife against the husband.

The grounds relied on are the cruel and inhuman treatment on the part of the husband—his aversion to her to such an extent as to destroy her peace and happiness. Her action was dismissed.

The testimony of three or more witnesses uncontradicted is that the wife is a kind, clever and an industrious woman, with a disposition amiable and affectionate; that the husband is a thriftless, no-account man, furnishing no means of support for himself or wife, and living from place to place, without payment of board, as long as his friends are content to be imposed on by reason of his indolent and lazy habits; that he subjects his wife to this mode of living, and treats her not as a wife, but as one not worthy of his position.

They are now living apart, the husband having abandoned her, but not a sufficient length of time to authorize a decree on that ground, but the facts of the case show a treatment worse than *blows*, and a course of conduct humiliating to the wife that drove her to want.

The judgment dismissing her petition is reversed, with directions to enter a judgment of divorce from the bonds that tie her to such a husband.

BROADDUS V. EUBANKS.

(Filed December 15, 1896—Not to be reported.)

1. *Oral testimony to show land embraced in deed*—It being a well-settled rule of law that courses and distances in a deed must yield to known objects, the court in this action of trespass involving the title to land did not err in admitting oral testimony to show the land embraced in plaintiff's deed.

2. *Amendment of pleadings*—In view of the facts of this case and of the time at which defendant asked leave to amend her answer to conform to proof which she desired to introduce, the court did not err in refusing the leave to amend.

W. H. Miller for appellant.

W. G. Welch for appellee.

Appeal from Lincoln Circuit Court.

Opinion of the court by Judge Guffy.

It is alleged in the petition in this case that plaintiff was, and for many years had been, the owner of and occupying a certain tract of land in Lincoln county (giving the boundary thereof), and that part of said farm, consisting of a strip of land 12 feet wide, extends to the county road leading to Stanford, the courthouse, church, depot, schools and other places; and said 12-foot strip extending to the county road, and that the said strip is used by plaintiff and family as a passway to and from the points aforesaid; and that said strip is his only passway to and from his farm to said parts and to enjoy his rights as a citizen. Here follows a description of the passway. It is also averred that he had been so using it for many years, being

in the possession thereof, and that he is entitled to the complete and full possession thereof.

It is further alleged in the petition that the defendant did, on the 8th of September, 1894, with the fraudulent design and intention of depriving plaintiff of the use and ownership of said 12 foot strip of land, and the use and enjoyment and possession of his said farm aforesaid, did unlawfully, maliciously, wantonly and willfully enter upon plaintiff's 12-foot strip of land aforesaid and build a fence across the same, thereby depriving him of the use and enjoyment and possession thereof and thus preventing him from using the same to reach the points aforesaid and other points, and has humiliated him and put him to great trouble and expense, and defendant threatens to continue to injure him by further trespassing upon said strip and thus do plaintiff great injury.

Plaintiff finally avers that he has been damaged $1,000 by defendant and prays judgment therefor.

It seems that a demurrer to the petition and a motion to strike out certain parts thereof were overruled and a jury impaneled, and on the next day defendant filed her answer, in which she denied that plaintiff was the owner of the strip of land in contest, and claimed that the strip of land in contest was part of a 17-acre tract conveyed to A. M. Swope by J. H. Swope in trust for her and her children, and that, long before said conveyance, J. C. Bryan, plaintiff's vendor, had conveyed the said land to her remote vendor.

A trial resulted in a verdict and judgment in plaintiff's favor for $500, and appellant's motion for a new trial having been overruled, she prosecutes this appeal.

The principal question involved is the title to the 12-foot strip of land. It is conceded that Bryan conveyed the strip to appellee, but appellant contends that he had, before that date, conveyed the same to others, under whom she holds. It must be conceded that the proof on that point is not perfectly clear when taken altogether.

It is a well-settled rule of law that courses and distances must yield to known objects, and, for the purpose of showing what really was conveyed by Bryan, oral proof was necessarily competent. Hence the objections to plaintiff's testimony were properly overruled.

It was the province of the jury to find the facts, and, being more familiar with the witnesses and objects described than we are, we are not disposed to disturb the finding.

Appellant insists that the court erred in rejecting her testimony as to the strip in contest being included in the home tract, and in not allowing her to amend her answer to conform to the proof, which she desired to introduce. But, under the facts of this case and the time at which leave to amend was asked, we do not think that the court erred in refusing leave to amend.

Appellant also insists that the verdict is excessive and appears to have been given under the influence of passion, etc. But we do not feel authorized to so hold, nor do we think that the court erred to the prejudice of appellant's substantial rights in giving or refusing instructions.

Judgment affirmed.

SLUSHER V. KINNAIRD, &C.

(Filed December 15, 1896—Not to be reported.)

Pleading—Defects cured by judgment—In this action upon certain promissory notes, although the petition would not have been good upon demurrer, yet as no demurrer was filed and judgment by default has been rendered in favor of plaintiffs the defects in the petition are cured by the judgment.

A. K. Cook for appellant.

G. W. Saulsberry and C. C. Turner for appellees.

Appeal from Bell Circuit Court.

Opinion of the court by Judge Guffy.

It is alleged in the petition in this action that on the 7th day of December, 1889, the defendant executed his promissory note to plaintiffs, Robert Kinnaird and Joseph Weisenger, for the sum of $468.75, due the 7th day of December, 1891, to bear interest from date, and on the same day executed and delivered to said parties his other promissory note for a like sum, with interest from date, by which he promised to pay said parties said sums, no part of which had been paid; that William H. Kinnaird alleged that on the —— day of ——, 18—, the said Joseph Weisenger departed this life, and that on the —— day of ——, 18—, he was appointed administrator of his estate, and that he executed bond as such and entered upon the discharge of his duties, and that he sued as such. Judgment for the amount of each note was asked. The notes seem to have been filed.

It seems that the defendant was duly summoned, at least the judgment so recites, and that no defense was made by the defendant, and judgment was rendered as prayed for, and to reverse that judgment the defendant has obtained an appeal to this court, and insists that the petition will not support the judgment.

It may be true that the petition would have been insufficient if demurred to, but it shows an indebtedness of the defendant to one of the parties plaintiff, and the other shows defectively it may be that he has a right to sue, and, no defense having been interposed, the defects in the petition are cured by the judgment.

It results, therefore, that the judgmust must be and is affirmed.

NORTHWESTERN MUTUAL LIFE INS. CO. V. CALLOWAY.

(Filed December 16, 1896—Not to be reported.)

Burden of proof—When a policy of insurance had lapsed and the insured, desiring to renew it, paid to the company's agent for that purpose the required premium, which was to be returned if the company declined to restore the policy or accept the certificate of health, the obligation to return the money being in writing, in this action by the insured against the company to recover the money, the plaintiff alleging in his petition that the company refused to receive the certificate of health or renew the policy, and the defendant by its answer admitting the payment of the money, but denying that it refused to restore the policy or accept the certificate of health, this denial by defendant was equivalent to affirming that the policy was renewed, and that fact being traversed by reply the burden was on defendant to show a compliance with its agreement to renew.

Barnett, Miller & Barnett for appellant.

C. B. Seymour, Calloway & Miller and Thomas H. Hines for appellee.

Appeal from Jefferson Circuit Court, Chancery division.

Opinion of the court by Chief Justice Pryor.

Upon which party the burden of proof rests is the only question involved in this case.

The plaintiff's policy of insurance had lapsed and he desired to renew it, and for that purpose paid to the appellant's agent $153, to be returned, however, if the company declined to restore the policy or accept the certificate of payment. The obligation to return the money is in writing.

It is alleged that the money was paid; that the company refused to receive the certificate of health or renew the policy. The company denies that it refused to restore the policy or accept the certificate. The payment of the money is admitted.

The answer of the defendant is in effect that it performed the agreement by accepting the certificate and restoring the policy, and this matter is traversed by a reply. On this condition of the pleadings the case was submitted and a judgment entered for the plaintiff without other evidence. The case for the plaintiff required no other proof, and the burden was on the defendant to show its compliance with the undertaking.

The plaintiff was not required to establish the negative of the issue, and, the money having been paid, the obligation to return the money existed unless the policy was restored.

The denial that the policy was not continued is but affirming that it was, and the fact being within the knowledge of the defense, and the company having received the money, the burden was on the company.

The fact that the appellee undertook to prove what the defendant ought to have established on the issue as formed can make no difference, as no testimony was introduced.

Judgment affirmed.

LOUISVILLE & NASHVILLE R. R. CO. v. HARTWELL, &C.

(Filed June 12, 1896.)

1. Carriers—Change of consignee—The shipper of goods may, even after their delivery to the carrier and after the bill of lading has been signed and delivered, alter their destination and direct their delivery to another consignee, unless the bill of lading has been forwarded to the consignee or some one for his use. However, this would not be the case if a state of facts existed which made the delivery of the goods to the carrier a delivery to the consignee and the owner of them.

2. While the consignee in the bill of lading is presumptively the owner of the goods, yet, when the shipper gives notice after the goods have been received by the carrier and before they are delivered to the consignee that he is not to deliver them to the consignee, the carrier must take notice that the consignor intends to retain control of their ultimate disposition, and after such notice the presumption no longer obtains that the consignee is the owner of the goods.

3. Bills of lading are assignable, and, when properly endorsed and delivered with the intention of passing the title to the goods, it is a constructive delivery of them.

4. Where the shipper of goods, after delivering them to the carrier and receiving a bill of lading, made a draft upon the consignee in favor of a bank and delivered it to the bank, together with the bill of lading, at the same time notifying the carrier not to deliver the goods to the consignee unless he presented the bill of lading and paid the draft, the carrier, having delivered the goods to the consignee without requiring him to present the bill of lading and pay the draft, is liable to the shipper for such damages as he has sustained not exceeding the value of the goods, and not exceeding in any event the amount of the draft.

5. A verdict "for plaintiff," without assessing the amount of recovery, was not sufficient to authorize a judgment.

W. H. Marriott for appellant.

R. L. Stith and S. H. Bush for appellees.

Appeal from Hardin Circuit Court.

Opinion of the court by Judge Paynter.

On the 9th day of September, 1892, Hartwell delivered to the appellant for shipment to A. Pennington & Co., of St. Louis, Mo., 170 barrels of apples, for which he received from it a bill of lading. On the day following Hartwell made a draft in favor of the First National Bank of Elizabethtown, Ky., on the consignee, A. Pennington & Co., for $300, and at the same time delivered to it the bill of lading. He then notified the appellant not to deliver the apples to the consignee unless he presented the bill of lading and paid the draft which he had drawn in favor of the bank. In violation of Hartwell's order the appellant delivered to A. Pennington & Co. the apples without requiring them to present the bill of lading and pay the draft. The bank gave Hartwell credit for the draft, but Pennington & Co. failing to pay it this action was brought to recover the amount of it of the appellant.

The answer denied that Hartwell was the owner of the apples, and alleged that they were owned by Pennington & Co. The shipper of goods may, even after the delivery to the carrier and after the bill of lading has been signed and delivered, alter their destination and direct their delivery to another consignee, unless the bill of lading has been forwarded to the consignee or some one for his use. However this would not be the case if a state of facts existed which made the delivery of the goods to the carrier a delivery to the consignee and the owner of them. (Hutchison on Carriers, second edition, section 134.)

While the consignee in the bill of lading is presumptively the owner of the goods, and must be treated by the carrier as the owner unless he has notice to the contrary, when goods are shipped deliverable to the order of the consignor for and on account of the consignee the carrier can not deliver them to such consignee except upon the production of the bill of lading properly evidenced by the consignor. When the goods are thus shipped and deliverable the carrier must take notice that the consignor intended to retain control of the disposition of the goods. (Hutchison on Carriers, section 130.)

So when the shipper gives notice, after they have been received by the carrier for transportation, and before they are delivered to the consignee, that he is not to deliver them to the consignee, he must take notice that the consignor intends to retain control of their ultimate disposition. After such notice the presumption no longer obtains that the consignee is the owner of the goods. Bills of lading

are assignable. When properly endorsed and delivered, with the intention of passing the title to them, it is a constructive delivery of the goods. (Hutchison on Carriers, section 129.)

In the same way they could be pledged to pay a debt and thus give the assignee control of the goods. There was no proof as to the value of the apples. It was essential that such proof should have been made before there could be a verdict and judgment for the plaintiff. (Subsection 4, section 126, Civil Code.)

Unless they had a value the appellant could not have been damaged except nominally on account of the appellant's delivery of the apples to Pennington & Co. It can not be said because the draft was for $300 therefore the apples were of equal value, and that there is an implied obligation on the part of the railroad company to pay that amount. The company can only be made to pay the bank such damages as it sustained, not exceeding in amount the value of the apples, but in no event more than $300.

Section 329, Civil Code, provides that "if, by a general verdict, either party be entitled to recover money of the adverse party, the jury, in their verdict, must assess the amount of recovery."

In this case the verdict must be general, and if anything the plaintiffs were entitled to recover money of the defendant. The court failed to tell the jury that if they found for the plaintiff they should assess the amount of recovery, and the jury did not fix it.

The verdict is as follows: "We of the jury find for the plaintiff." Although there had been proof as to damages, the court was not authorized to render a judgment on the verdict because the jury had failed to assess the amount of recovery. The testimony of Grimes and Talbot in rebuttal should have been given in chief.

The judgment is reversed for further proceedings in conformity with this opinion.

The court delivered the following response to petition for rehearing January 26, 1897:

The only question in this case under the pleadings and proof is as to who owned the apples when they were delivered to the carrier. There is no evidence tending to show that Hartwell had any authority as the agent of Pennington & Co. to draw the draft. In fact the theory of the bank is that Hartwell bought the apples on his own account, and it furnished the money to pay for them.

It follows that instruction No. 4 should not have been given.

JUDD'S ADM'X V. CHESAPEAKE & OHIO RY. CO.

(Filed November 19, 1896—Not to be reported.)

1. Master and servant—Defective appliances—Peremptory instruction—Negligence—In this action by an administrator against a railroad company to recover damages for the killing of plaintiff's intestate while making a coupling in discharge of his duty as conductor of a construction train, it being his duty to aid in making couplings when necessary, the court erred in giving a peremptory instruction to find for defendant, the evidence showing that the conductor, who was standing upon the pilot of the detached engine for the purpose of coupling it to the caboose, was injured by reason of the fact that the engine failed to respond to the effort of the fireman in charge to reverse it, owing to the fact that the air-brake was out of order, and it being also in proof that the engine had a general bad reputation, which, if justified by its true

condition, rendered the defendant guilty of gross negligence, if not willful negligence, in furnishing and using such an engine.

2. *Same*—It was not necessary for plaintiff to show that his intestate did not know and could not by the exercise of ordinary diligence have known of the defect in the engine, although it was necessary to allege those facts. And even though the bad reputation of the engine may have reached him, yet, as it had been in the shop for repairs the Saturday night before, it is not unreasonable to suppose that he relied upon that fact and believed, as he had a right to believe, that all needed repairs had been made.

3. *New trial*—The trial court should be allowed a reasonable discretion as to granting new trials, and this court is not inclined in this case to reverse because of the action of the lower court in granting defendant a new trial.

James Andrew Scott, Proctor K. Malin and R. S. Dinkle for appellant.

Wadsworth & Cochran for appellee.

Appeal from Boyd Circuit Court.

Opinion of the court by Judge Guffy.

This action was instituted by the appellant, Jennie Judd, administratrix of Thomas Judd, against the appellee, Chesapeake & Ohio Ry. Co., to recover judgment for the killing of said Thomas Judd by the appellee.

It is alleged in the petition that the decedent was a conductor of appellee's freight train, and while so employed was killed by the gross carelessness and willful negligence of the defendant, its agents and servants; that the engineer and fireman in charge of the engine at the time were reckless, unskillful and incompetent, and that these facts were known to appellee, or could have been known by ordinary care and diligence, but the same was not known to decedent, nor could have been known by ordinary care on the part of decedent; that the engine, machinery, appliances and apparatus furnished by appellee to propel said train and operation by the crew at the time of the injury complained of were defective and unsafe, and insufficient for the purpose for which they were ordinarily used; all of which was well known to the defendant in time to have prevented the injury, or could have been known by ordinary care, and that defendant was negligent in the use of said machinery and appliances after its dangerous condition was known, or could have been known by ordinary diligence or care, and that decedent did not know, and could not have known by ordinary care and diligence, of the defects and unsafeness of said machinery.

The defendant in the first paragraph of the answer traversed all the material allegations of the petition. The second paragraph pleaded contributory negligence of decedent. The reply traversed the material averments of the answer.

At the April term, 1894, of court the plaintiff was permitted to file an amended petition alleging that by mistake of the pleader it was alleged that Charles Judd was the man who was killed; that his name was Thomas Judd, and that the plaintiff was appointed administratrix of said Thomas Judd. To the petition as amended the defendant pleaded the statute of limitation, to which plea a demurrer was sustained.

A trial at the said April term, 1894, resulted in a verdict and judgment in favor of plaintiff for $10,000. A motion for new trial was made, and the motion continued until the next term of court, at which term a new trial was awarded and cause continued, and

at the succeeding term a trial was had, and, at the conclusion of plaintiff's testimony, the defendant moved the court to instruct the jury to find for the defendant, which motion was sustained by the court, and the jury under a peremptory instruction found for the defendant, and the plaintiff's petition was, by the judgment of the court, dismissed, and her motion for new trial having been overruled she prosecutes this appeal.

It is the contention of appellant that the court erred in setting aside the verdict and judgment of the April term, 1894, and she asks that the same be reversed and the court below ordered to re-enter the judgment and verdict of 1894; also insists that the court erred in giving the peremptory instruction at the final trial.

We deem it unnecessary to discuss the grounds for new trial filed by defendant at the April term, 1894. The trial court should be allowed a reasonable discretion as to granting new trials, and we are not disposed to reverse the order granting the new trial in question. Appellant also insists that the court erred in giving the peremptory instruction, and erred in overruling her motion for a new trial.

The deceased was the conductor of a construction train, and he and others had detached the engine from the train and rode on it to some point for dinner, and, as they returned, the engineer got off to look for a monkey-wrench that had been lost, the fireman remaining in charge of the engine. The caboose and some flat cars were on the track, and it was necessary to couple the engine to the caboose in order to connect the train for work.

The evidence conduces to show that the speed of the engine was then about five miles per hour. The conductor went upon the pilot and took hold of the bar used in coupling, the fireman reversed or attempted to reverse the engine, but for some cause the engine failed to respond to the effort. The air brake was out of order and no sand in the box, hence the speed of the engine could not, under the circumstances, be lessened, and the result was that the engine approached the caboose so rapidly that the deceased failed to make the coupling, and the bar broke and the deceased was so injured as to cause his death in a few days or weeks.

It seems from the proof that if the air brake had been in order, or if the engine had been in condition to respond to the effort to reverse it, that the accident would not have happened.

The proof conduces to show that it was the duty of the conductor, when necessary, to aid in coupling, and that to stand on the pilot to couple was one of the usual ways to couple, and that the conductor was on the pilot attempting to couple.

It is also in proof that the engine had a general bad reputation; was called a rattletrap or scrap pile, and had been so spoken of for a year or so. It is also in proof that it was the duty of the engineer to report in writing to the proper person the condition of the engine when he would turn it in on Saturday night, and that it was then the duty of a certain officer to have the necessary repairs made; and the proof shows that it had been in the shop the Saturday night before the injury occurred.

Appellee insists that appellant did not show any right to recover because no proof was introduced to sustain the allegation that the decedent did not know and could not, by the exercise of ordinary diligence, have known of the insufficiency of the machinery or appliances.

If such proof had to be made in a case like this, we do not see how a recovery could be had. The injured party being dead, how could such proof be made?

It is regarded as necessary in a suit upon a note to allege that it is unpaid, but we are not aware of any authority which requires the plaintiff to prove that averment.

Appellee also contends that the proof establishes contributory negligence on the part of decedent. It may be that there is some proof tending to show such negligence, but other proof tends to contradict that theory. It may be that the notoriously bad reputation of the engine would reach the conductor, and thus put him on his guard.

If it be true that the bad reputation of the engine was justified by its true condition, it follows inevitably that the appellee was guilty of gross negligence and not willful negligence in furnishing and using such an engine.

As before stated the engine had been in the shop for repairs the Saturday night before, and it is not unreasonable to suppose that decedent relied upon that fact and believed, as he had a right to believe, that all needed repairs had been made, and that all the machinery, air brakes and apparatus were in perfect order; and, if such had been the case, it is pretty clear that the injury would not have happened. The peremptory instruction should not have been given.

The judgment in appellee's favor is reversed and cause remanded, with directions to award appellant a new trial, and for proceedings consistent with this opinion.

The court delivered the following response to a petition for rehearing February 2, 1897:

The case of Bogenschutz v. Smith, 84 Ky., 330, was an action by the servant against the master to recover for injuries received, as alleged, by the negligence of the master, as by his failure to furnish safe or suitable apparatus or machinery for the use of the servant in the discharge of his duty; or, if such machinery or appliances were ever furnished, that they had become defective. The servant's right to recover was under the common law, and he was required to make out his case according to the rules of the common law.

The case at bar is purely a statutory right, not existing under the common law, hence the case in 84 Ky., *supra*, is not like the case under consideration, and the decision in this case is not in conflict with the one relied on by appellee, even if it be conceded that the latter case announced the rule contended for by appellee. The adoption of the rule contended for by appellee would practically nullify the statute, for it would be impossible to prove that the decedent was not aware of the defects, and could not have known thereof by the exercise of ordinary diligence, or, at any rate, such proof could rarely, if ever, be made. There is nothing in the statute to sustain the contention of appellee.

The question as to whether decedent knew of the defective machinery was a question for the jury, and not for the court.

Petition overruled.

LOUISVILLE & NASHVILLE R. R. CO. V. GUY, &C.

(Filed December 1, 1896—Not to be reported.)

1. Railroads—Carrying passenger past station—Excessive verdict—In this action against a railroad company to recover damages for carrying the plain-

tiff, while a passenger on one of defendant's trains, beyond her station, and requiring her to get off at an inconvenient place, from which she had to walk back to the station, a short distance, the evidence was sufficient to support a verdict for the plaintiff, and, while the amount of the verdict ($218) is larger than this court may think it ought to have been, it is not so great as to indicate passion or prejudice.

2. *The court properly refused to instruct* the jury that they could only find nominal damages.

Breckinridge & Shelby for appellant.

Leland Hathaway for appellees.

Appeal from Clark Circuit Court.

Opinion of the court by Judge Guffy.

It is alleged in the petition in this case that the plaintiff, Millie Guy, paid her fare to the defendant's agent, and was a passenger on one of defendant's regular passenger trains from Winchester station to Elkin, another station on said road, and that said train did not stop at Elkin for her to get off, but carried her over the trestle south of said station, and against her will and consent the conductor of the train put her off on a very high fill, which she had to climb down and cross a creek to get back to the station, very much fatigued and worrying her in her delicate condition and greatly to her damage, in the sum of $2,000, for which she prayed judgment.

The answer of the defendant was in substance a denial of the failure of the train to stop at Elkin long enough for plaintiff to get off, and further denied that defendant put her off at all as charged; and, further, that after the train had passed the trestle the conductor notified plaintiff that he would back the train to the station, but that she declined the offer and got off the train, and walked back of her own free will.

The reply was in substance a traverse of the answer, and further alleged that plaintiff at the station was waiting for the conductor to return her change for a bill given to him to take out of it her fare.

A trial resulted in a verdict and judgment in favor of plaintiff for $218, and, defendant's motion for a new trial having been overruled, it prosecutes this appeal.

The evidence conduces to prove that plaintiff was waiting for her change due her from a bill given to the conductor, out of which he was to take the fare due from her, and thus passed the Elkin station, and that she was thereby required to get off the train, and, in a delicate condition, walk 400 pards during a hot day, over a rough and rocky road.

It may be conceded that evidence was introduced conducing to disprove the claim of the plaintiff, yet it was the province of the jury to weigh the evidence and find accordingly, and, while it might be true that the verdict is greater than we might think it ought to have been, still we do not feel authorized to say that it was given under the influence of passion or prejudice, or that it is not supported by sufficient evidence. The court did not err in refusing to instruct the jury that they could only find nominal damages.

Judgment affirmed.

HUFF V. COMMONWEALTH.

(Filed December 2, 1896—Not to be reported.)

Unlawfully detaining woman against her will—Upon the trial of appellant under an indictment for unlawfully detaining a woman against her will, with intent to have carnal knowledge with her, the evidence showed a detention within the meaning of the statute, and was sufficient to authorize a verdict of guilty.

H. C. Eversole for appellant.

W. S. Taylor for appellee.

Appeal from Laurel Circuit Court.

Opinion of the court by Judge Paynter.

The indictment charges the defendant with taking and detaining Diana Robinson, a woman, against her will, with intent to have carnal knowledge with her himself.

The testimony conduces to prove that the defendant, in company with a negro man, went in the nighttime to the residence of Mrs. Robinson, who is a widow living with her children, waked her, and falsely told her they were her nephews, Preston and Thomas Settles. One of the children let them in the house. The defendant informed her that they had been sent for her to come to the house of her brother-in-law to see her sick daughter. After she dressed she started along the street with the defendant to the house of her brother-in-law. After they had gone part of the way the defendant made an insulting proposal to her, which she rejected, and started to leave him.

The complainant tells what the defendant did, in language as follows, to wit: "He run against me in front, and jammed up against me, and jammed up against my side and back."

As a matter of fact, admitted to be so by defendant, no one had sent for complainant. It was a ruse of the defendant to get her away from her home that he might accomplish his desires. It was for the jury to determine whether or not the defendant was guilty of detaining the woman against her will, with intent to have carnal knowledge with her.

We are of opinion there was a detention in the meaning of the statute under which the indictment was found; besides, we think the facts authorized the verdict.

The judgment is affirmed.

MCGOODWIN V. CITY OF FRANKLIN, &C.

(Filed December 4, 1896—Not to be reported.)

Where the question of incurring an indebtedness by a city is submitted to the voters of the city the proposition does not carry unless two-thirds of all those voting at that election vote in favor of it. It is not sufficient that two-thirds of those voting upon the proposition vote in favor of it. The writer of this opinion, however, does not agree with the majority of the court in that conclusion, heretofore announced in other cases.

G. T. Finn for appellant.

Goodnight & Roark and L. B. Finn for appellees.

Appeal from Simpson Circuit Court.

Opinion of the court by Judge Paynter.

At the November election, 1896, there was submitted by proper ordinance to the voters of the city of Franklin the question of incurring an indebtedness of not exceeding $21,000, for the purpose of building and providing the city with a system of waterworks.

There were cast in favor of incurring the indebtedness 259 votes, and against it 28 votes. More than two-thirds of those who voted on the question of incurring the indebtedness voted in favor of it. There were more than 450 ballots cast at the election by qualified electors of the city of Franklin. They voted for presidential electors, etc. There were not two-thirds of those voting at the election who voted for the proposition to incur the indebtedness.

Under the decisions of this court, in the cases of Belknap, &c. v. City of Louisville, 18 KY. LAW REP., 313, and City of Owensboro, &c. v. Baker, &c., 18 KY. LAW REP., 324, it required two-thirds of those voting at the *election* to vote for the proposition to carry it. To follow the cases cited the required number of votes were not cast for the proposition to authorize the city to incur the indebtedness.

The writer of this opinion did not agree with the majority of the court in its conclusions in the cases referred to, as he then and now believes that, when two-thirds of those who vote on the proposition submitted vote for it, then it has received the assent of the number of votes required by the Constitution to carry it.

The constitutional provision does not attempt to regulate the election of officers, nor does it even refer to an election for that purpose, neither does it say that those who vote at an election for officers, but do not vote on the question of a municipality incurring an indebtedness shall be counted against the proposition.

It simply provides that before such an indebtedness can be incurred two-thirds of those who vote at the election "held for the purpose" must vote for the proposition. It is nowhere said in the section under discussion that the assent of two-thirds of the "electors" of the municipality, or two-thirds of those who may vote for candidates to fill offices, must be obtained before the indebtedness can be incurred.

If it was said the municipality could not incur the indebtedness "*without the assent of two-thirds of the voters thereof*," then the writer would understand that an elector's failure to vote was equivalent to voting against the proposition because the assent of two-thirds of the electors of the municipality would have to be obtained.

If it had said "without the assent of two-thirds of voters thereof voting *at an election*," the writer would still be of the opinion that when the word "election" was used it referred to the election on the proposition of incurring the indebtedness. To avoid the necessity of the courts determining the meaning of the word "election," as used, the constitutional convention, by adding immediately after the word "election" words as follows, "*to be held for that purpose*," so the language used in the Constitution is as follows, to wit: "Without the assent of two-thirds of the voters thereof voting at an *election* to be held for *that purpose*."

The writer has added his individual opinion, with the hope that on some occasion the court may reach a correct view of the constitutional provision in question.

For the reasons given the judgment is reversed, with direction to perpetuate the injunction.

HARRIS, &C. V. CALMES.

(Filed December 9, 1896.)

Mistake in deed—Rescission—In this action by the vendor to rescind a contract for the sale of land upon the ground that the vendee had not complied with his covenant to erect a residence and mill on the land conveyed, it being alleged and proved that such a covenant was omitted from the deed by mistake, the plaintiff was entitled to have the mistake corrected and to have the terms of the deed as thus amended complied with on the part of the grantee; or, in case of his refusal, to have the contract rescinded. And this is true although the grantee has sold the land, the purchaser having notice of the consideration and condition of the sale to his grantor.

J. B. White for appellants.

Samuel H. Patrick and G. W. Gourley for appellee.

Appeal from Lee Circuit Court.

Opinion of the court by Judge Lewis.

In 1890 appellee Calmes executed to appellant Harris a deed as follows: "That the said party of the first part, in consideration of $100, in hand paid, * * * does hereby sell and convey to the party of the second part * * * the following-described property, viz: Two acres of land on the south side of Kentucky river in Lee county, *for the purpose of erecting a residence and mill thereon*, said land bounded as follows: * * * Also a free right to use water from the spring situated near the above-described tract of land; also the free right to pipe or trough water from any part of the farm now owned by the party of the first part, but not to obstruct any passway nor exhaust said Calmes supply of water, with a free right of way to and from above described tract of land. To have and to hold the same, with all the appurtenances thereon, unto the second party, * * * with covenant of general warranty, *for the purposes herein named.* * * * *The said Calmes is to have refusal if said land is sold by said Harris.*"

Harris did not erect a residence or mill upon the tract of two acres, nor does he now claim the right or assert an intention to ever do so. On the contrary, he sold the land to appellant, James Durbin, at the advanced price of $200, who has a residence upon it, and he there retails brandy as a distiller.

Appellee, therefore, brought this action to rescind the contract, which the lower court adjudged is to be done upon terms that appellee repay the $100 and interest, be allowed as set-off rents, and also pay for valuable and lasting improvements.

Whether the language used in the deed amounts to or falls short of a covenant by Harris to erect on the land a residence and mill, it is manifest such was the intention of the parties; for, independent of the positive statement of appellee and admission by appellant Harris that he intended at the time of the purchase to do so, it is plainly stated in the deed the land was sold and conveyed and title warranted for such purposes. Besides, the unusual and valuable concession of not only the free use of water from the spring, but also the right to pipe water from any part of appellee's farm, together with the right of way in any direction to and from the two acres, show the parties had, when the deed was executed, in contemplation the erection by Harris of the residence and mill as part consideration for the sale.

We, therefore, think the statement in appellee's petition that an express covenant by Harris to erect the residence and mill was omitted by mistake is fully and satisfactorily established; and, being so, his right to have, in a court of equity, the mistake corrected and the terms of the deed, as thus amended, complied with on the part of Harris, or, in case of his refusal, rescission of the contract, is unquestionable. And as appellant Durbin does not deny he, at the time of his purchase, had notice of the consideration and condition of the sale and conveyance by Calmes to Harris, there is no intervening equity to prevent the rescission.

Judgment affirmed.

TURNER V. TOWN OF PEWEE VALLEY.

NOCK V. SAME.

(Filed December 10, 1896.)

1. Taxation—Void assessment—Provisions respecting the assesment of property must be followed with particularity, and it is essential to the validity of an assessment that it should be made by the proper officer.

2. Same—A town ordinance instructing the assessor in making assessments to adopt the list made by the county assessor for State and county taxation and assessments made pursuant thereto are void, no provision being made even for a report to the board of trustees for its approval, or for giving the taxpayer an opportunity to be heard and correct his list.

3. The assessment of poll tax against the appellants pursuant to the town ordinance was legal and valid, and they are liable for the payment of same.

4. Curative statutes—An act of the legislature seeking to cure the defects in the assessments is void as to the parties to these suits to enjoin the collection of the taxes, the act not being passed until after the suits were instituted.

5. The sheriff had no right to levy upon land and sell it for taxes until the personal property of the taxpayer was exhausted.

D. H. French for appellants.

Stone & Sudduth for appellee.

Appeal from Oldham Circuit Court.

Opinion of the court by Judge White.

These two cases, by agreement of parties, were heard together in the court below, and by agreement are to be heard together in this court.

They involve the same questions, and are alike in every particular except Nock seeks to enjoin the sale of his land and collection of taxes assessed for the year 1887 by the town of Pewee Valley, in Oldham county, and Turner seeks to enjoin the sale of his land and collection assessed against him for the years 1885-6-7 by the town of Pewee Valley.

Each of appellants' lands are situated in the corporate limits of the town of Pewee Valley, and each claimed that his land is exempt from taxation because it is land used for farming land and grazing purposes, and is not benefited by reason of the corporation, and that none of said land is laid off into lots and streets; and that said land being farm land, and, therefore, they claim that their land is not subject to town taxes.

Many material questions are raised by the pleading in this rec-

ord, but we consider the vital question made is the charge that the assessment of the lands of appellants for taxation is void for said town, and we deem it to be unnecessary to decide many points raised in the pleading if the court should hold that the assessment of this land for taxation was void.

The land levied on of appellants is situated within the corporate limits of the town of Pewee Valley, and was about to be advertised and sold when appellants brought these actions, and obtained an injunction enjoining said town, its trustees and the sheriff from proceeding to advertise their lands and sell the same.

The board of trustees passed an ordinance in the year 1885 by which they claim that taxes were duly levied against the lands of all citizens, and a like ordinance was passed in the years 1886 and 1887, and the validity of the assessment made under these ordinances is the question in this case.

We quote so much of the ordinance as will be necessary to an understanding of the case: "Be it ordained by the board of trustees of the town of Pewee Valley, that an *ad valorem* tax of 20 cents on each one hundred dollars in value of the real estate situated in the town of Pewee Valley, Ky., liable for State taxation, be, and the same is hereby, levied. * * *

"Sec. 2. A poll tax of two dollars is hereby levied on each and every male inhabitant of said town over 21 years of age for the year 1885, for the purposes aforesaid.

"Sec. 3. For the purposes of the levy above provided the assessor is instructed to adopt the assessment list as made by the county assessor for State and county taxation for the year 1885, so far as it applies to persons and real estate within the limits of the town of Pewee Valley.

"Sec. 4. It shall be the duty of the assessor to furnish the sheriff of the county with tax bills, regularly made out, in accordance with the provision of the ordinance, on or before the 1st day of August, 1885.

"Sec. 5. The taxes levied and assessed, as aforesaid, shall be due and payable on and after August 10, 1885."

Under and by virtue of this ordinance the tax bills were levied on appellants' land, and an attempt to sell the same was made when enjoined. The ordinances made in 1886 and 1887 are an exact copy of the one made in 1885.

It is in proof, and not denied in the pleading, that the only assessment of appellants' property was made by taking a copy of the assessment made by the assessor of Oldham county for the years complained of, which list was given to the sheriff of Oldham county for collection, and the sheriff, with that authority alone, levied on the land of each appellant, and each has enjoined the town and its then trustees and the sheriff from selling their land.

We are compelled to hold that the pretended assessment of appellants' property in the mode and manner shown in these cases is void. Every tax is an involuntary charge on the taxpayer, although in some instances a community may desire and vote a tax on themselves, yet there are always some who object to being taxed, and as to those who do object it must be an involuntary charge.

The imposition of such involuntary charges of taxes on citizens is the exercise of sovereign power, and so closely is the exercise of that power guarded by constitutional provisions and by the adjudication of the courts that require a strict observance of the law under which such taxes are to be imposed. As said by Judge Cooley on Taxation: "The assessment being so important, provision respecting its

preparation and contents ought to be observed with particularity. * * * The assessment must, therefore, be made by the proper officer or it will be void. * * * So the assessment will be void if the assessor commits the office of making it to a clerk." (Cooley on Taxation, pages 363-4.)

The board of trustees, by requiring the assessor of the town to adopt the assessment made by the assessor of Oldham county, not only prevented him from making an assessment himself, but required the assessor to procure an assessment made by one who was not a citizen of the town, and one who had no common interest with those who were expected to pay the tax. They failed to require even a report to the board for its approval, but directed the assessor to make out the list and give it to the sheriff for collection by these ordinances. No provision was made for the taxpayer to be heard, nor was he given any notice or opportunity to be heard and correct said list.

This question is not new to this court. Similar questions were decided in the case of Slaughter v. City of Louisville, 89 Ky., 112; Davidson v. Sterrett, 13 KY. LAW REP., 176.

But after these suits were instituted the appellees, in the year 1890, procured an act of the Kentucky legislature, seeking to cure the defects in the assessment complained of, but this court has repeatedly held that no legislature can affect the rights of parties litigant enacted after the institution of the suits, therefore, the curative act of the legislature, attempting to affect the parties to these suits, must be treated as a nullity so far as it relates to the rights of appellants at the time of bringing their suits. (Allison v. Railway Co., 9 Bush, 247.)

But the appellees contend that the injunction ought not to have been granted because each of the appellants were charged with poll tax of $2 against appellant Nock and $6 against appellant Turner, and that the assessment of the poll tax was in form and valid.

We can not concur in this contention, although the assessment of poll tax against appellants may have been all right and legal, but still that would not authorize the sheriff to levy on appellant's land; for by the General Statutes, which was in force at the time, the sheriff had no right to levy on land and sell it for taxes until the personal property of the taxpayer had been exhausted.

The proof in these cases show clearly that appellants had an abundance of personal property within the corporate limits of the town to satisfy these taxes against them. (General Statutes, chapter 92.)

The judgment is, therefore, reversed and cause remanded, with directions that the court perpetuate the injunction in each of said cases and for further proceedings in accordance with this opinion.

The court delivered the following extension of opinion January 15, 1897:

Appellees having petitioned for an extension of the opinion heretofore filed in this case, and for further opinion, we hold that the levy or assessment of poll tax against the appellants was legal and valid, and the appellants are liable to the payment of the same, and as held in the opinion their lands were not liable to sale for the payment of the poll tax until their personal property was exhaused, and all that was intended in the former judgment was to perpetuate the injunction as to the collection of the *ad valorem* taxes levied, and the sale of their lands for the poll taxes, and the petition is overruled.

CLARK V. COMMONWEALTH.

(Filed December 19, 1896—Not to be reported.)

1. *Indictment*—An indictment under section 1166 of the Kentucky Statutes' which accuses defendant of the offense of "malicious cutting and wounding" is sufficient, it not being necessary in naming the offense to state that the cutting was "willful" or done "with intent to kill," those facts being stated in describing the circumstances constituting the offense.

2. *Instructions to jury*—In instructing the jury as to the punishment to be inflicted according to the degree of the offense of which defendant may be found guilty, it was sufficient to refer to the degrees of the offense as "malicious cutting and wounding" and "cutting and wounding in sudden heat and passion," the degrees of the offense being specifically defined in another instruction.

A. M. Baker for appellant.

W. S. Taylor for appellee.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge DuRelle.

Appellant seeks a reversal of the judgment against him upon the ground that the indictment is insufficient, in that the introductory part accusing the defendant of a named offense does not sufficiently state the offense. The indictment is as follows: "The grand jury of Fayette county, in the name and by the authority of the Commonwealth of Kentucky, accuse John Clark of the crime of *malicious cutting and wounding*, committed as follows, viz: That said John Clark, on the 23d day of June, 1896, in the county aforesaid, did unlawfully, willfully and maliciously cut, wound, strike and stab one William Creighton with a knife or other sharp instrument, with the intent to kill said Creighton, but from which cutting, striking and wounding the said Creighton did not die, against the peace, etc."

The indictment is drawn under section 1166 of the Kentucky Statutes, which provides that "if any person shall willfully and maliciously cut, strike or stab another with a knife, sword or other deadly weapon, with intent to kill, if the person so stabbed, cut or bruised die not thereby, etc."

The objection to the indictment appears to be based on the fact that the introductory part does not accuse the offender of the crime of *willful* and malicious cutting and wounding *with intent to kill.*

It may be conceded that "it is the rule that all indictments upon statutes must state all the facts and circumstances which go to make up the offense as defined in the statute, so as to bring the defendant precisely within it" (Clark Cr. Pros., 259.) But in this case all the circumstances which go to make up the statutory offense have been stated in the body of the indictment, where it is charged that Clark did the cutting unlawfully, willfully and with intent to kill. At common law this would have been sufficient, without undertaking to state the name of the offense.

In the Shouse case, 95 Ky., 621, the indictment, in stating the offense charged under this same statute, did not describe the cutting as willful or malicious, and in "stating the particular circumstances of the offense charged," and "which were necessary to constitute a complete offense," it was not stated that the cutting was done with intent to kill; but this court held that "the positive and direct charge that the appellant cut Reffit having been once made, it was

not necessary to repeat the same statement in giving the particular circumstances of the offense, for the Criminal Code expressly declares that the acts constituting the offense shall only be made in ordinary and concise language."

As in that case, so in the case at bar. We are of opinion that "the indictment charges a statutory offense." Moreover, we think that the phrase "malicious cutting" is a "brief, general description as given by law" within the meaning of section 123 of the Criminal Code.

It is objected further that in the fourth instruction, upon the punishment to be inflicted according to the degree of the offense of which the defendant may be found guilty, the grades of the offense are described as "malicious cutting and wounding," and "cutting and wounding in sudden heat and passion," and that the language used does not sufficiently describe the grades of the offense.

This instruction does not purport to describe the grades of the offense which are defined in the first instruction, but merely to fix the amount of punishment to be inflicted, according as the jury might find the accused guilty of the one or the other offense defined in the first instruction. For this purpose we think the grades of the offense are sufficiently stated to enable the jury to understand which of the grades defined in the first instruction is referred to.

The same response applies to the objection urged to instruction No. 5, which instructs the jury to give him the benefit of the doubt as to the grade of offense proven; and, if in doubt, to find him guilty of the lower degree.

Instruction "A," as to self-defense, was properly refused, the law of self-defense having been given in instruction No. 2.

Wherefore, the judgment is affirmed.

LAVELLE & CO. v. CLARK, &C.

(Filed December 16, 1896—Not to be reported.)

Fraudulent conveyance—Burden of proof—A conveyance to a father in trust for his daughter being attacked by a creditor of the father as fraudulent, the plaintiff alleging in his petition that the father paid the consideration, the relationship of the parties, with the title in the father as trustee and the purchase made after the creation of plaintiff's debt, are such circumstances of suspicion as place the burden on defendants to show the good faith of the transaction, the mere denial by defendants that the father paid the consideration not being sufficient to throw upon plaintiff the burden of establishing that fact, there being no recital in the deed as to who paid the money.

A. C. Rucker and C. B. Seymour for appellants.

Phelps & Thum and Alfred Selligman for appellee.

Appeal from Jefferson Circuit Court, Chancery division.

Opinion of the court by Chief Justice Pryor.

The appellant filed his petition in equity, and by proper averments sought to subject certain realty alleged to have been purchased by the appellee, Asa D. Clark, with his money, and the conveyance made by his direction to himself in trust for his co-appellee, who was his daughter.

It is further alleged that it was done for the fraudulent purpose of

passing it beyond the reach of creditors, and particularly the plaintiff, whose debt existed when the property was purchased. The deed is filed with the petition, showing the amount of money paid, but by whom is not stated, and that the father held the title in trust for the daughter.

The answer of both defendants *denies* the money was paid by the father; denies the improvements placed on the realty were made by the father.

This transaction, if not between father and child, is made by the father for the daughter's benefit; that Clark, the debtor, paid $500 and executed his notes as trustee for the balance appears from the deed. Where the money came from, or that the daughter had any estate, is not made to appear. Good faith must be shown in such a transaction, and a mere denial in this class of conveyances is no answer to the charge of fraud.

There is no evidence on the part of either of the defendants, save the recitals in the deed, and the relation of father and child existing, with the title in the father as trustee, and the purchase made after the creation of plaintiff's debt, are such circumstances of suspicion as place the burden on the defendants to show the *bona fides* of the transaction.

The judgment is, therefore, reversed and remanded, with directions to allow the defendants, if they care to, to amend their pleadings and establish by proof the good faith of the transaction; if they fail to do so the property to be subjected to the plaintiff's debt. (Garnett v. Whittaker, 3 Bush, 402, and authorities cited.)

The Kentucky Law Reporter.

EDITOR:
WALTER G. CHAPMAN, ... Frankfort, Ky.

VOL. 18. APRIL 1, 1897. No. 19

KENTUCKY COURT OF APPEALS.

EAST TENNESSEE TELEPHONE CO. v. SIMMS' ADM'R.

(Filed June 6, 1896.)

1. *Death from electric shock—Negligence of telephone company*—In this action against a telephone company to recover damages for the death of plaintiff's intestate, alleged to have resulted from the negligence of defendant, the court properly refused a peremptory instruction to find for defendant, there being testimony tending to show that the death resulted from negligence on the part of defendant in allowing a "dead wire" to hang in close proximity to an electric light wire, and also in so putting up its wire at the residence at which the accident occurred as that it could come in contact with trellis wires about the porch.

2. *Under section 241 of the Constitution, which authorizes a recovery for death* resulting from negligence, as well as under the statute enacted pursuant thereto, there may be a recovery although the person killed left neither widow nor child.

3. *Willful neglect*—The provision of the Constitution was to abrogate the further use of the words "willful neglect" in our law. The words "wrongful act" of the Constitution and "willful act" of the statute do not primarily refer to an act of negligence, which is the opposite of those terms.

In this case, although the petition alleges that the death of plaintiff's intestate, which occurred after the adoption of the new Constitution but before the enactment of the present statute, was caused by the "willful, gross and reckless negligence" of defendant, the suit is not for "willful neglect," the word "willful" being used manifestly as the synonym of "gross."

4. *The word "gross," when used to qualify the word "negligence,"* is a relative one, and is supposed to emphasize merely the want of due care; and negligence is gross or ordinary according to the circumstances, relations and conditions under which due care is omitted to be exercised.

5. *Compensatory damages* were recoverable, and there was no error in the instruction authorizing such recovery.

6. *Evidence*—A letter from the secretary of the company, to the effect that the "dead wire" caused the death of plaintiff's intestate, was not competent as evidence, as the secretary was not the agent of the company for the purpose of making damaging admissions after the transaction occurred, and, besides, she had no personal knowledge of the facts.

J. Q. Ward for appellant.

Ward & Lafferty for appellee.

Appeal from Harrison Circuit Court.

Opinion of the court by Judge Hazelrigg.

The appellee, as administrator of Richard Simms, recovered judgment against the appellant for $7,000 in damages for the death of his intestate, which was caused, it is alleged, by the willful and gross negligence of the appellant and the electric light company.

Briefly stated, the facts are that in 1887 the appellant, then operating a telephone system at Cynthiana, put up a wire from its central office in that city to the residence of W. T. Handy, about one mile out. On December 13, 1892, this wire was still in use by Handy, or in condition for use, under his lease or contract with the company, though it appears he was away with his family in Florida, and his term of rental was out or about out. Simms, as a tenant, occupied two rooms in the rear of the Handy residence, and, for purposes of protection, overlooked the premises. At about 10 o'clock on the night of the 13th the family of Simms heard a noise in front of the residence, and, in company with his son and two nephews, he went around to the front porch with a lantern. They discovered the storm doors swaying back and forth, and, fastening them, they came down from the porch onto a pavement, when some sparks were seen on some trellis wires about the porch. Simms stepped off the pavement, saying: "What is that?" at the same time reaching out towards the wires. His nephew exclaimed: "Don't touch it." But at that instant Simms fell dead, and it is supposed that he had touched the wires with his outstretched hand, although there were no burns found on his hands or body. These wires had become charged with electricity from contact with the telephone wire leading from the box in the hall onto the porch, and thence to the ground; and the telephone wire had, in turn, become overcharged from contact with the electric light wire within the city. Just how this came about forms the chief ground of dispute in this record.

It appears that some two years prior to the night in question the telephone company had discontinued a wire theretofore rented to Victor & Whaley, and this wire had been taken down, save a few hundred feet which had been left on the poles. One end of this "dead wire" was connected with the Handy wire, and the other was fastened to a bracket on a pole of the Western Union Telegraph Co., also in use by the light company. This bracket became loose, and turned down, and the dead wire was left to sway and vibrate, sometimes touching the light wire. On the evening in question there was a heavy wind, and some rain, and at about 5 o'clock the bracket was so shifted that the two wires were brought in contact, the one perhaps resting on the other. The current of the electric plant had been turned on at about 4:30 o'clock that evening, and a disturbance was noticed at the central office of the telephone company between 5 and 6 o'clock, when the wire in the keyboard was burned. An investigation made at once seems to have located the cause of the disturbance on the Handy wire, but there the matter rested for the night.

The effort of the plaintiff was directed to showing negligence on the part of the telephone company in allowing its dead wire to hang for so long in close proximity to the light wire, and in so putting up the wire at the residence of Handy as that it could come in contact with the trellis wires then about the porch.

Without setting out the details of the proof it is sufficient to say

that it conduced to show negligence in the particulars mentioned; and the court, therefore, properly overruled the appellant's motion for peremptory instructions upon the conclusion of the plaintiff's proof. Such a motion, however, was sustained for the light company.

The appellant attempted to show that it had kept up the usual inspection of its line, and had no reason to apprehend danger from the dead wire remaining on the poles; that the trellis wires were so placed by Handy, or others over whom it had no control, as that connection with its wire was made without its knowledge or consent; and, moreover, that the deceased was the subject of heart disease, and likely to die suddenly under undue excitement, and that he had probably died from natural causes, and not from an electric shock.

The jury found against these contentions, and we proceed to notice the errors of law complained of.

And, first, it is insisted that the petition was fatally defective, in that it failed to allege that the intestate left a wife or child. We are of opinion that this was not necessary. The Constitution, section 241, provides that "whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then, in every such case, damages may be recovered for such death from the corporations and persons so causing the same. Until otherwise provided by law the action to recover such damages shall in all cases be prosecuted by the personal representative of the deceased person. The general assembly may provide how the recovery shall go and to whom belong, and until such provision is made the same shall form part of the personal estate of the deceased person."

This section was in force when Simms lost his life, though the legislature had not then provided how the recovery should go or to whom it should belong. It was wholly immaterial, therefore, whether there was or not a widow or child.

It is true that under the old statute (General Statutes, chapter 57, section 3), providing for a recovery where death was caused by "willful neglect," it had been held more than once that no recovery could be had unless the deceased left a widow or child; but it seems probable, as held in Wright v. Wood's adm'r, 96 Ky., 56, that the constitutional provision had in view the correction of this supposed defect in the law, and gave a right of recovery to the personal representative in any event, leaving to the legislature the mere distribution of the recovery. And it is true that in Wright v. Woods, where the recovery had been effected in a suit under the old statute on "willful neglect," this court held that the distribution should be made under that statute, and to this extent the old statute was said to be still in force, or was until in July, 1893, when the present statute on the subject was adopted.

The provision of the Constitution (section 241) authorizes a recovery for death resulting from negligence, including all supposed degrees of it, and was intended to abrogate the further use of the words "willful neglect" in our law. The present statute follows the Constitution and nowhere uses those words, but does provide that if the "negligence" is gross, or the "wrongful act" by which death is caused is willful, punitive damages are recoverable.

The words "wrongful act" of the Constitution and "willful act" of the statute do not primarily refer to an act of negligence, which is the opposite of those terms. The word "gross," when used to qualify the word "negligence," is a relative one, and is supposed to emphasize merely the want of due care and negligence as "gross" or "ordinary," according to the circumstances, relations and conditions under which due care is omitted to be exercised.

In this case there appears to have been no intention of conforming the petition to the old statute. It is not a suit for "willful neglect," but recovery is sought for the death of the plaintiff's intestate, caused by the "willful, gross and reckless negligence" of the company, the word "willful" being used manifestly as the synonym of "gross." The demurrer to the petition was, therefore, properly overruled.

It follows from what we have already said that compensatory damages were recoverable in the action, and hence there was no error, as is insisted by counsel for appellant, in the instruction authorizing such recovery.

The case relied on of Railroad Co. v. Privitt's adm'r, 92 Ky., 223, was one under the old statute, and it was held that unless "willful neglect" was shown no recovery could be had. We perceive no error to appellant's prejudice in any of the instructions given.

The court, however, committed a serious error to the prejudice of the company in permitting the alleged letter of Mrs. Lake to Handy to be read as evidence. She was the secretary of the company, it is true, but she was not its agent in making damaging admissions after the transaction occurred in which Simms lost his life (Railroad Co. v. Ellis' adm'x, 17 KY. LAW REP., 259). The letter was to the effect that the dead wire caused Simms' death, and completely silenced the company's contention that Handy's trellis wires were placed in contact with the telephone wire without its knowledge, and thus caused his death, or contributed to it, or that his death was due to natural causes. Moreover, if otherwise competent, it must have been mere opinion, based on hearsay, as the writer had no personal knowledge of the facts, though the statement, coming from one connected with the company, had the force of an absolute admission, and one fatal to the company's defenses.

For the reason indicated the judgment is reversed for proceedings consistent with this opinion.

The court delivered the following response to a petition for rehearing December 19, 1896:

It was insisted at the original hearing by counsel for the appellant that unless "willful neglect" had been shown no recovery for even compensatory damages could be had; that it was a case for punitive damages or nothing.

This contention was based on the case of Cincinnati R. R. Co. v. Prewitt's adm'r, 92 Ky., 223, which we held in the opinion to have no bearing on the case at hand, and we said in answer to this contention that from our views of section 241 of the Constitution compensatory damages *were* recoverable in the action, and that an instruction so permitting was not erroneous. This was not intended as a restriction of the rights of the plaintiff to recover only compensatory damages, but to meet the contention of counsel that even such damages were not recoverable; nor do we think, as already indicated in the opinion, that the Constitution restricts the recovery to compensatory damages when at the common-law punitive damages were recoverable.

There are certain minor errors not expressly passed on by us in the opinion, and counsel desire these should be acted on. The first complaint is that appellee was permitted to prove by Whaley a conversation between him and Mrs. Lake, in which the latter said she wanted the witness to take down the dead wire, which, as she claimed, was a part of the line of Victor & Whaley, and witness declined because, he contended, it was not his business, etc.

If this conversation was after the death of Sims it clearly falls within the rule announced in the opinion as to the letter of Mrs. Lake and would be incompetent. If before, it would seem to be competent. The bill of evidence does not disclose when it was. The testimony of Handy that the line was overcharged with electricity on several occasions prior to the occurrence under investigation was competent as held below.

The proof of Berkley showing the custom of the best telephone companies in respect to manner of detecting defects and irregularities in their lines would have been competent if shown to be the best known method of such detection, and as the avowal for the witness seems to state this the court should admit it. It may be true that those not acquainted with this mysterious power or agency might think it a poor protection if defects were not to be discovered and corrected until after the damage had likely been done. This would only show the custom or rule a poor one, and does not argue against its admissibility as evidence.

MORTON, &C. V. HAMILTON COLLEGE.

(Filed December 10, 1896.)

1. Corporations - Liability upon contracts of projectors—Where the projectors of a contemplated corporation enter into a contract in its behalf, the corporation, when subsequently created, can not take the benefit of the contract without performing that part of it which the projectors undertook that it should perform.

2. Same—A subscriber to a college, the incorporation of which was contemplated, having been induced in making his subscription to stipulate that it should bear interest like other subscriptions, the consideration for such a stipulation being the execution of a bond by certain of the projectors of the company indemnifying him against the payment of interest, the obligors in that bond, having been required to pay the interest upon the subscription, have the right to look to the corporation, which was subsequently created, to reimburse them, the corporation which received the benefit of the money being estopped to deny its liability. While the correct rule is that a majority of the provisional agents or trustees must have induced those who signed the bond to assume the responsibility before the corporation can be made liable, yet as no objection was made in this case, and it is manifest that all were consenting to this mode of obtaining the subscription, the corporation is liable.

3. Actions—The action to enforce that liability should have been in equity, and upon the return of the case it should be transferred to that docket.

Webb & Farrell for appellants.

Beauchamp & Walton for appellee.

Appeal from Fayette Circuit Court.

Opinion of the court by Chief Justice Pryor.

This action was instituted by J. B. Morton and others against a corporation known and called Hamilton College. It is on an implied *assumpsit* on the part of the college to pay to the plaintiffs certain sums of money advanced by them as the *promoters* of what was then called Hocker College, with the name of the corporation changed to that of Hamilton College by a charter subsequently obtained.

The money, it is alleged, was advanced by the plaintiffs for the

college, with the agreement and understanding that it was to be repaid to the plaintiffs when the corporation was brought to life by the charter.

We wish much the action had been in equity as the facts bring the case clearly within the jurisdiction of the chancellor, and, while the action of *assumpsit* upon an implied understanding is in the nature of an equitable claim, still where money has been advanced, as in this case, and gone into a trust fund to be applied in a particular way, the *corpus* of the trust should not be interfered with under an execution from a common-law court; and, besides, it is often difficult for the chancellor to raise an equity, although of the highest character, from a given state of facts, and much more difficult for a jury to do so in the absence of an express contract. This case, however, went off on an instruction to find for the defendants.

In the year 1876 J. M. Hocker owned Hocker College, in the city of Lexington, a college of much celebrity and patronized principally if not controlled by the members of the Christian Church. Hocker desired to sell the property, and the members of that church, wishing to place it under their control, entered into negotiations for its purchase, and Hocker agreed to let them have his property for $50,000, on certain terms and conditions. A committee was selected to raise the $50,000 by subscription, and succeeded in raising all but $10,000 or $15,000. At one of the meetings, where nearly all of those were present who were recognized, and made a board for the purpose of organizing the college and raising the fund, a man by the name of Hamilton was present, and agreed to subscribe $10,000 upon certain conditions. He was not willing to make the payment at the time and in the manner of the other subscriptions, and, to prevent the loss of the subscription proposed to be made by Hamilton, it was suggested that he be indemnified against the payment of interest, as was stipulated in the other subscriptions, and accordingly, as is alleged, the appellants gave to Hamilton a bond of indemnity, and he executed his notes, like those of the other subscribers, bearing interest, and, with additional subscriptions made perhaps on the same day the contract with Hocker was executed, and the property passed to the trustees, and a charter obtained by the president, with the name of the institution changed to that of *Hamilton College*.

Hamilton did not live long after this purchase, and these *appellants* were compelled to pay a difference of near $1,200 on account of their bond, all of which went into the fund raised to make the purchase. The bond was executed at the instance and persuasion of some of the trustees, and without objection by any, and when one or more of the appellants declined to sign the indemnity they were urged to do so upon the ground that, if they had the money to pay, such just and equitable claims could not be overlooked. They had each subscribed liberally to the enterprise, and, from the facts of the record, it was never intended or supposed by any one present that they were making a voluntary donation to the corporation of any sum they might have to pay by reason of the bond to Hamilton.

They derived no benefits other than those resulting to the subscribers of stock; had no interest in the property, but assumed a liability that was at the basis of the undertaking, and without which the purchase would not have been made.

There is no pretense or claim that the plaintiffs looked to the individual liability of the trustees for contribution, but, on the contrary, it is apparent that this money was regarded as a part of the trust fund with which the property was purchased, and those contributing to

its payment could look to the corporation for remuneration. Some one was liable to them, and there is no controversy as to the payment of the money.

The trustees, or those acting as such, were inducing the plaintiffs to pay the money or assume the responsibility, that the corporation might be formed. They were acting at the time for the contemplated corporation. The institution obtained the money on the faith that it would be repaid, and the equity of the appellants should be enforced.

It is contended that a majority of the provisional agents or trustees must have induced the appellants to have assumed the responsibility before the corporation can be made liable, and while this may be and doubtless is the correct rule, here there was no objection made, and the inference is plain that all were consenting to the mode of obtaining Hamilton's subscription. No single member of a corporation can bind it to a contract unless authorized by the board of trustees, or those who have the right to contract in its behalf, but in this case the body, having the capacity to act, obtained this money and paid it on the purchase on the faith that it would be repaid or the parties saved harmless, and the corporation, to which its very payment gave life, will be estopped from saying this provisional body had no power to bind it.

In the case of Low v. Railroad, 45 N. H., 370, the court, in deciding a similar question, said: "In such cases it can avail nothing, by way of defense, to show that in fact the party had no capacity to make such an antecedent request or to bind himself by a contract, as in the case of a corporation, that it was not organized at all."

In 79 Penn. State Reports, 54, in the case of Bell's Gap R. R. Co. v. Cristy, it was said: "We do not desire to controvert the principle established in England, and to some extent recognized in this country, that when the projectors of a company enter into contracts in behalf of a body not existing at the time, but to be called into existence afterwards, then if the body for whom the projectors assumed to act does come into existence it can not take the benefit of the contract without performing that part of it which the projectors undertook that it should perform."

It is true that the corporation, after its organization, in nowise ratified the contract, for it had already received the benefits under the agreement with the projectors, and the money paid invested in the trust estate. If this had been a joint adventure between these projectors and the money or liability assumed by the plaintiffs as alleged, can it be well argued that the joint adventure or the trust fund would be exempt from liability? We think not; and the fact that these projectors obtained a charter and converted the institution into a corporation relieves it from all liability is an argument equally untenable.

This case was heard on the testimony of the plaintiffs alone, and when the case goes back it should be transferred to equity and the parties on each side allowed to take proof, and if the plaintiffs are entitled to relief the money should be required to be paid from the income of the corporation. The report of the committee to investigate the claim of the plaintiffs was properly rejected as evidence.

Reversed and remanded for proceedings in conformity to this opinion.

ROGERS, RECEIVER V. RAINS.

(Filed December 17, 1896.)

1. *Conflict of laws—Agreement in note to pay "reasonable attorney's fee"*—A stipulation in a note executed in another State to pay "a reasonable attorney's fee" in the event of litigation will not be enforced in this State, although enforcible in the State where the note was executed, as such agreements tend to oppress the debtor and to encourage litigation, and are, therefore, within the well-recognized exceptions to the general rule of comity giving effect to contracts beyond the limits of the State where made.

2. *Building associations*—Upon premature dissolution of a building association the advanced members may be compelled to pay forthwith the balances due from them on their securities, although the latter be given in terms only for the payment of installments.

3. *Same*—In winding up an insolvent building association borrowing members are not entitled to have deducted from their indebtedness to the association payments made by them as dues on stock, but must, after deducting payments of premium and interest, discharge in cash the balance remaining upon their indebtedness. Payments upon stock must stand to their credit on the books of the corporation until time for final adjustment, when all the stockholders, borrowers and nonborrowers, will be paid *pro rata* from the fund for ultimate distribution.

Jesse L. Rogers for appellant.

H. P. Cooper for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Judge DuRelle.

The New South Building & Loan Association was a Tennessee corporation, having its place of business at Cumberland Gap, Tennessee. In October, 1891, the appellant was, by the chancery court of Claiborne county, Tennesee, appointed receiver of the business and property of the company and qualified as such. By decree in the cause, in which appellant was appointed, entered in March, 1892, the corporation was dissolved upon the ground that it was insolvent, and its business was directed to be wound up and settled. It appears that all stockholders in the company were either parties plaintiff or defendant in the cause.

The appellant thereupon instituted suit upon a note executed by appellee to the company which came into his hands among the assets of the corporation, dated June 1, 1890, for $1,000, with 5 per cent. interest and 5 per cent. premiums per annum, and payable on or before 7 years from date, with a proviso precipitating the maturity of the principal upon default for six months in payment of interest or premium.

The note was secured by mortgage of appellee's land in Marion county, and by pledge of stock held by him in the company. The mortgage provided further for the payment of a reasonable attorney's fee in the event the indebtedness should be collected by suit. The appellee had subscribed May 1, 1890, for fourteen shares of the stock of the company, the subscription being for monthly payments of eighty cents per share until the stock should be paid up and matured, and on the maturity of the stock, which it was estimated would occur in about seven years, the shareholder, who was a borrower, would be entitled to have the amount of his loan deducted from the face value of the stock, and be paid the difference in cash. Appellee had paid dues on his stock up to June 16, 1891, and interest

and premium on his loan to the same date. The petition sought the recovery of the $1,000, subject to credits by the amounts paid as interest and premium on the loan, and of an attorney's fee of 10 per cent. on the amount due.

By amended petition it was averred that the company was a Tennessee corporation, having its principal place of business in that State; that the note was payable there—the note and mortgage were there delivered and accepted—and that the laws of that State allowed the collection of an attorney's fee when contracted for. Appellee pleaded a set-off of the value of certain paid-up stock held by him, mistake in the drawing of the mortgage, and that the contract entered into by him was that the note was to be paid by the maturing of the stock and in no other way, and prayed that the note be credited by the dues paid on his stock, as well as the interest and premium, and for damages for breach of contract.

By an agreement filed in the cause, it is established that the note and mortgage were executed at Lebanon, Kentucky, but the note was payable in Tennessee; that the laws of Tennessee authorize and enforce contracts for the payment of reasonable attorney's fees in such cases; that appellee subscribed for his stock for the sole purpose of securing a loan of $1,000 from the company, and having secured it executed the note and mortgage sued on; that at the time he secured the loan it was estimated that his stock would mature and be worth par in seven years, at which time the company would owe him $1,400 on his stock, which would cancel his loan and entitle him to $400 in cash, and that he contracted to pay $11.20 per month on his stock, and the interest and premium on his loan until his payments, with the profits of the company, should make his stock worth par, whether this was for a longer or shorter period than seven years; that he "had a right to retain the loan until the same was canceled by the said monthy payments and profits of the association;" that the dues payable on the stock were $11.20 per month, and the interest and premium were $8.34 per month. The amount of payments by appellee on each account was agreed, and that he had not been in default in payment for a period of six months before either the insolvency of the association or the appointment of the receiver, but had been in default for more than six months at the time of the decree of dissolution, and that he ceased payment because he believed in July, 1891, that the association was insolvent and was misappropriating the funds.

The circuit court decreed a reformation of the note and mortgage as prayed in the answer. This is immaterial, as there seems to be a general concensus of authority "that upon premature dissolution of the association the advanced members may be compelled to pay forthwith the balances due from them on their securities, although the latter be given in terms only for the payment of installments." (Endlick on Building Associations, second edition, section 523.)

The circuit court gave judgment foreclosing the mortgage, allowing credits on the note not only for the amount paid as interest and premiums, but also for the amounts paid as dues on the stock. The judgment denied the attorney's fees prayed by appellant.

Although appellee prayed a cross appeal, he appears in this court asking an affirmance. The appeal, therefore, presents but two questions for decision. First, whether the contract for attorney's fee, which was valid according to the laws of the State where contract was by its terms to be performed, is enforcible in this State. This question has been recently decided by this court in the negative.

It was held in the case of Clark v. Tanner, decided December 9,

1896, that the general rule of comity giving effect to contracts beyond the limits of the State where made does not embrace contracts like the one in question. Such contracts come within recognized exceptions to the general doctrine. Those exceptions, as said by Justice Martin in Whitson v. Stodder, 8 Mart. (La.), 95, apply to cases in which the contract is immoral or unjust, or in which the enforcing of it in a State would be injurious to the rights, the interest or convenience of such State or its citizens." And as said by this court in Witherspoon v. Musselman, 14 Bush, 214, of such contracts for the payment of attorney's fees, "they are agreements to pay penalties, tend to oppression of the debtor and to encourage litigation." There was, therefore, no error by the lower court upon this point.

The second question is whether the sums paid as dues on stock subscriptions are proper credits upon the mortgage debt, or whether those payments should stand to his credit until time for final settlement, when all shareholders, borrowers, as well as nonborrowers, will be paid *pro rata* from the fund for distribution, it being conceded that the payments of interest and premium were properly credited upon the debt.

Mr. Endlick, in his work on Building Associations, in the latter part of section 523 (second edition) thus states the doctrine contended for by appellee: "In one class of decisions it has been declared that the borrower is to be charged only with the amount he has actually received, with legal interest, and credited with all his payments *upon stock and interest* upon the principle of partial payments."

Quite a number of authorities sustain this view, but on this question we concur with the courts of Pennsylvania and Tennessee, and Mr. Endlick, in summing up the effect of the authorities, in section 531, concurs in the reasoning of those courts, while he contends for a qualified application of it. He says (page 530): "It must be true, therefore, that the basis of the borrower's indebtedness is to be taken to be the amount of money actually passing into his hands, with legal interest thereon. *But it can not be true that he is to be allowed as deductions therefrom all that he has paid into the society.* That would be overlooking his duty as a member to contribute to the losses and expenses of the common enterprise. What he has paid as interest is to be allowed him as paid upon interest. If he has paid interest upon the premium bid by him he has overpaid his interest, and the excess ought to go in reduction of his debt; and upon it he is entitled (by reason of his right to apply, if he chooses, his stock payments to the reduction of his debt) to a further credit for whatever his shares are worth, *i. e.*, for his proportion of the assets of the association at the same rate per share as the shares of unadvanced members. The balance remaining upon his indebtedness he is bound to discharge in cash."

Mr. Endlick then goes on to argue that the value of the stock of such an association, when in the hands of a receiver, under the supervision and control of a court of equity, can be readily ascertained, or at least approximated, and the advanced shareholder given the benefit immediately, by way of credit on his debt, of a part at least of the value of his stock, an estimated proportion thereof being reserved to cover losses and expense of liquidation, and the surplus, if any, remaining to be paid him on final distribution. But we apprehend that the procedure suggested by Mr. Endlick, and which does not appear to have been approved by the courts, would prove dangerous in actual practice. Over sanguine receivers would put too high an estimate upon the value of the association's assets, and too low an estimate on the probable losses and expenses, with the result

of a loss to the unadvanced members and a proportionate gain to the advanced members. Moreover, it would be extremely difficult of application, in a case like the one at bar, where the member's debt is collected through the forums of a different sovereignty from that under which the receiver was appointed.

We are of opinion that the true rule is laid down in the case of Rogers v. Hargo, decided by the Supreme Court of Tennessee, in considering a question arising out of the same receivership involved in this case. The court in that case (92 Tenn., 38) quoted as follows from Stroken v. Franklin Saving Fund and Loan Association, 8 Atlantic Rep., 843, decided by the Supreme Court of Pennsylvania in 1887: "The insolvency of the company, as before observed, puts an end to its operations as a building association. To a certain extent it also ends the contract between it and its members respectively, and nothing remains but to wind it up in such a manner as to do equity to creditors and between the members themselves. As regards the latter, care should be taken to adjust the burdens equally and not to throw upon either borrower or nonborrower more than their respective share. That result may be reached by requiring the borrower to repay what he actually received, with interest. He would then be entitled, after the debts of the corporation are paid, to a *pro rata* dividend with the nonborrower for what he had paid on his stock. He will thus be obliged to bear his proper share of losses. To allow him to credit upon his mortgage his payments on his stock would enable him to escape responsibility for his share of the losses, and throw them wholly upon the nonborrower. In other words, the borrower would escape without loss. It will not do to administer the affairs of an insolvent corporation in this manner."

The Tennessee court, in commenting upon the opinion quoted, said: "The reasoning of the court, as there given, fully indicated the conclusion reached. To our minds it seems unanswerable. Without further discussion or elaboration we are content to adopt and follow the decision of the Pennsylvania court. Charge defendant with money actually received by him, treating same as due and drawing interest from time received, and credit him thereon by payments of interest and premium when made. Ascertain balance due, making calculation upon the principle of partial payments, and give recovery for such balance. Let amount paid by defendant as dues on stock stand to his credit on the books of the corporation until time for final adjustment, when he and all other stockholders, borrowers and nonborrowers will be paid *pro rata* from the fund for ultimate distribution. Thus the loss will be apportioned equally." In this conclusion we fully concur.

Wherefore, the judgment is affirmed on the cross appeal and reversed on the original appeal, with directions to enter a judgment in accordance with the principles of this opinion.

STRUSS V. JOHNSON.

(Filed December 19, 1896.)

Elections—Disposition of questioned ballots—The provision of section 1482 of the Kentucky Statutes requiring that doubtful or questioned ballots shall be sealed up and returned to the clerk of the county court with a statement as to whether or not they have been counted, and, if counted, how counted, is mandatory and not directory merely, and where such ballots are returned unsealed and without the required statement, they are not admissible as evidence in a contest of the election.

Walter Evans, George DuRelle, Wm. Kreiger, Fairleigh & Straus and W. O. Harris for appellant.

Kohn, Baird & Spindle and P. B. & Upton W. Muir for appellee.

Appeal from Jefferson Circuit Court, Common Pleas division.

Opinion of the court by Judge Paynter.

The appellant, H. C. Struss, and the appellee, William P. Johnson, were candidates for the office of clerk of the Jefferson County Court at the November election, 1894. Johnson's majority was 210, as appeared from the returns of the election officers of the various precincts.

Struss instituted this contest, and claims there were enough legal ballots cast for him, which were not counted by the election officers, to elect him. There were several hundred ballots placed loosely or unsealed, and without endorsement on the ballots or otherwise, in the ballot boxes by the election officers. When they completed the count in their respective precincts, the ballot boxes were locked and delivered to the clerk of the Jefferson County Court. There were other ballots, properly sealed and endorsed by the election officers, which were also placed in the ballot boxes and returned to the clerk of the county court.

There were not enough of the latter class of ballots returned to overcome the majority which had been returned for Johnson. The contestant introduced an election officer or an inspector at the precincts from which the loose or unsealed and unendorsed ballots were returned to prove they were not counted by the election officers.

The question to be determined is as to whether the ballots should have been counted which were placed unsealed in the ballot boxes, unaccompanied by a true statement by the officers of election as to whether they had or had not been counted; and, if counted, what part and for whom. A solution of this question depends upon a proper interpretation of the election law.

Section 1482 of the Kentucky Statutes provides: "When the polls are closed the officers of election shall, in the voting room, immediately count the votes and certify the same as hereinafter provided; and no adjournment shall be had until the same is completed. When the result of the ballot is ascertained it shall be immediately announced by one of the judges in front of the voting room, and thereupon the judges shall, in the presence of the clerk, sheriff and the inspectors, provided for in the preceding section, destroy the ballots voted, mutilated or spoiled and the ballots remaining unvoted: *Provided*, That if there are any ballots cast and counted, or left uncounted, concerning the legality or regularity of which there is any doubt or difference of opinion in the minds of the judges of election, said ballots shall not be destroyed, but sealed up and returned to the clerk of the county court, with the returns of the election, for such judicial or other investigation as may be necessary, with a true statement as to whether they have or have not been counted; and, if counted, what part and for whom "

And section 1483 provides: "The form of the return to be made on the inside of the cover of the stub-book shall be substantially as follows: State of Kentucky, ——— county, election held on the ——— day of ———, eighteen ———, in ——— precinct. Number of ballots counted as valid, ———; number of ballots questioned or rejected, ———; number of ballots marked 'spoiled,' ———; whole number

of ballots cast, ——; number of votes received for governor, —— by ——; number of votes received for lieutenant-governor, —— by —— (and so for other State and county offices); number of votes on question of ——, voted yes, ——; voted no, ——.

"We, the judges, sheriff and clerk of election at the precinct above mentioned, certify that the above is a correct return of the election held therein on the day aforesaid.

"————, Judge,
"————, Judge,
"———— ————, Clerk,
"————, Sheriff."

Until the adoption of the present Constitution there was no law in this State providing for an official and secret ballot. The legislation which followed the adoption of the Constitution prescribed the kind of ballots to be used, and surrounded the elector with such safeguards as the wisdom of the general assembly could devise to render it impossible for any one to know for whom he had cast his ballot. The purpose was to place him beyond the control or influence of any one, that he might vote without the fear of social or political ostracism or of suffering loss in his business, profession or calling.

The general assembly also had under consideration the best method of conducting and ascertaining the result of the election. It knew that frauds frequently followed the casting of the ballots, and by that means the result of the election was often changed. The question arose as to what were the best means to be employed to prevent the perpetration of frauds after the ballots had been cast.

By the provisions of section 1482, when the polls close, the officers of election shall, in the voting room, immediately count the votes, and certify the same as provided in section 1483, and this shall be done before an adjournment takes place. There must be a public announcement made by one of the judges of the result as ascertained. When this is done the judges, in the presence of the clerk, sheriff and the inspectors, shall destroy the ballots *voted, mutilated or spoiled, and the ballots remaining unvoted.*

If there are any ballots cast and counted, or left uncounted, concerning the legality or regularity of which there is any doubt or difference of opinion in the minds of the judges of election, such ballots shall not be destroyed, but be *sealed* up and returned to the clerk of the county court with the returns of the election, for such judicial or other investigation as might be necessary, but they should be accompanied with "*a true statement as to whether they have or have not been counted; and, if counted, what part and for whom.*"

The law authorizes political parties to be represented by inspectors at the count made by the officers of election.

As great authority had been vested in the officers of election the law-making power deemed it wise that they should immediately ascertain, certify and publicly declare the result of the election.

The law provides that the ballots which were cast (except those heretofore mentioned) should be destroyed. The general assembly did not believe it was wise to preserve them, as had been theretofore done under the law, because they were admissible as evidence to affect the returns of the officers of election. It did not intend that they should be used as evidence, as it was possible for the ballots to be changed in the box after the election, and thus, in some instances, overturn the result of the election as certified by the officers. The law requires that the ballots remaining unvoted should be destroyed

because it removed the possibility of any one using them for the purpose of stuffing a ballot box or substituting them for those which the law required should be returned *sealed*, etc., to the county court clerk.

The general assembly deemed it proper to preserve, for judicial or other investigation, the ballots cast and counted or left uncounted, concerning the legality or regularity of which there was any doubt or difference of opinion in the minds of the judges of election. It knew if these ballots were preserved in the manner in which they had been preserved under the laws of this and other States that a possibility still existed for the fraudulent substitution of ballots, and thus impeach the returns of the officers of election. It, therefore, provided the method for preserving, certifying and returning them, which rendered the successful substitution of ballots therefor almost if not entirely impossible.

If we hold that the ballots which the officers of election placed unsealed in the ballot boxes, and without the statement from the officers of election, which the law requires, as to whether they have or have not been counted; and, if counted, what part and for whom, then we render possible the evil of the fraudulent substitution of ballots which the general assembly manifestly attempted to guard against by providing for the destruction of all ballots which were cast or spoiled or unvoted. It is just as easy to make such fraudulent substitution when the class of ballots in question are returned in the manner in which they were in this case as it would be were all the ballots which were cast preserved and returned.

Without the statement required by the statute there is no official evidence or certificate to show whether the ballots have or have not been counted.

We held in Houston v. Steele, 17 KY. LAW REP., 1149, in effect, when the questioned or doubtful ballots were sealed up and returned as the law provides, the word "returns," as used in the statute, includes the undestroyed ballots.

To hold that that part of the statute requiring the sealing up of the doubtful or questioned ballots, and a statement of the officers of election as to whether they have been counted, etc., is directory, we sweep away the safeguard which the law places around the returns of the officers of election. To hold it is mandatory, in the particular indicated, we follow the manifest purpose of the law-making power, which was to prescribe how doubtful or questioned ballots should be preserved and returned for "such judicial or other investigation as may be necessary."

To render the doubtful or questioned ballots admissible as evidence in a judicial or other investigation, we are of the opinion that they must be sealed and returned with the statement of the officers of election, as required by the statute.

This view is nowise in conflict with the case of Broaddus v. Mason, 95 Ky., 421. There was no question in that case as to the extent ballots were admissible as evidence but the question was as to the competency of parol evidence to show the officers of the election had made a mistake in adding the votes together after they had been counted. In that case the mistake was shown by the tally sheet and corroborated by the officers of election.

The conclusion which we have reached renders it unnecessary to consider other questions raised by appellant and appellee. It would be unprofitable to review the many authorities cited by counsel because, in our opinion, the policy of admitting ballots as evidence to impeach or change the returns of the officers of election has been

reversed by the law-making power, and when it provided for the preservation of a particular class of ballots—a small number compared to the entire number cast—it prescribed a statutory rule to regulate the admission of such ballots as evidence.

Judgment affirmed.

Judge Guffy dissenting, and Judge DuRelle not sitting.

Judge Guffy delivered the following dissenting opinion January 19, 1897:

It seems to me that the majority opinion of the court in this case is erroneous, and if adhered to will enable election officers to disfranchise many voters, and incidentally deprive persons of office to which they would in law and equity be entitled.

Section 1482 of the Kentucky Statutes, after providing for the counting, certifying, etc., of the result of the election, provides that ballots voted, spoiled, mutilated, and those not voted shall be destroyed; provides that if there are any ballots cast and counted or left uncounted, concerning the legality or regularity of which there is any doubt or difference of opinion in the minds of the judges of election, such ballots shall not be destroyed but be sealed up and returned to the clerk of the county court, with the returns of the election, for such judicial or other investigation as may be necessary, with a true statement as to whether they have or have not been counted, and if counted what part and for whom.

In this case it is clear that a large number of ballots were returned in the ballot boxes, some from one precinct and some from another, but without the statement required by law as to whether they had been counted or not; in fact without any statement at all. The majority opinion holds that such ballots can not be examined nor proof heard to show that they were not counted.

Manifestly it was the intent of our law makers to better secure honest and fair elections by the adoption of the present ballot law, but if the opinion in this case is to be settled law then the voters as well as the candidates are at the mercy of election officers, who, either through ignorance, carelessness or perversity, may neglect to make out the required statement as to ballots that one or more judges doubt.

If, as is claimed in this case, none of these returned ballots had been counted, it is not remarkable that the statement was omitted, because to those not versed in law the statement would seem to be unnecessary, and we are, as I think, bound to take notice of the fact that very many election officers are not at all versed in the law and not able to see and comprehend the meaning and importance of all the statutes regarding elections. I doubt if there is a full and strict compliance with the election laws in half the precincts of the State at any election.

It seems to me that there can be no law nor tenable construction of law that can or ought to disfranchise a voter who has in a legal manner cast his ballot. When the voter in the manner prescribed by law has cast his ballot he has nothing else to do. In fact can do nothing else towards seeing that it is counted or certified, and to allow his vote to be rejected or lost by reason of the omission of election officers to comply with the statutes seems to me to strike at the very foundation of our form of government.

Indeed section 1471 of Kentucky Statutes provides that no ballot shall be rejected for any technical error which does not make it *impossible* to determine the voter's choice. The section *supra* may be said to directly apply to the officers of election who are to count the

ballots at the close of the polls, but it seems to me there can be no good reason why it should not apply in all cases.

As before remarked it is believed that the object of the law-making power in the adoption of our present system of voting was to more effectually protect the voter and prevent fraud of all kinds, and that there was no intention to adopt any new rule as to the right of all voters to have their votes counted if legally cast, and that whenever that fact could be ascertained the vote should be counted, although the officers of election might have omitted to comply with the requirements of the law enacted for the purpose of evidencing how a voter had voted.

I think that the decision in this case is in conflict with the principles announced by this court in many decisions in election cases. In Clark v. McKenzie, 7 Bush, 530, it appeared that a leaf or page of paper not fastened to the poll-book had thirty-four votes recorded on it but the clerk had not signed his name at the bottom of the page as was then required by statute, and the county canvassing board refused to count the votes. Clark brought suit in the circuit court to compel the board to count the thirty-four votes, which suit was dismissed by the court below, and on appeal this court held that the mandamus should issue, and in discussing the question quotes with approval the following from the opinion of Judge Breese of the Supreme Court of Illinois, delivered in an election case: "The question in all such cases should be, whom did the majority of the qualified voters elect? Form should be made subservient to this inquiry, and should not rule in opposition to substance.

"A literal compliance with prescribed forms is not required in any case if the spirit of the law has not been violated, and in all cases the intention of the voters clearly ascertained should govern."

The foregoing principles have, so far as I am advised, never been departed from by this court prior to the rendition of the opinion in this case, and the provisions of section 1471 *supra* is a statutory endorsement of the doctrine announced in the case of Clark v. McKenzie *supra*. There is nothing in section 1482 that prohibits a judicial decision respecting the validity of returned ballots unless the required statement is also filed with them. The statutory requirement is but one of the means by which certain facts are proven, established or shown, just as the court said with reference to the clerk's signature to the bottom of each page of the poll-book. The required statement adds nothing to the validity of the ballots, but is only evidence as to whether any of them have been counted, and if so which and for whom, but if that evidence be not furnished by the officers it does not seem to me that if such evidence to establish these facts can be produced that law and justice requires that it shall be heard and considered.

Suppose that the officers should neglect to make out any certificate showing the number of ballots cast and counted, and returned the books and all the ballots, would it be contended that all the voters at such precincts should be disfranchised and some one given an office, when in fact the ballots showed another person had been in fact elected? Surely not.

I think in such a case that if it clearly appeared that the ballots so returned were the true legal ballots cast at the election any court would be bound to count them.

In Broaddus v. Mason, 95 Ky., 421, it was held by this court that the certificate of the precinct officers of election as to the number of votes cast for a candidate might be shown to be the result of a mistake, and then so corrected as to give the office to one who, accord-

ing to the certificate as returned, was defeated, and that decision is evidently right, and it being lawful to show what the real facts were, although to do so contradicted the returns of the officers, it seems to me that where the officers had failed to certify as to a fact required, that proof as to such facts should be heard in order that the truth should be known and the man really elected get the office. If the official certificate can be contradicted by parol proof to the end that the will of the voter should prevail, surely in the absence of any certificate evidence should be heard so that the voter should not be disfranchised, and persons inducted into office to which they had not been elected.

The court in the opinion in the last-named case said: "It may be difficult, on account of ballots being destroyed, in many cases to determine whether officers of the election have miscounted them, and thereby make a false return, yet it is well settled that in order to ascertain the fact, not who was returned elected, but who was in fact elected, parol evidence is admissible." (McCreary on Elections, section 468.)

In McLaughlin v. Wheeler, lately decided by this court, the principle announced in the above-named case was adhered to. It appeared in the last-named case that the officers in a certain precinct certified to only nineteen votes for Wheeler, which resulted in McLaughlin obtaining the certificate of election. Upon a contest instituted by Wheeler he was allowed to prove that in fact he received one hundred and nineteen votes, thus contradicting the certificate, and thereby obtaining the office in the court below, and this court affirmed that judgment.

Suppose that the returned ballots in question had been sealed up and a statement signed by all the officers of election that none of them had been counted, would not the court hear proof to show that in fact all of them had been counted? It seems unreasonable to me to hold that the required statement of the officers is the only proof that can be heard as to returned ballots.

The same section which requires the statement aforesaid to accompany the questioned ballots returned requires the officers to immediately count and certify the result, and announce the same without adjournment, yet I presume that a failure to do any or all of these without adjournment would not result in the exclusion of the votes so cast. I do not assume that the evidence in this case would have given the office to the appellant, as I do not know what evidence was embraced in the record, because it was held that such evidence could not be read or considered.

I regret to differ from my associates, but the doctrine announced in the majority opinion seems to me to be fraught with so much danger to the voters and candidates that I have felt it my imperative duty to file this, my dissenting opinion, in the case. (Anderson v. Winfree, 85 Ky., 597; Houston v. Steele, 17 KY. LAW REP., 1149.)

STATEN V. STATEN, &C.

(Filed December 19, 1896—Not to be reported.)

James H. Polsgrove for appellant.

Frank Chinn and Ira Julian for appellees.

Appeal from Franklin Circuit Court.

Opinion of the court by Chief Justice Pryor.

In this case we perceive no error to the prejudice of the appellant, but, on the contrary, the judgment is for the infant's benefit.
Judgment affirmed.

COMMONWEALTH V. EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES.

(Filed January 6, 1897.)

Limitation of penal action—To a penal action by the Commonwealth to recover the penalty prescribed by section 656 of the Kentucky Statutes against life insurance companies and their agents for making discrimination in rates or for allowing rebates of premiums the limitation of one year, prescribed by section 1138 of the Kentucky Statutes, applies, and not the limitation of five years, prescribed by section 2515, the latter section applying to civil actions where damages in the nature of a penalty are annexed.

E. L. Worthington and Wm. J. Hendrick for appellant.

Richards, Baskin & Ronald for appellee.

Appeal from Mason Circuit Court.

Opinion of the court by Judge Burnam.

This action was instituted in the Mason Circuit Court by the Commonwealth of Kentucky against the Equitable Life Assurance Society of the United States, a corporation having its main office in New York, and which, as appears from the petition herein, has been duly authorized to do business as a life insurance company in this Commonwealth, to recover a fine from said defendants for a violation of the provisions of section 656 of the Kentucky Statutes, relating to a rebate of premium payable on a policy issued by them. The allegation of said petition is that "said company did, on the ——— day of February, 1894, by its duly authorized agent, J. D. Rummons, contract with one Yagell to insure his life for the sum of $5,000; in consideration of his agreement to pay an annual premium of $146, and to issue him a policy to that effect, and, in order to induce the said Yagell to agree to take out said policy with it, the said company, by its agent, agreed with said Yagell, prior to issual thereof, that when he paid the first installment premium of $146 it would pay back to him as a rebate the sum of $16; and that the said Yagell under said agreement took out said policy and paid the first installment premium of $146, and that said defendant, pursuant to its agreement made by its agent, gave back to the said Yagell the said sum of $16 as a rebate; and that said rebate was not expressed or provided for in the policy contract of insurance.

This petition was filed in the Mason Circuit Court on the 20th day of May, 1895, about fifteen months after the alleged cause of action accrued. A demurrer was filed by defendant to the petition of plaintiff, and same was sustained, and a judgment entered dismissing said petition, and from this order of dismissal this appeal is taken.

The only question presented by the demurrer aforesaid is whether said action, at the date of its institution, was barred by the statute of limitation in such action made and provided.

It is contended by appellant's counsel that the limitation provided by section 2515 of the Kentucky Satutes, which is fixed at five years,

applies to actions brought under section 656 of the Kentucky Statutes, and in support of his contention he makes a very ingenious argument. On the other hand it is contended by appellee that the limitation upon actions under this section is fixed by the provisions of section 1138, and expires in one year from the date of their violation.

In our opinion these sections of the Kentucky Statutes are intended to relate to two entirely different classes of actions, and are in no sense repugnant to each other, although they both apply to actions to recover penalties.

Section 2515 is found in chapter 80, the chapter which is entirely devoted to fixing limitations upon all classes of civil actions, whilst section 1138 is found in chapter 36, which is entirely devoted to the subject of crimes and their punishment.

This is certainly a penal action, brought to recover the penalty for the violation of a penal statute, which is imposed as a punishment for a public offense; and, in our opinion, the limitation upon same is one year from the date when said cause of action accrued.

Section 2515 was intended to apply to civil actions where damages in the nature of a penalty are annexed.

The distinction between these two sections was pointed out by this court in the case of Boyd v. Commonwealth, 91 Ky., 480.

The judgment of the lower court is affirmed.

COMMONWEALTH V. RUMMONS.

(Filed January 6, 1897—Not to be reported.)

Limitation of penal actions—Judgment affirmed for reasons given in Commonwealth v. Equitable Life Assurance Society of United States, reported above.

E. L. Worthington and Wm. J. Hendrick for appellant.

Richards, Baskin & Ronald for appellee.

Appeal from Mason Circuit Court,

Opinion of the court by Judge Burnam.

This action was instituted in the Mason Circuit Court by the Commonwealth of Kentucky against the defendant to recover a fine for an alleged violation of the provisions of section 656 of the Kentucky Statutes, relating to the rebate of premiums payable on a policy of insurance contracted for by him as the agent of the Equitable Life Assurance Society of the United States. It appears from the petition that the action was instituted about fifteen months after the date of the alleged offense.

A demurrer was filed by the defendant to said petition, and same was sustained, and said petition was dismissed, and to reverse this order of dismissal this appeal is prosecuted. The sole question raised by the demurrer is whether said action at the date of its institution was barred by the lapse of time and the statute of limitation in such actions made and provided.

On the same day, and to recover a fine for identically the same offense, an action was instituted by the Commonwealth against the Equitable Life Assurance Society of the United States (*supra*, 778),

the company which this defendant is alleged to have represented in making said alleged rebate. That case has been decided this day by this court, and the judgment of the lower court affirmed, and for the same reasons therein given.

The judgment in this case is also affirmed.

COMMONWEALTH V. ENGLAND.

(Filed January 8, 1897—Not to be reported.)

1. It is lawful to kill gray squirrels at any season of the year.

2. Killing of gray squirrels—Repeal of statute—Section 2 of chapter 183 of the Acts of 1891-2-3, which prohibited the killing of "any black, gray or fox squirrel" between the 1st day of February and the 15th day of June in any year, having been amended in March, 1894, by setting out the section in full, omitting the word "gray," that amendment is now the law, although the amendment makes no reference to an act passed in February, 1894, re-enacting the original act, with the proviso that "gray squirrels may be killed for the protection of crops."

W. S. Taylor and J. C. Muncie for appellant.

Appeal from Monroe Circuit Court.

Opinion of the court by Judge Paynter.

The indictment charges that defendant, in March, 1896, killed and had the same in his possession after they had been killed, six gray squirrels.

The court sustained a demurrer to the indictment presumably because he was of the opinion that the killing of gray squirrels was not in violation of law.

Section 2, chapter 183, Acts 1891-2-3, page 813, provides that "no person shall catch, kill or pursue with such intent, or have the same in possession after it has been caught or killed, any black, *gray* or fox squirrel between the 1st day of February and the 15th day of June in each year."

Section 2 of "An act to protect game and small birds," chapter 28, acts 1894, page 40, is the exact language of the section quoted above, with the exception of a proviso as follows, to wit: "Gray squirrels may be killed for protection of crops."

The act containing this section was approved February 27, 1894. Afterwards the general assembly passed an act entitled "An act to amend section 2 of chapter 183 of Session Acts of 1891-2-3, entitled 'An act to protect game and small birds in this Commonwealth.'

This act was approved March 3, 1894, four days after the act of February 27, 1894, became a law, and contains two sections, which are as follows:

"Sec. 1. That the section above recited be, and the same is hereby, amended by striking out the word 'gray' in the third line of said section, which section, when so amended, will read: No person shall catch, kill or pursue with such intent, or have the same in possession after it has been caught or killed, any black or fox squirrel between the 1st day of February and the 15th day of June in each year."

"Sec. 2. Whereas, the gray squirrel in the mountain counties of this State are liable to do a great injury to growing crops, an emergency is declared, and this act shall take effect from its passage and approval by the Governor."

The act approved March 3, 1894, purports to amend section 2 of the act of 1893, yet that section had been re-enacted with the proviso mentioned by section 2 of the act approved February 27, 1894. While this is true, the act declared that the section which it purported to amend should read as amended in a given way. This was equivalent to declaring what the statute should be with reference to the killing, etc., of squirrels.

Under the February act it was lawful to kill gray squirrels at any season of the year to protect crops. By the March act it is made unlawful to kill black or fox squirrels within a specified period but not gray squirrels. The language of the act makes it perfectly clear that the general assembly intended to remove any restriction that had been placed upon the killing of gray squirrels. It is lawful to kill them at any season of the year.

The judgment is affirmed.

COMMONWEALTH V. SHELBY.

(Filed January 8, 1897—Not to be reported.)

1. *Indictment—Resubmission to grand jury*—Where a demurrer is sustained to an indictment, the attorney for the Commonwealth is entitled to have the case, by an order of court, submitted to another grand jury unless it is sustained, because it appears that the offense was not committed within the jurisdiction of the court, or the indictment improperly charges more than one offense, or because it contains matter which is a legal defense or bar to the indictment.

The court having sustained the demurrer to an indictment for maiming because instead of charging that defendant did "bite off" the ear of a person named it charged that he did "bite of" the ear of that person, a motion to resubmit the case to the grand jury ought to have prevailed.

2. *It was error to sustain the demurrer*, the omission of the letter "f" in the word "off" not being fatal to the indictment.

W. S. Taylor for appellant.

Appeal from McCracken Circuit Court.

Opinion of the court by Judge Hazelrigg.

Where a demurrer is sustained to an indictment the attorney for the Commonwealth is entitled to have the case by an order of the court submitted to another grand jury, unless it is sustained, because it appears that the offense was not committed within the jurisdiction of the court, or the indictment improperly charges more than one offense, or because it contains matter which is a legal defense or bar to the indictment. (Section 170, Criminal Code.)

In this case a demurrer was sustained to an indictment for maiming which, instead of charging in the language of the statute (Kentucky Statutes, section 1165) that the defendant did "bite *off*" the ear of Richard Caldwell, charged that he did "bite *of*" the ear of that person. The motion to resubmit the case to the grand jury ought to have prevailed. We are further of opinion that the language used is sufficiently clear to indicate what offense was in fact meant to be charged, and that the omission of the letter "f" in the word "off" was not fatal to the indictment.

For the reasons indicated the judgment sustaining the demurrer and dismissing the indictment is reversed and the cause remanded for further proceedings consistent with this opinion.

COMMONWEALTH v. BALLARD.

(Filed January 8, 1897—Not to be reported.)

1. *Breaking into warehouse with intent to steal*—When one by some trick gains admission to a warehouse with intent to steal therefrom, this constitutes a breaking within the meaning of section 1164, Kentucky Statutes.

Where two brewing companies had separate apartments rented in a warehouse for the purpose of storing beer, and a servant of one of the companies, upon telling the superintendent of the building that he wished to get some beer, received a ring containing not only the key to his master's apartment but also the key to the apartment rented by the other company, which he entered and from which he took a keg of beer, the entry under such circumstances constituted a breaking within the meaning of the statute.

2. *Same*—The ownership of the warehouse broken was properly alleged to be in the company which owned and retained control of the building.

W. T. Bradshaw and W. S. Taylor for appellant.

Appeal from McCracken Circuit Court.

Opinion of the court by Judge Paynter.

The indictment charges that the defendant feloniously broke into the warehouse of the Paducah Ice Co. with intent to and did steal a keg of beer therefrom. The indictment is under section 1164, Kentucky Statutes.

At the close of the evidence for the Commonwealth the court instructed the jury to find the defendant not guilty. We have not been favored with a brief for the appellee, and the reason for giving the instruction does not appear in the record. However, the court must have concluded that there was not a breaking in the meaning of the statute, or that it was not the warehouse of the Paducah Ice Co. into which defendant broke.

The Paducah Ice Co. keeps a cold storage warehouse in the city of Paducah. There is a hall, with one door to each of four or five apartments opening into it. The Henderson Brewing Co. and Lemps Brewing Co. each had one of these apartments rented for the purpose of storing kegs of beer. These renters were each given a key to their respective apartments. The Paducah Ice Co. also retained keys to each apartment, which were kept by its engineer, Andrews. The superintendency of the building was retained by the Paducah Ice Co.

The defendant drove a wagon for Lemps Brewing Co. Between 11 and 12 o'clock P. M. the defendant told the engineer that he wanted to get some beer, whereupon the engineer gave him a ring which contained the key to the apartment rented by the Lemps Brewing Co., and also to that of the Henderson Brewing Co. A keg of the Henderson Brewing Co. was missing about that time and found in the possession of the defendant.

The defendant had no authority to enter the apartment of the Henderson Brewing Co. If he did so by the use of the key of that apartment with intent to steal or did feloniously take therefrom the keg of beer there was a breaking within the meaning of the statute. Then the mere fact that he obtained the key from the engineer did not authorize him to enter the apartment of the Henderson Brewing Co. The key may have facilitated his entry into the apartment, but it did not change the effect of the act.

"In cases where the offender, with intent to commit a felony, gains admission by some trick for the purpose of effecting it, the offense is

burglary, for this is a constructive breaking. * * * So if admission be gained under pretense of business, or if one take lodgings with like felonious intent and afterwards rob the landlord." (Wharton's Criminal Law, sixth edition, section 1539.)

The ownership of the warehouse was properly alleged and proven. The Henderson Brewing Co. did not rent the warehouse but the use of one of its apartments. The Paducah Ice Co. retained the control of it, except the Henderson Brewing Co. acquired the privilege of storing beer in a particular apartment which it reached through a hall, the use of which was common to the owner and other renters of apartments.

In cases of burglary the rule as to ownership of the dwelling house is stated in Wharton's Criminal Law, sixth edition, section 1586, to be as follows: "When divers persons have several rooms in a house of which they keep the keys, and inhabit them severally with their families, yet if they enter at one outer door with the owner these rooms can not be said to be the dwelling house of the inmates, but the indictment ought to be for breaking the house of the owner."

Under the statute if any person feloniously break in any warehouse with intent to steal, *or* shall feloniously take therefrom goods or thing of value, whether the owner or other person be or be not in such house, he is guilty.

The evidence was such we think the court erred in giving the peremptory instruction to find the defendant not guilty.

COMMONWEALTH V. HALL.

(Filed January 8, 1897—Not to be reported.)

Practice in criminal cases—Peremptory instruction—Where a verdict of guilty would be palpably or flagrantly against the evidence, the trial court should not submit the case to the jury, as, if it does so and a conviction follows, the verdict must be set aside. The fact, however, that the verdict would rest on evidence not entirely satisfactory or conclusive is not sufficient to authorize the court to take the case from the jury.

In this case a peremptory instruction to find the defendant "not guilty" was proper.

W. S. Taylor and J. T. Simon for appellant.

Blanton & Berry for appellee.

Appeal from Harrison Circuit Court.

Opinion of the court by Judge Hazelrigg.

Whilst this court can not reverse when there is evidence to support the finding of the jury in criminal cases, more latitude is given the trial court, and that court may grant a new trial to the defendant "if the verdict be against law *or evidence*." (Section 271, Criminal Code.)

In this case the proof of the State—altogether circumstantial, it may be stated—conduced to establish the guilt of the defendant. The opposing proof, however, offered by the defendant to explain the circumstances and establish his innocence, was quite convincing, and led the trial court to give a peremptory instruction to find the defendant "not guilty."

Undoubtedly when a verdict of guilty would be palpably or flagrantly against the evidence the trial court should not submit the case to the jury; as, if it does so and a conviction follows, the verdict must be set aside. If, however, the proof is merely contradictory, and the verdict would rest on evidence not entirely satisfactory or conclusive, still the case should go to the jury, as under our system the jury, and not the court, are the judges of the facts. These principles are so firmly imbedded in our jurisprudence that it would seem hardly necessary to call attention to them.

In this case we can not denounce the peremptory instruction as violative of these well-settled principles.

Judgment affirmed.

SUIT, &C. V. CRAWFORD.

(Filed January 8, 1897.)

Decedents' estates—Right of distributees to maintain an action upon a note held by intestate—While the general rule is that heirs and devisees can not in their own names prosecute suits to recover the unadministered estate of the decedent, yet a note held by an intestate which was turned over by the administrator to the widow and children upon a settlement of his accounts is an administered asset, and the widow and children may maintain an action thereon in their own names, especially after the lapse of nineteen years from the death of the intestate, when all debts against the estate, if any existed, are barred.

W. J. Osborne for apppellants.

Hanson Kennedy for appellee.

Appeal from Robertson Circuit Court.

Opinion of the court by Judge Paynter.

This action was brought by the widow and children of Leonard Pyles on a promissory note which it is claimed was an asset of the estate of the decedent.

Leonard Pyles died in 1876 intestate. An administrator of the estate was duly appointed. It is alleged he settled his accounts as such with the county court and was discharged as administrator and from all liability on the note in suit, and that he thereupon turned the note over to the plaintiffs. The court sustained a demurrer to and dismissed the petition upon the ground that the action could only be maintained by the personal representative.

We recognize the rule to be that heirs and devisees can not in their own names prosecute suits to recover the *unadministered* estate of the decedent, but that such actions can only be maintained by the personal representative, except in cases where the personal representative refuses to administer upon the estate sued for or to prosecute suits for its recovery, or in a case like Bellamy's adm'r v. Bellamy, 3 Bush, 109.

The intestate died nineteen years before this action was brought. His personal representative had settled his accounts as such and been discharged. The presumption is that all the debts of the decedent have been paid. At any rate none could have existed when the suit was brought, as the lapse of time had barred a recovery on any unsatisfied claim that may have existed. It follows that no one had

any interest in the note except the heirs at law. The personal representative had relinquished any right he had in it by settling his accounts as administrator and turning the note over to the plaintiff.

We are of the opinion that it is an *administered asset.* The proceeds of the note are not liable to pay the debts of the intestate, neither has the personal representative any interest therein for reimbursement or protection, as he surrendered the note to its real owners.

Under such circumstances it seems to us to be unreasonable to require that an administrator *de bonis non* be appointed, and allow him alone to maintain the action, as it would put the heirs to considerable expense. Besides, as this is an administered asset, an administrator *de bonis non* would have no control over it.

We are of the opinion that when the administrator settled his accounts and turned the note over to the plaintiffs, they were vested with the right to collect the note and maintain an action on it.

The judgment is reversed, with directions that further proceedings conform to this opinion.

CURLE v. JONES.

(Filed January 8, 1897—Not to be reported.)

Garnishment—Lien of attaching creditor—The service of summons upon garnishees gave to the attaching creditor a lien upon money held by them for the debtor, although they had, prior to the service of the summons, given to an agent of the debtor a check for the amount, as they had not thereby surrendered control over the fund, as is shown by the fact that they afterward deposited the amount in court subject to its order. And the debtor having died pending the litigation her personal representative has no greater right to the fund as against the attaching creditor than the debtor herself would have if living.

George C. Webb and J. R. Morton for appellant.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Lewis.

February 8, 1893, and subsequent to a return of "no property found" on an execution in favor of T. J. Curle against Lucy M. Jones, the former instituted this action to subject to the satisfaction of his judgment $650, alleged to belong to the latter and in the hands of her sons-in-law, Stuart Taylor and R. D. Steele. Of that sum $345 was conceded to be subject to plaintiff's judgment, and, having been deposited in court, was adjudged to be paid to him; but it is stated by the garnishees that on the same day the action was commenced, and before either of them were summoned, they gave a check for the remaining $300, payable at a specified bank, in favor of Susie J. Steele, wife of R. D. Steele, and daughter, and, as they allege, agent of Lucy M. Jones. And the question in this case is whether that sum is an asset of the estate of Lucy M. Jones, who died intestate February 13, 1893, and to be administered by appellee, Security Trust and Safety Vault Co., as her personal representative, or is subject to attachment in this action.

It is alleged by plaintiff, without denial by any defendant to the action, that no payment of any part of said sum of $300 had been made to Lucy M. Jones, nor any part deposited to her credit or

credit of Susie J. Steele, as her agent, until February 10, 1893, after summons was served on the garnishees.

The $300 was not, in the first instance, a debt which Taylor and Steele owed Lucy M. Jones, but money collected and held by them as her agent. And that the check which they gave to Susie J. Steele, even if intended to put the money out of reach of creditors, did not actually deprive them of either control or possession is shown by the fact they, pending this litigation, actually deposited the entire sum of $645 in court, subject to the order of which it has ever since been.

This is not a question between a plaintiff in an execution and another creditor of an insolvent debtor, but simply whether property or money, attached and under the control of the court prior to the death of the debtor, shall be subjected *pro tanto* to the satisfaction of plaintiff's debt, or transferred as assets of the estate to the administrator. If Lucy M. Jones was still alive there could be no doubt of the right of plaintiff to subject the money in question for the simple reason that his lien had attached, and the property was in the control of the court; and, such being the case, her death did not nor could operate to deprive him of full benefit of such lien, for surely her personal representative did not acquire, as against him, any right or exemption she did not possess.

In our opinion the sum of $300 in question, less about $20, which it appears was actually used by Susie J. Steele for the benefit of her mother, Lucy M. Jones, during her illness, is subject to the judgment debt of plaintiff, and should have been so applied by the lower court.

Judgment reversed and cause remanded for further proceedings consistent with this opinion.

AVRITT, &C. V. BRICKEN & DANT'S ASS'EE, &C.

(Filed January 8, 1897—Not to be reported.)

1. *Judicial sales—Commissioner not estopped to deny receipt of purchase money, although he had so reported*—When an order confirming a judicial sale directed the commissioner to execute to the purchaser a deed when the bonds for the purchase money should be paid in full, and the son of the purchaser, who was surety in the bonds for the purchase money and also attorney for the plaintiff in the action, persuaded the commissioner to report a deed acknowledging the receipt in full of the purchase money, although in fact none of it had been paid, the promise being made by him to the commissioner that the money would be paid when needed for the purposes of distribution, neither that deed nor a report filed by the commissioner, showing the collection by him of the purchase money in full, is sufficient to estop the commissioner, in response to a rule against him to pay into court the balance shown by the report to be in his hands, from denying that he had collected all the purchase money, or from proceeding against the purchaser and her sureties to collect the balance in fact due by them.

2. *Mandate*—The opinion of this court reversing the judgment of the lower court, and directing the collection of the unpaid purchase money for the land, is not erroneous upon the ground that the opinion should go no further than to overrule the action of the lower court in sustaining the demurrer, and should allow the appellees, upon the return of the case, to plead further and sustain their plea by proof, since no demurrer was filed but a response by the appellees to the rule against them to show cause why they should not pay into court the sum alleged to be due, and they were allowed to introduce testimony to sustain their response and to defeat the recovery against them.

3. An indebtedness of the master commissioner to one of the sureties on the bond of the purchaser at judicial sale is a matter which in no way can influence the action of the court in regard to the collection of the unpaid purchase money.

J. B. Thompson and Samuel Avritt for appellants.

S. A. Russell for appellees.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Burnam.

On the 3d day of May, 1887, G. A. Bricken and J. P. Dant made an assignment of their partnership assets to A. K. Russell for the benefit of their creditors, and on the same day they each assigned their individual property to the same party for the same purpose. In addition to a small personal estate, Bricken conveyed by the aforesaid deed of assignment three small tracts of land, aggregating about 47 acres. This land was encumbered by a vendor's lien in favor of C. Gohe for $1,289.54 at the date of the payment of same. In a few days after the date of the assignment the assignee filed a suit in the Marion Circuit Court, asking a judgment for a sale of said land to satisfy the debts of the assignor. In this suit he was represented by Russell, Roe & Lisle, and a sale of same was decreed at the August term, 1887, and G. C. Avritt, master commissioner, was directed to make said sale by the judgment upon credits of six and twelve months respectively, and take from the purchaser at said sale bonds, with good security, payable to himself.

Pursuant to this judgment he exposed said land for sale at public outcry on the 8d day of October, 1887, when Mrs. Sue A. Russell became the purchaser at the price of $30 per acre, and executed her bond for same, with W. E. Russell, her husband, and S. A. Russell, her son, as securities. This sale was duly reported to the court, approved and confirmed, and a writ of possession directed to issue in her favor for said purchase.

At the same term of court an order was entered by consent of plaintiff and his attorney, one of whom was the aforesaid S. A. Russell, granting the purchaser permission to pay off her bonds at any time to the said G. C. Avritt, master commissioner, said order going on to recite that when same should be fully paid she should be entitled to a general warranty deed, conveying title to the 47 acres of land; and on the 13th day of December, 1888, the said Avritt, master commissioner, reported a deed to the said Sue A. Russell, conveying to her the title to said land, and acknowledging receipt in full of the purchase price for same.

This cause was continued on the docket for some time, awaiting the determination of an issue as to the extent of the lien of C. Gohe for purchase money on said land. This was finally adjudged in favor of said Gohe, and the said Avritt, as master commissioner, was directed to discharge same.

At the December term, 1891, of said court an order was entered, on motion of G. A. Bricken, directing the said Avritt, as master commissioner, to file his report of distribution of said fund, and to report what balance would remain after the payment of the lien to Gohe and cost for *pro rata* distribution amongst the general creditors of said Bricken. This motion was not acted on until the March term, 1892, of said court, and then W. E. Russell, the regular judge, declined to

preside because of his relations to the parties, and a special judge was elected to act in his stead. At the said term the master commissioner filed his long-delayed report, and said that the 47 acres of land had sold for a total of $1,410, and that same amounted, with interest, on the 15th of June, to the sum of $1,554.33, and that he had paid the lien debt of Chas. Gohe, amounting, when paid, on the 15th day of June, 1889, to $1,289.54, and this, with the cost of the action and his fee, would leave a balance for distribution to the individual creditors of G. A. Bricken of $121.43.

This case was continued on the docket from term to term until the April term, 1895, when Bricken was awarded a rule against the said Avritt as the late master commissioner, he (presumably) having gone out of office, to show cause why he should not pay into court the balance of $121.43, shown to be in his hands by his report of the 30th of March, 1892, with interest.

In response to this rule the said Avritt filed a reply, and said that, as a matter of fact, he had never collected from the purchaser of the 47 acres but $1,289.54; that there was still due on said bond the sum of $289.97, with interest from the 15th of June, 1889, and that he had paid all of the money collected on said bond to discharge the lien to vendor.

Upon the filing of this response of Avritt a rule was awarded against Sue A. Russell, W. E. Russell and S. A. Russell to show cause why they should not pay into court the balance due on the bond for the purchase of land, viz, $289.97, with 6 per cent. from the 15th of June, 1889.

The said Sue A. Russell, W. E. Russell and S. A. Russell, by way of defense to this rule, relied upon the report of the said Avritt, showing the collection of the money and upon the deed made, reciting payment in full, and the said S. A. Russell, one of the securities, insisted that they should not be required to pay said balance because of claims alleged to be due to him by said Avritt growing out of other transactions.

There was no denial of the evidence of Avritt that the $1,289.54, which was paid to discharge the lien of Gohe, was all that had ever been paid on said bond, or of his evidence that at the date of the execution of the deed to the purchaser, reciting payment in full, not a dollar of said purchase money had ever been paid on same.

On the trial of the issues made by the responses to these rules the lower court gave judgment against G. C. Avritt for the sum of $121.43, and the cost of Bricken on the motion, and sustained the motion of the purchasers to quash the rule against them, and gave them a judgment for their cost. To the entry of this judgment both G. A. Bricken and G. C. Avritt excepted, and asked and were granted an appeal to this court, and we are called on to review said judgment.

The facts in this case are clear and undisputed. Avritt was the master commissioner of the Marion Circuit Court by appointment of W. E. Russell, the judge thereof, and was no doubt grateful and obligated for such, and perhaps other favors. S. A. Russell was the attorney of record of the plaintiff in the suit in which the decree to sell the land was entered, and was responsible largely for the entry of the order directing the execution of the deed. He does not deny the testimony of Avritt that he induced him to make said deed by persuasion, and promises to pay the purchase money when same was needed for purposes of distribution under the order of the court.

It is evident that G. C. Avritt was unduly influenced by these considerations, and was induced to go beyond his duty in his efforts to

favor said purchaser in the report made by him and in the execution of said deed aforesaid, but we can not concur in the finding of the lower court; and, for the reasons indicated, said judgment is reversed, both in so far as it gives judgment against G. C. Avritt for the sum of $121.43 and for Bricken's cost, and also the judgment of said court dismissing the rule against the purchaser of the land and her securities upon the bond for purchase money, and this cause is remanded, with instructions to collect the balance of the purchase money due upon the bond of the purchaser, subject to the credit of the sum of $1,289, as of the 15th of June, 1889, and to secure the payment of such balance a lien exists upon the tract of 47 acres of land, for which said bond for the purchase money was executed.

The court does not pass upon the question of what might be the liability of Avritt upon his official bond, if the balance due upon the bond of the aforesaid purchasers of the land could not be collected out of them and from an enforcement of the lien on the land sold, and for which said bonds were executed.

The motion of Sue A. Russell, W. E. Russell and S. A. Russell to dismiss the appeal of G. C. Avritt in this court is overruled, as the grounds for said motion set out in the answer filed by them is insufficient.

The court delivered the following response to petition for modification February 13, 1897:

The appellees, Sue A. Russell, W. E. Russell and S. A. Russell, have filed a petition for rehearing in this case, and asked for a modification of the opinion of the court rendered herein, because, as they allege, the opinion was erroneous in directing the collection of the purchase money for the land bought by Sue A. Russell, insisting that the opinion of this court should have gone no further than to have reversed the ruling of the lower court "upon the demurrer filed by them to the rule awarded against them," and insisting that they ought to be permitted on the return of the case to plead further and to show any facts that would exonerate them from liability on the bond for the purchase money by payments made to Avritt as master commissioner, appellees claiming that the rule awarded against them stands upon the same basis as a petition, and that having demurred to the rule, and the same having been sustained by the trial court, if said demurrer is overruled by this court, the opinion ought to go no further than to overrule the action of the lower court in sustaining the demurrer, and to have remanded the case for further pleading.

To test this contention of the appellee by the facts of this case let us briefly recite them. On the 10th day of May, 1895, G. C. Avritt, in response to a rule of the court to show cause why he should not pay into court the balance of the purchase money due upon the bond executed by Sue A. Russell, filed his response, in which he said that he had not collected from the purchaser, Sue A. Russell, or her securities, $289.79 of said purchase money, with interest thereon from the 15th day of June, 1889. The court, immediately upon the filing of this response by Avritt, awarded a rule against Sue A. Russell, W. E. Russell and S. A. Russell to show cause why they should not pay into court this sum, with interest from June 15, 1889. This rule was served on the parties, and by agreement they were given until the 20th day of the term to respond to the rule. On that day, as was proper, the court heard the case, both upon the response of Avritt and of the appellees, Sue A. Russell, etc. Appellee, Sue A. Russell, did not file a demurrer as contended, and no demurrer could

properly have been filed to a rule of this character. The only pleading that the law recognizes which can be filed to a rule of this character is a response, and the appellees responded to this rule, not by a demurrer as claimed, but by a motion to quash on the face of the record. This was in effect not a demurrer but a response to the rule. At the same time the court heard the testimony of G. C. Avritt, and also read the deed, upon which the appellees relied to defeat recovery against them, and also heard the sworn statements of Samuel Avritt and H. W. Rives, and rendered its opinion after a full hearing of the case.

The appellants had their day in court, and if they had actually paid to Avritt a greater sum than claimed by him in his response and sworn to by him in his testimony on the trial of the rule, it was the duty of appellee, Sue A. Russell, then and there to have set up her defense and to have asked a hearing on her claim. As to whether appellant Avritt was indebted to S. A. Russell or not was a matter that could not be considered on the hearing of the rule. The only pertinent question was whether Avritt had collected the purchase money for the land sold under an order of the court; and if he had not collected it, as was clearly made manifest, it was the duty of the court to direct that same be collected, as whatever was owing on the bond was due to Avritt in a trust capacity—was a fund in court—and was subject to the orders of the court, and the fact that he may have been indebted to S. A. Russell, one of the securities in the bond of Sue A. Russell, was not a matter that could in any way have properly influenced the action of the court.

The plea of appellee, S. A. Russell, that there is now pending in the Marion Circuit Court a suit of S. A. Russell v. Avritt, in which the defendant is seeking credit against S. A. Russell for this balance due upon the bond of Sue A. Russell for purchase money as having been paid by him, is not a fact of which this court can take notice, and is not germane in any way to the issues involved herein. Certainly the appellee would not be estopped from pleading the facts as to said balance in defense of such a claim.

In our opinion the long delays which have attended the collection of this money and the settlement of this trust, coupled with the evidence that appellee has had her day in court, forbid any re-opening of the case to enable appellant to plead further.

For the reasons indicated the petition for a rehearing or a modification of the opionion heretofore given is overruled.

WHITE & COCHRAN V. MOORE.

(Filed January 9, 1897.)

1. Judgments—Limitation—Where a second execution was issued upon a judgment, when the right thereto was barred by the lapse of fifteen years since the issual of the first execution. a payment made upon this execution did not operate to revive the judgment, and both the second and a third execution were properly quashed; and this is true, although during a part of the fifteen years an action in equity was pending to enforce the judgment, as this did not suspend plaintiff's right to successive executions or stop the running of the s tatute.

2. Same—Voluntary payment—Where a payment is voluntarily made by the defendant upon a judgment within fifteen years after its rendition, the period between the date of the judgment and the payment is no longer estimated as a part of the period of limitation, but limitation begins to run anew from the date of the payment.

K. D. Perkins for appellants.

R. S. Crawford and G. C. Moore for appellee.

Appeal from Whitley Circuit Court.

Opinion of the court by Judge Lewis.

August 14, 1872, White & Cochran obtained a judgment against L. and M. A. Moore for $584.55, upon which, September 28, 1872, an execution was issued, and in due time returned with the official endorsement, "no property found."

On and not until February 16, 1890, another was issued, which was returned with this official endorsement: "Received of M. A. Moore $200 on the within execution, and I return the within execution by consent of plaintiff April 20, 1891."

And now this is an action in equity by M. A. Moore, one of the original defendants, in which he asks judgment quashing the third execution, issued February 2, 1894, vacating the levy made under it, and prohibiting plaintiffs in the original action from proceeding further by execution.

As more than fifteen years had elapsed after return of the first before the second execution was issued the statute of limitation operated as a bar to the latter, as also to the one issued in 1894, unless by one of the modes suggested for appellant, running of the statute was suspended, so that the time antecedent to the date of the second execution is not to be counted in computing the bar.

It has been repeatedly held by this court, and may be considered settled doctrine, that a partial payment made on a bond or note within the statutory time operates as a suspension of the running of the limitation between the accrual of the cause of action on the instrument and date of that payment. And we think if there had been a partial payment of the judgment voluntarily made by the defendants within fifteen years after September 28, 1872, when it was rendered, running of the limitation in this case would have been likewise suspended. And if the date of such partial payment had been less than fifteen years prior to the issual of the second execution there would be no bar to either it or the execution issued in 1894.

But more than fifteen years had elapsed, and consequently there was a complete statutory bar to any proceeding on the judgment of 1872, when the payment of $200 was made on the execution of 1892. Consequently no act of the defendants short of an express or clearly implied promise to satisfy the residue of the judgment, founded on moral obligation to do so, could have operated to revive it or entitle plaintiffs to an execution on it.

It appears that in 1876 an action in equity was instituted to subject certain property of M. A. Moore to the satisfaction of the judgment of 1872, which was pending until 1878. But that action was merely a cumulative mode of securing satisfaction of the judgment, and did not have the effect to suspend plaintiffs' right to successive executions, nor to stop the running of the limitation of the time within which they were required by statute to cause execution issued in order to prevent the bar to all proceedings on that judgment.

In our opinion the issual of the execution of 1892, and of course that of 1894, was illegal and ineffectual for every purpose, and the judgment quashing the latter and prohibiting further proceeding under it is affirmed.

MATNEY V. FERRELL.

(Filed January 9, 1897.)

Married women—Fraud in sale of land—Set-off—One who comes into a court of equity must do equity; and the court will either refuse altogether to enforce a contract tainted with fraud or will purge the transaction. Therefore, where a married woman, by fraudulent representations which she induced her husband as her agent to make, effected a sale of her land, which she and her husband conveyed to the purchaser, in an action by her to recover an unpaid balance of the purchase price the defendant should be permitted, if he asks it, to set-off the damages he has sustained, although the plaintiff, being a married woman, could not make herself liable in damages for a failure to comply with her contract. If, however, either party desires it the contract should be rescinded.

Connolly & Connolly and Bart Belcher for appellant.

E. W. Hines and Samuel J. Salyers for appellee.

Appeal from Pike Circuit Court.

Opinion of the court by Judge White.

This is an appeal from the Pike Circuit Court. The appellee, Kentucky Ferrell, sued appellant to recover on notes executed by appappellant Matney for the purchase price of a tract of land near Pikeville, in Pike county.

The whole purchase price agreed to be paid by appellant was $2,500, of which he had paid about one-half at the date of the institution of this suit.

At the time of the sale of the land Mrs. Ferrell, the appellee, was a married woman, wife of N. M. Ferrell, who has since departed this life. The land sold to appellant was the property of Mrs. Ferrell, the appellee. The appellant resists the payment of the notes sued on on the ground of fraud in the sale of the land to him.

Appellant by answer charges "that he made the contract with. N. M. Ferrell, the husband and agent of appellee, in making the sale of the land to him, for which the notes were executed. N. M. Ferrell was the plaintiff's husband, and the person with whom defendant made the trade, and who had authority as agent and husband of plaintiff, falsely and fraudulently represented that there was a four-foot vein of stone coal on the land near or about the lower end of the orchard, and which showed up well, and that said vein was worth half what he asked for the land, which was $2,500. Defendant says that by reason of these representations made to him at various times by N. M. Ferrell, plaintiff's husband, believing the same to be true, he was induced to make the purchase, and did buy the land of N. M. Ferrell, plaintiff's husband, and executed the notes sued on.

Defendant, further answering, says that plaintiff's authorized agent and husband, N. M. Ferrell, represented and told him before and at the time he did purchase the land for which the notes were executed that the said coal vein was near the creek and public road, and was four feet thick and a good quality of coal, showed up well and was the same vein as the Dick Sych vein, and giving reasons why he (Ferrell) had not opened up said coal mine, charging that all these representations were false and untrue, and were made by plaintiff's husband with a view to induce defendant to purchase the land.

Defendant further charges that there was not, at the time he purchased said land, such a vein of coal on said land at the place designated by plaintiff's husband, or on said land at all, but there was a vein of coal about the place designated by plaintiff's husband, but it was only about fourteen inches thick and does not enhance the value of the land or add anything to its value, and which could not be worked, and also charges that all of said statements of plaintiff's said agent and husband were false and untrue, and by them defendant was induced to make the purchase at $2,500; that said land was worth not more than one-half that sum at the time of the purchase; that if said vein of coal had been four feet thick on said land, as represented by plaintiff's husband at the time of the trade, said land, would have been worth $3,000. He pleads the difference in the value of the land at $1,250 as it is, and what it would have been worth if the vein of coal had been on it as represented, it being $1,750 as set-off and counterclaim against the notes sued on.

To this answer plaintiff filed a demurrer, which was sustained, and defendant given leave to amend, whereupon defendant filed his amended answer, in which he charges that the false and fraudulent representations set out in the original answer were made by plaintiff through her husband and agent, N. M. Ferrell, to induce this defendant to purchase the land, and were all known to her, and she caused and induced them to be made. She knew at the time of the conveyance they had been made; acquiesced in them; acted upon them; carried out the fraud by conveying the land with full knowledge of the fact that it was a fraud, knowing at the time that the true vendable value of the land was not more than $1,000 or $1,200.

To this amendment and original answer plaintiff insisted on their demurrer, which was sustained by the court, and judgment rendered for appellant for the amount sued for, with decree of sale of the land, and from that judgment this appeal is prosecuted and a reversal asked.

The appellee being a married woman at the time of the sale and conveyance of the land involved in this case, she could not bind herself by promissory contract or make herself liable in damages for a failure to comply with the contract. However, when one comes into a court of equity asking the court to enforce a contract brought about by her fraud or the fraud of her husband while acting as her agent in making the sale of her property, presents a different question. A court of equity could not enforce such a contract without giving its aid to the perpetration of a fraud. In such cases the courts of equity should at least purge the transaction or refuse to stain its ermine by taking jurisdiction of the complaint of a plaintiff asking the enforcement of a contract tainted with fraud.

It is a well-known rule of equity that those who come into a court of equity must do equity. In this case the answer and amended answer charge fraud and false representations that induced the appellant to make the purchase; that these false and fraudulent representations were made by appellees' husband and agent, and that the appellee induced and caused them to be made, knowing they were false and fraudulent, and now, when she is seeking the fruits of this fraudulent transaction, she, to avoid it, relies on her coverture. If the statements in appellant's answer be true, and it must be taken as true on demurrer, we see no reason why he should not have the right to set off the damages he has sustained against the purchase money not yet paid by him.

We think the court erred in sustaining the demurrer to defendant's answer and amended answer.

Wherefore the judgment is reversed and cause remanded, with directions to the lower court to set aside the order sustaining demurrer to defendant's answer and amended answer, and overrule the same, and for further proceedings in conformity with this opinion. On the return of the cause the court should allow either party to amend their pleading asking a rescission of the contract if they should desire to do so.

STARR V. SEARCY, &C.

(Filed January 9, 1897—Not to be reported.)

Vendor's lien—The vendor of an undivided half interest in a tract of land has a lien for the payment of the purchase money upon only one-half the land, and, the land having been sold to satisfy various liens upon it, she can look to only one-half the proceeds for the payment of her claim. And she having united with the vendee in a mortgage, her lien is postponed to that of the mortgagee.

J. C. Wickliffe for appellant.

W. P. Hillsman for appellees.

Appeal from Nelson Circuit Court.

Opinion of the court by Judge Guffy.

The appellant, Miss Starr, was the owner of one undivided half of a tract of land in Nelson county, Ky., which land she conveyed to R. O. Dorsey. The other half was at one time owned by Julia Dorsey, Tate Offutt and J. T. Offutt. Dorsey and wife conveyed their interest to Offutt. Afterwards Offutt conveyed the whole of the land to Dorsey, taking notes for the purchase money, part of which notes were assigned to appellee Searcy.

It also appears that Offutt, Dorseys and the appellant all united in a mortgage on the land in favor of the Mutual Life Ins. Co. of Kentucky. The insurance company brought suit to enforce its mortgage lien, making the appellees and appellant parties, and by appropriate pleadings the various lien holders asserted their claims.

It seems that, without objection, a sale of the land was adjudged, and the controversy is as to priority of liens, or a proper *pro rata* of the proceeds of the sale.

The following is the judgment appealed from: "It is further ordered and adjudged that the cross-plaintiff, Nannie R. Starr, has a lien on the fund remaining out of the proceeds of said sale, after paying the debt of the plaintiff and the costs of this action, to the extent of one-half thereof; that the cross-plaintiffs, J. T. Offutt and John Searcy, jointly, have a lien on said fund so remaining to the extent of one-half thereof; and it is ordered that if the land sold does not bring a sum sufficient to pay the debts of said plaintiffs and cross-plaintiffs, including the costs herein, the sum remaining after paying said plaintiffs' debt and said costs be divided equally between the holders of the liens on the respective moities in the following manner, to wit: One-half to said Nannie R. Starr and the remaining half to J. T. Offutt and John Searcy jointly, in proportion

to the amounts due to said Offutt and Searcy respectively on their notes filed therein."

It seems to us that the judgment appealed from is fully sustained by the law under the facts as admitted in the pleadings and shown by the exhibits. The appellant was the owner of an undivided half of the land in question, and sold the same for $1,000. She had a lien only on one-half of the land for that purchase money. That being true, she could in equity have a lien or claim on only one-half of the proceeds of the land—that is, half of the price for which it sold. She having united in the mortgage to the insurance company, it follows that the company had a prior lien for the proceeds of the land for its debt.

Whether appellant has any further claim upon Dorsey, growing out of the transaction in question, is not before us for decision.

Judgment affirmed.

JACKSON V. COMMONWEALTH.

(Filed December 8, 1896.)

1. Indictment for murder—An indictment against two persons jointly for murder, charging that both did "kill and murder" the deceased "by the one or the other" cutting off her head, the other being present aiding and abetting, but that which did the cutting or which aided and abetted the same is not known to the grand jurors, is good.

2. Criminal trial—Conduct of sheriff—There can be no reversal because of the refusal of the court to designate some other person to perform the duties of the sheriff during the trial of the case, the affidavit of the accused that the sheriff had taken an unusual interest in bringing about his conviction not being sufficient to require the court to make such an appointment, and there being nothing to show that the sheriff did not faithfully perform his duty.

3. The ticket system of admission to the courtroom during the trial, adopted by the sheriff to prevent the courtroom from being overcrowded, did not deprive the accused of his right to a public trial, tickets being issued in the order in which requests were made for them.

4. Evidence—Although no mention was made in the indictment of the killing of an unknown child it was not improper to permit the Commonwealth to show that the deceased was pregnant, and that a fœtus of five months was found, as that fact conduced to furnish a motive for the killing, and, besides, helped to solve the question as to where the killing occurred, there being less flow of blood where the subject is pregnant.

5. Same—It was not improper to permit proof of conversations between appellant and his co-defendant, in which each accused the other of the crime and each denied his own guilt, the parties having voluntarily entered into the conversations.

6. Conversations between the defendants, when confined in the "sensitive cells," were competent, being voluntary.

7. Evidence—It being shown that cocaine was found in the stomach of the dead girl and that the accused had inquired into its effects, it was not improper to allow a witness to state the use of this drug in producing abortions, and its effects on the system.

8. If the accused cut off the head of his victim in Campbell county while she was in fact alive, he was guilty of murder, although he believed her already dead, provided this act succeeded and was but a part of a felonious attempt to kill her in Cincinnati, and the court properly so instructed the jury in effect, there being some evidence upon which to base such a hypothesis.

9. If the accused feloniously administered or procured another to administer drugs to the deceased for the purpose of procuring an abortion when she was

so far gone with child as to make it necessarily dangerous to her life, or when the drugs were in themselves or in the manner of their administration dangerous to her life, and, though believing her to have been killed in this way, he cut her head off in Campbell county when she was in fact alive, yet he was guilty of murder, and the court properly so instructed the jury; also instructing them in substance that if the drugs were administered when not dangerous, he was guilty of voluntary manslaughter.

10. Argument to jury—Historical allusions to celebrated cases of circumstantial evidence were not improper in argument to the jury.

L. J. Crawford for appellant.

M. R. Lockhart and W. S. Taylor for appellee.

Appeal from Campbell Circuit Court.

Opinion of the court by Judge Hazelrigg.

The appellant was jointly indicted with one Alonzo Walling in the Campbell Circuit Court for the murder of Pearl Bryan, and on his separate trial was found guilty and sentenced to be hanged.

It will be necessary to submit only a brief summary of the facts disclosed in the voluminous record before us to render intelligible the various complaints urged on this appeal against the judgment of conviction.

On the morning of Saturday, February 1, 1896, the headless body of a woman was found on the farm of one Locke, near Newport, in Campbell county. Every effort to find the head proved futile, but the shoes the dead girl wore were marked "Lewis & Hays, Greencastle, Indiana," and this circumstance led to the identification of the body as that of Pearl Bryan, a young girl of that city. Her clothes were saturated with blood, particularly about the neck, and a large quantity of it was found on the ground near the neck, covering a circular spot some six or seven inches in diameter, and also a spot of a similar kind some feet away. Extending near to or over this last named spot there were some privet bushes, the leaves of which were spattered with blood, and drops were discovered pending under the leaves, as though the blood had reached the under side of them by spurting from the neck, which it might do as disclosed by the testimony if the decapitation had taken place or been commenced at the spot near the bushes, and if the victim were alive at the time.

These and other circumstances led the authorities to proceed on the theory that the murder—for such it evidently appeared to be—occurred in Campbell county.

An autopsy disclosed that the girl was pregnant, and a healthy fœtus, of some five months development, was found, which, in the opinion of the experts, was probably alive until the death of the mother. The inquiries which led to the identification developed the fact that appellant, Scott Jackson, a dental student at the Ohio Medical College, but who formerly lived at Greencastle, was probably the author of the girl's ruin.

It was established beyond question that Pearl Bryan, after trying without success certain remedies prescribed by the appellant, left home on the Monday preceding her death, ostensibly to go to Indianapolis to visit friends, but in fact to come to Cincinnati in order that appellant might in some way procure relief for her, and it was shown that when she arrived in the city, where she was a stranger, she applied to him, or to him and Walling, the roommate and intimate associate of Jackson, for the purpose indicated.

On several days succeding her arrival the three, Jackson, Walling and Pearl Bryan, were seen together in different parts of the city, though where she stayed during this time does not clearly appear. By one witness, and by one only, does the Commonwealth directly connect the appellant and his associate Walling with the girl at about the time she must have been murdered. This witness, a negro, George H. Jackson, testifies that at about 1 o'clock on the night of Friday, the 31st (or rather the morning of February 1st), he was employed to drive, and did drive, a hack or cab from Cincinnati across to Newport, and out to a point near where the body was subsequently found, and was accompanied by Walling, who rode on the seat with him, and by appellant, who was in the interior of the vehicle with another person whom he could not see, but whom he took to be a woman in distress, etc.

This witness was discredited by proof seriously affecting his reputation for truth and veracity and by other circumstances, though it is fair to say that he appears to be corroborated in some material respects. To discard his testimony entirely is by no means to affect the State's case against the prisoner.

It is shown that on the Wednesday preceding the murder the accused bought some seventeen grains of cocaine, and an analysis of the girl's stomach discloses that cocaine had been administered to her. He is shown to have had possession after the girl's death of the valise belonging to her, on the inside of which were blood stains and in which was also found some strands of hair, believed to have come off her head, from its color, etc., and also dirt or mud corresponding in microscopical appearance with that where the body was found.

On Jackson's pants, found, however, in Walling's locker, were found blood stains, and on the knee was also found some earth which, under the microscope and by chemical analysis, is found identical with the earth found at the point where the body was discovered. His coat is also found in the sewer, where he admits having thrown it, stained with blood. He is found in possession of her clothing, which he attempted to dispose of. He admits that he attempted to get rid of the valise by throwing it in the river, and by attempting to place it on an outgoing train.

There is produced and he admits writing a letter to his friend and associate, one Wood, in which he asks Wood to write in Pearl's name to her parents from Chicago, or elsewhere, saying she was tired of living at home and was at the place of writing, and concludes with these words: "Get the letter off without one second's delay, and burn this at once. Stick by your old chum, Bill, and I will help you out the same way, or some other way, some time."

The theory of the defense is, and the accused so testified, that Wood was the author of the girl's misfortune, and sent her to Cincinnati, where he had made an arrangement to turn her over to Walling, who was to perform, or had performed, an abortion. He says that he last saw the girl at noon of Wednesday, and affects not to have inquired of Walling thereafter of the success or failure of the plan, or to have known anything of her whereabouts; that he knew nothing or suspected nothing wrong until while at supper with Walling, on Saturday evening, he read a newspaper account of the finding of a headless body on the Locke farm, and at once had a presentiment that "this was Walling's case." He discovered from Walling's conduct on that occasion, and from what Walling confessed to him, that his suspicion was well founded.

He then became panic-stricken, and attributes to this mental con-

dition his subsequent conduct in helping Walling to dispose of the dead girl's effects and in writing the damaging letter to Wood. All this he testifies was done at the instance of Walling, and while he was under Walling's influence and in the mental condition named.

This recital, without an elaboration of the proof, some of which is wholly at variance with the theory of the defense, serves to show that the facts in evidence conduced to establish the guilt of the accused, and further than this we are not authorized to examine the testimony, being confined exclusively, under the express language of the law, to a review of errors of law appearing of record, and then only when they are such as to affect the substantial rights of the accused.

By his demurrer and motion in arrest of judgment the appellant first raises the question of the sufficiency of the indictment. This instrument is as follows: "The grand jury of Campbell county, in the name and by the authority of the Commonwealth of Kentucky, accaccuses Scott Jackson and Alonzo Walling of the crime of murder, committed as follows, to wit: The said Scott Jackson and Alonzo Walling on the — day of ————, 1896, before the finding of this indictment, in the county aforesaid, did willfully, feloniously and with malice aforethough, kill and murder Pearl Bryan by the one or the other, the said Scott Jackson or Alonzo Walling, with a knife or other sharp instrument, cutting the throat of the said Pearl Bryan so that she did then and there die, the other being then and there present, aiding and abetting the same, the exact manner whereof is unknown to the grand jurors, and which did the cutting, Scott Jackson or Alonzo Walling, or which aided and abetted the same is unknown to the jurors, against the peace and dignity of the Commonwealth of Kentucky."

It is urged that this indictment is not direct and certain as regards the party charged, but charges in the alternative that one party or the other committed the offense, when it is permissible only to charge in the alternative the different modes or means of committing an offense.

The indictment, however, charges directly and certainly that Jackson did kill and murder Pearl Bryan, first by himself cutting her throat with a knife, or secondly by aiding and abetting Walling in doing so.

The cutting by himself is one mode, and the aiding and abetting Walling whilst he did the cutting is another mode of committing the murder, and these modes and means may be charged in the alternative.

The indictment is sufficient, and its accuracy and conciseness of expression is to be commended.

Prior to the trial the appellant sought to prevent the sheriff of the county from performing his usual duties, and for that purpose filed his affidavit stating that that officer had taken an unusual and remarkable interest in bringing about a conviction of the accused, and had frequently denounced him and his co-defendant, Walling, as the guilty parties, and had devoted his whole time to hunting up evidence against them, and had endeavored by threats of punishment to force the defendants to confess to the crime. The court's refusal to relieve the sheriff furnishes another ground of complaint.

Unquestionably if it should be shown in any case to the satisfaction of the court that a sheriff was a "party" or was "interested" in the proceeding (Civil Code, section 667, and section 151, Criminal Code), then another officer should be designated to execute the process, and so in criminal proceedings "the court may, for sufficient

cause, designate some other officer or person than the sheriff to summon petit jurors." (Section 193, Criminal Code.)

In this case it is not pretended that the sheriff had any personal feeling or bias against the prisoner, or was personally interested in the trial. While the "sufficient cause" named in the law is not defined, this court in Forman v. Commonwealth, 86 Ky., 603, said of a somewhat similar complaint that the unsupported affidavit of a defendant that the officer "was not a suitable person" and was "biased against him" and "would not summon impartial men to act as jurors" did not furnish sufficient cause for his removal.

It does not appear from the record here, and it was not intimated during the trial, that the sheriff or his deputies failed to execute all process placed in their hands by the accused. As to the jury it does not appear whether any member thereof was summoned by the sheriff or any of his deputies, and certainly there is no evidence in the record that he or they failed to perform properly any duty in this behalf.

In this connection, as it involves the conduct of the sheriff, we notice the complaint with respect to what is termed the ticket system of admission, adopted by the sheriff to control the attendance at the trial.

The affidavit of the accused, filed several days before the trial commenced, was to the effect that Sheriff Plummer "had announced his intention of permitting no one to enter the courtroom upon the trial herein excepting members of the bar and court officials who shall not hold a ticket of admission issued by him, and that such tickets should be good for only one half of a daily session, and that no person shall receive tickets more than once; and that if said Plummer shall be permitted to carry out said program, friends of affiant, and all others who are not favorites of said Plummer, will be denied admission to the courtroom during the trial, and that affiant will thus be denied his right to an open and public trial, free from partiality and favoritism, etc."

Accompanying the paper was a motion that the court direct the sheriff "to permit any and all well-behaved and respectable persons, who desired to attend the trial herein, to do so, so long as such persons can be conveniently accommodated in the courtroom, and to refrain from admitting some and excluding others, merely to gratify his own caprice and at his own pleasure, and to refrain from excluding any person for the sole reason that he may not hold a ticket of admission, etc."

Here is an effort to forestall the action of the sheriff, as well as a charge in advance that the sheriff would prostitute his office out of mere caprice or his own pleasure. The court properly refused to take any notice of the affidavit or motion.

It is significant that when the trial was over the accused was not able to say that any of his friends, or any other person who desired to attend, had been prevented from doing so, but contents himself with filing an affidavit that the ticket system had been carried out during the trial, and the admission of persons regulated thereby.

While much has been said in oral argument and by brief on this alleged error there is not the slightest indication that the ticket system was carried on, and the tickets of admission issued otherwise than to those who first applied for them, and for the sole purpose of preventing an overcrowding of the courtroom. This plan was carried on under the eye of the trial judge, and we quote his ruling on the point when discussing this ground for a new trial: "The fifth ground is stated to be 'error of law committed in refusing

to permit defendant to have an open and public trial, free from favoritism and partiality.' There is absolutely no foundation for such a statement. There is no suggestion made that there was the slightest discrimination in the admission of persons to the courtroom. The court, to enable it to transact business and as a protection to the defendant, directed the sheriff to have tickets of admission to the courtroom limited in numbers to the seating capacity of the room, and to give them in the order in which requests were made to him for them; that if strangers applied for them to satisfy himself they were not persons who might do violence to the defendant. The court has no knowledge that while the tickets were not exhausted any person was refused one. The ticket system prevented disorder in the corriders of the courthouse."

In the case of People v. Murray, 14 L. R. A., 405, relied on by counsel for appellant, the order of the trial court to the police officer was to "stand at the door and see that the room is not overcrowded, but that all respectable citizens be admitted, and have an opportunity to get in whenever they should apply."

The Supreme Court (Michigan) said: "It is shown beyond question that during the whole trial the courtroom was not overcrowded, nor were the seats provided for spectators occupied to any great extent. This officer was under the control of the court, aud when the court was informed that he was excluding citizens and taxpayers, he refused to take any notice of the complaint, and left the officer to exercise his discretion as to what respectable citizens he should admit."

It is not pretended that any such exclusion or discrimination was practiced in this case. Had the court adopted the suggestion contained in the motion of appellant's counsel, and directed the officer to admit all "*respectable* persons," then the vigorous language of the case cited, denouncing the plan as violative of the constitutional right of "public trial," would have been applicable here; for, as indicated in that case, no citizen is required to present to a police or other officer a certificate of respectability before he is entitled to attend a public trial, as demanded by the Constitution of his country.

Counsel next discusses the alleged errors of the court in admitting and excluding testimony. These are quite numerous, and, while all have been examined carefully, only the more important seem to demand special comment.

It is to be remembered in this connection that the true solution of this mysterious case rests largely not upon direct testimony explaining the immediate transaction, but upon circumstances affecting or supposed to affect the main transaction; so that, as said by this court in the O'Brien case (89 Ky., 362), "the evidence should be allowed to take a wide range, otherwise the guilty would often go unpunished. It is true there must be some connection between the fact to be proven and the circumstances offered in support of it; yet any fact which is necessary to introduce to explain another, or which afforded an opportunity for any transaction which is in issue, or shows facilities or motives for the commission of the crime, may be proven. Even evidence tending to prove a distinct offense is, therefore, admissible if it shows facilities or motives for the commission of the one in question. The purpose," says the court, "is to weave a net about the guilty, and often this can no more be done by proof of a single circumstance than the building of a house with a single brick."

This language is particularly applicable to the first complaint of counsel on this subject.

The autopsy held by the coroner developed that he found a healthy fœtus, which must have been alive up to the time of the mother's death. This is claimed to be error because no mention is made of the murder of an unborn child in the indictment. We think the existence of the fœtus conduces to furnish a motive for the killing; its age would show the necessity for immediate action if relief was to be afforded or concealment made longer possible. Moreover, it appears that where death is caused by hemorrage, there is less flow of blood in cases where the subject is pregnant, owing to the mysterious effort of nature to maintain the life of the fœtus; and this question of the quantity of blood found about the body affects the very jurisdiction of the court trying the case, as upon it depends chiefly the solution of the question whether the decapitation occurred during life, and at the spot where the body was found.

Serious complaint is urged against the competency of Mayor Caldwell's testimony to the extent particularly that the witness gave any conversation between Jackson and Walling after their arrest. The point of the objection can be understood the better by quoting from the bill of evidence.

"*A.*—Mr. Jackson was asked about the satchel, and he said he had left the satchel at Mr. Legner's saloon across the street from where he roomed. When asked why he brought that satchel out he said he wanted to loan it to a young doctor, whose name I do not remember, and he intended taking it to the college to give it to him, but he did not give it to him, and finally admitted that it was Pearl Bryan's satchel. Walling then repeated, 'I want to say in the meantime, in one of these conversations, we had told both these young men that they did not have to make any confessions to any person; that they were at perfect liberty to refuse to answer any and all questions that were asked them.' Walling then stated in his presence that when Mr. Jackson came back from his holiday vacation he took him into the corner of his room on Ninth street, where they roomed, and told him that he was in trouble with Pearl Bryan, and that he intended to kill her. When asked how, he says: 'I propose to get a room, take her to the room and give her some quick poison and leave her there.' Then again, he says, he changed, and said: 'No, I will cut her up into pieces and take the pieces and deposit them in different places about the city.' On this evening he said that he saw Pearl Bryan at the postoffice, and I believe that was Thursday evening instead of Wednesday evening. He said that Jackson had made arrangements to take her over to Bellevue (I think it was) or over at the sand-bar or some place and then kill her, take her head off and bury her. He said that Jackson asked of the physicians as to the effects of the different kinds of poisons and that he had a standard medical dictionary in his room studying the effects of poisons, and that he asked one physician particularly as to the effects of cocaine, and he said that Jackson went to Sixth street to a pharmacist and got cocaine, and he brought it back and he said there was a level teaspoonful—a small teaspooful as he described it; that he poured it out and dissolved it in two teaspoonfuls of water and put it in a bottle, as he said, to give her to paralyze her vocal organs or throat, and then cut her head off. Jackson turned to 'Wally' as he called him at this time, and he says: 'Wally, why do you talk that way? You know you are not telling the truth; you know that you killed Pearl Bryan,' whereupon Walling says: 'No, you know that you killed her, and why don't you tell where her head is?' Then, when Jackson was asked where Peal Bryan's head was, he says, 'I don't know;

Wally says he threw it overboard.' Then he (Jackson) said that they took her clothes and made one or two trips, I don't remember, to the river, and threw part of them over into the river and some into the sewers, but he could not tell where. Mr. Jackson then said that there was a bundle that he had given Walling; that Walling had a bundle and asked him what he did with it. Walling says that bundle is up in my locker at the college. The bundle was sent for and brought into their presence, and it was a pair of pantaloons which Jackson identified as his, but said that he hadn't seen them for some time; that Walling must have worn them, and thereupon I asked them as to where the other clothes were, whereupon Walling says: 'Jackson, why don't you tell him where those things are; you might just as well do it now as any time?' Whereupon Jackson said that on the Saturday, I believe it was, that they were walking up Plum street with the bundles, that they met there some young physician or dental student coming toward them in an opposite direction, when they changed around and went down Plum and out Ninth. Jackson, as he said, went in Little Richmond street, and emerged from that, after the other man had passed, and came back down Plum to Ninth, from Ninth to Richmond, and out Richmond street westward, where he threw the bundle in one of the manholes or sewers, but he could not state which. The sewers were drained or searched and the bundle brought to the department and Mr. Jackson identified it as his coat, first denying that it was his; said it was Walling's, but afterwards admitted that it was his coat, but that Walling must have worn it. There were several conversations of this character, one time Walling accusing Jackson of killing the girl, then Jackson accusing Walling of killing her."

It is altogether clear that the statements of both Jackson and Walling were made voluntarily, and are free from the suspicion of having been procured by promises or threats. It follows, therefore, indisputably that Jackson's statements are competent. These, however, without the corresponding portions of the conversation, as made up by Walling's statements, would be unintelligible. The whole must be taken in order to get the sense of it.

Here Walling discloses where a bundle is—a bloody coat—and it is found where he locates it. Jackson also tells where a bundle is—a pair of pantaloons, muddy and bloody—and the bundle is found where he locates it. There is no confession by either party, and no admission of any fact intended to be inculpatory. The conversation was voluntarily entered into by each party to it, and we think the whole of it was competent; but on the following day the court said to the jury: "When upon yesterday I permitted Judge Caldwell to detail to you what Walling had stated concerning the conduct and statements of Jackson to him in Jackson's presence, it was done and admitted to you as testimony in this case for the sole purpose of your determining from what Jackson said, or his conduct at the time, in Judge Caldwell's presence, whether he admitted or denied the statements made by Walling; and you will determine, from all the testimony you hear in this case, whether or not Jackson, by his conduct, expressly or impliedly admitted or denied what Walling said."

We are not satisfied that it was proper to thus limit this testimony. On the contrary, it would seem that those portions of Walling's statements which Jackson did not deny, or, in other words, remained silent about, were the portions which were incompetent, if any were. This is true because Jackson was not called on, or it was not incum-

bent on him to speak at all. He had the right to remain silent when charged with the crime, and guilt is not to be imputed to him by reason of that silence.

As we have seen, however, he did not remain silent, but voluntarily entered into the conversation, denying every imputation of guilt. Later on the witness, Crim, was testifying to conversations between Jackson and Walling and the officers, and testified that Walling said that the Saturday before the arrest he met Jackson in Cincinnati with a Penny Post in his hand; that Jackson told him "they had something to work on; that if it were not for those damned shoes we would be all right;" and further said that "I see the detectives have gone to Greencastle, and it looks damned blue." In response to this Jackson answered: "It is not true, and you know it is not true, Walling." Thereupon the court said to the jury: "You are to disregard every statement this witness has detailed that Walling made, which Jackson denied the truth of. I take this occasion now to charge you further that you will do the same as to all the testimony that Judge Caldwell gave as to what Walling said upon this same occasion, to which Jackson answered, 'Walling, you know you are not telling the truth.' All that testimony you will disregard, and will not consider it in coming to a conclusion in this case."

Still later in the trial, and after the defendant had testified minutely as to these conversations and his conduct and manner toward Walling, the witnesses, Caldwell, Crim, Deitsch and others, were brought back in rebuttal, and were allowed to testify to the manner of Jackson's denial of Walling's statements, the court saying: "The court now tells the jury that for the purpose of rebutting the testimony of Scott Jackson, and for that purpose only, the jury will consider statements made by Chief Deitsch, Mayor Caldwell, Cal Crim, McDermott, Julius Plummer and Mr. Poock, in reference to conversations that they detailed between Walling and Jackson, in the presence of Chief Deitsch and Mayor Caldwell, in reference to what Jackson had said to Walling when in Jackson's room and Jackson's denial of it;" and finally, in a written instruction (No. 13), the court told the jury that "all the evidence offered by the Commonwealth as to any statement of Alonzo Walling, the truth of which the defendant, Scott Jackson, denied, and, as to the manner and language of the denial, are to be considered by them solely in rebutting the defendant's testimony thereto—that is, to contradict, weaken or explain Scott Jackson's statements in reference thereto, and not as testimony upon which to find him guilty. The defendant's own statements of what Alonzo Walling said, and the language and manner of his denial, are before the jury for every purpose."

As in all the conversations Jackson did in fact deny the truth of every charge looking to his guilt made by Walling, the effect of the court's ruling was to exclude from the jury all that Walling said to Jackson's detriment, except as affecting his own statements on the stand with respect thereto. This we have seen was more favorable to him than he had the right to demand.

We are of the opinion further, in view of the fact that cocaine was found in the stomach of the dead girl, and that the accused had inquired into its effects, that the witness, Cullen, was properly allowed to state the use of this drug in the production of abortion and its effects on the system.

It is insisted that the witness, Poock, was allowed to testify what Jackson said in his presence after his arrest without it being first shown the circumstances surrounding the statement were proper.

It is clear, however, that in no case was any statement of the accused admitted without a full opportunity for a preliminary examination and until the court was satisfied that the statement was voluntarily made.

Complaint is also made that questions intimating other acts of doubtful propriety on the part of Jackson, and touching matters wholly foreign to the trial were, allowed to be asked. Objection to these, however, was sustained and counsel cautioned not to indulge in such conduct further.

We think, too, that the various acts of Walling during the week preceding the death of the girl and after her arrival in Cincinnati were properly shown by the proof of Rogers, Martin, Skidmore and others. These acts were "single bricks in the building," and Jackson was shown to have been closely connected with them. So, too, we think competent the conversation between Jackson and Walling when confined in the "sensitive" cell. The talk was wholly voluntary. Nor do we think incompetent the testimony of the negro witnesses who were introduced in person by the State after their depositions taken for the defense had been read. The jury heard each statement.

Many other rulings of the court touching the admission and rejection of testimony are complained of, but the decision of the court in each case is easily sustained on principles already announced. The instructions of the court have been examined carefully and need no extended comment. The first is on the theory that Jackson did the cutting and killing; the second that Walling did this and that Jackson aided and abetted him; the third we quote in full: "If the jury believe from all the evidence beyond a reasonable doubt that the defendant, Scott Jackson, willfully, feloniously and with malice aforethought, himself attempted or aided or abetted or procured another to attempt to kill Pearl Bryan, but she was not thereby killed, and that said Scott Jackson, in this county and State, before the 14th day of February, 1896, though believing said Pearl Bryan was then dead, for whatever purpose, cut her throat with a knife or other sharp instrument so that she did then and there, and because thereof die, they will find said Scott Jackson guilty of murder."

The conclusion is fairly deducible from certain portions of the testimony that an attempt was made to kill the girl by the administration of cocaine while in Cincinnati, and that this was done by the defendant or at his instance, but that she was not thereby killed. It is to be remembered that, according to the testimony of Jackson, he did not see the girl in life after Wednesday, and, according to Walling, he did not see her after that day; but the proof conduces to show that they were both with her Friday night when she was in the cab, and that they brought her over to Campbell county.

If she was then dead, as might be supposed from her making no outcry, a verdict of guilty could not have been rendered; but if she was then alive, though appearing to be dead, and by the cutting of her throat she was killed while in Campbell county, then the jury might find a verdict of guilty, although the cutting off of the head was merely for the purpose of destroying the chances for identification or for any other purpose. At last, the instruction does not authorize a verdict of conviction unless Jackson is shown to have cut off the head of his victim in Campbell county—and whilst she was in fact alive—and if he did this, he was guilty of murder, though believing her already dead, if the act succeeded and was but a part of the felonious attempt to kill her in Cincinnati.

Some of the facts on which this instruction is based do not appear as distinctly in proof as others, but there is some basis for the hypothesis put, and the whole arises naturally out of the circumstances in evidence.

The fourth is the same instruction, with Jackson as an abettor and Walling as principal.

The fifth is based on the theory that Jackson feloniously administered, or procured another to administer, drugs to Pearl Bryan, for the purpose of producing an abortion, when she was so far gone with child as to make it necessarily dangerous to her life, or when the drugs were in themselves, or in the manner of their administration, dangerous to her life; and, though believing her to have been killed in this way, he cut her head off in Campbell county when she was in fact alive, yet he was guilty of murder.

The sixth is identical with the fifth, save that appellant is treated as an abettor and Walling as principal.

Keeping in mind the purpose for which, as appears from the proof, the girl was brought to Cincinnati, the fact that cocaine was found in her stomach and the defendants' inquiries with respect thereto, we think these instructions fairly suggested by the proof and embody correct principles of law.

The seventh and eighth are with reference to voluntary manslaughter, and are not seriously objected to.

The ninth also authorizes a verdict of voluntary manslaughter, and is fashioned after the fifth, with the exception of the words "she *not* being then so far gone with child as to make the same necessarily dangerous, etc.;" and the tenth is like the sixth, with the exception of the above words. Our disposition of the fifth and sixth, therefore, disposes of the ninth and tenth.

The eleventh was on the subject of involuntary manslaughter, and authorized such a finding if Jackson cut the throat of Pearl Bryan in Campbell county, under the belief that she was already dead, and did so, not intending to kill her, but merely for the purpose of concealing her identity, unless he had theretofore himself attempted to kill her, or procured another to so attempt, or had administered drugs, or procured another to do so, for the purpose of producing an abortion, in which event they were to "find as elsewhere instructed;" meaning, it is evident, that if the attempt was to kill her, or if the drugs were administered when dangerous to her life, he was still guilty of murder, as theretofore defined, or of voluntary manslaughter, if the drugs were administered when not dangerous.

The twelfth is the same, except that the accused is treated as an abettor and Walling as principal.

The thirteenth, we have already seen, is a limitation on the scope of certain testimony, and is unobjectionable.

The succeeding instructions are the usual ones on reasonable doubt, presumption of innocence, etc., and substantially embrace those asked for by appellant on these subjects.

Complaint is made that counsel for the State referred in his argument to the state of public sentiment in the case, but what was said on this subject was wholly in response to statements of counsel for the defense on the same subject, and was presently stopped by the court.

The references to the Webster-Parkman case and to the Durant case were merely historical allusions to celebrated cases of circumstantial evidence, and can not be said to have been an improper argument or furnish ground for reversal.

Upon the whole case we are convinced that the accused has had a fair and impartial trial. If upon his arrest and when first confronted with the charge of having committed so horrid a crime he was so disconcerted—as he might naturally be even if ever so innocent—as to tell an incoherent and contradictory story of his connection with it, yet when time had been given to come to himself he seems not to have availed himself of the opportunity to tell a story at all compatable with that of an innocent man, or even of one who had committed a grave error by inadvertence, ignorance or mistake.

The explanation of his damaging letter to Wood, his claim of utter ignogrance of the whereabouts of Pearl Bryan after Wednesday, and his claim of failure to even inquire where she was or what success had attended the plan for her relief, his reasons for disposing of the satchel and other effects of the dead girl, are all improbable stories, and it is not to be wondered at that the jury could not accept his statements as true.

The judgment must be affirmed.

The court delivered the following response to petition for rehearing February 13, 1897:

With great earnestness, force and plausibility two contentions are made by the petitions for rehearing in this case and in the case of Walling v. Commonwealth:

1st. That no facts which occurred in the foreign jurisdiction of Ohio can be tacked on to facts which occurred in Kentucky for the purpose of supplying the elements necessary to constitute the crime of murder in Kentucky.

2d. (And this appears to be the point chiefly relied on) That in giving its instructions to the jury the trial court is not authorized to refer to any fact which occurred in the foreign jurisdiction. Other suggestions are made in the petitions, but in our judgment do not require specific response.

These two contentions may be considered together, as the first is necessarily raised and considered in the decision of the second, and so treated in the petition.

Reduced to its lowest terms, the claim of counsel is that an attempt to commit a murder in another State, supposed by the guilty party to have been there successful, but in reality completed in this State, though by an act not by him believed to be the consummation of his purpose, is not in this State punishable.

Such is not nor should it be the law. By the law of this State a crime is punishable in the jurisdiction in which it has effect. Statutes in numbers have been passed by the general assembly of this Commonwealth providing that jurisdiction should be had of crimes in the county in which the crime became effectual. (Chapter 36, article 2, Kentucky Statutes.) Such we believe to have been the common law before such enactments.

Assuming that what the jury found was true, in what State or district could the crime be punished? If not here, where? If we concede the claims of counsel for appellants no serious crime was committed in Ohio. Nothing was there done but an ineffective attempt to murder. None was committed here. What was done in this jurdiction was only the mutilation of a supposed corpse, and yet the fact, established by overwhelming testimony, remains that the crime has been committed. Not all the refinements of counsel can lead us from the conclusion that, when a crime has been completed the result of which is a death in this Commonwealth, we can take jurisdiction of the offense.

Not for a moment can we admit as law the logical conclusion of counsel's argument, namely, that there is a variety of murder, which, by reason of error in its commission, is not anywhere in any jurisdiction punishable; not in Ohio, for the reason that the attempt there made was not successful; not in Kentucky, for the reason that the act there done, and which accomplished and completed the actual killing, was done upon the supposition that the murder had already been accomplished.

One reliance of the defense upon petition for rehearing is that the indictment charges murder by cutting the throat or decapitation, and that the instructions permit and require the jury to consider a previous attempt to kill in a foreign State and by different means. But in our opinion it was not error in the instructions to present to the jury evidential facts which, if found to be true, showed the criminal nature of the act by which the offense was completed.

We see no good reason why we should not consider the motive which inspired an attempted crime in another sovereignty, and the circumstances of the attempt, with the view to determine the character, criminal or not, of the ultimate fact which took place in this sovereignty; nor is such a determination an invasion of the constitutional right of the accused to a speedy "public trial by an impartial jury of the vicinage." For the accused himself selected the vicinage in which the final act occurred, and thus himself gave jurisdiction to the court which determined the criminal character of that act. Nor can we consider as serious the contention that the ruling of the trial court, approved by the opinion in this case, is punishment in Kentucky of an offense committed in another jurisdiction, and there again punishable, so as to come within the constitutional inhibition against a citizen being twice put in jeopardy. On counsel's own contention no completed crime existed in Ohio, and the crime committed, if punishable under this State's law, can not further or again be punished there.

The objections made to the ticket system of admission to the courtroom during the trial are also insisted on in the petition for rehearing. It is objected that it was impossible for any friend of the appellant to be present during the trial, and that, therefore, the appellant was denied an open public trial; but it has not been attempted to be shown that any friend of the appellant in either case was excluded from the courtroom.

With regard to the objections to the accusatory statements of Walling, made in the presence of Mayor Caldwell, we need only say that they were excluded from the consideration of the jury, except in so far as they tended to contradict, weaken or explain Jackson's own statements in regard to the same conversation.

We have carefully examined the immense mass of testimony in the case, and see no error to the prejudice of any substantial right of the appellant.

The petition for rehearing is overruled.

TARVIN & HALL V. TIMBERLAKE, &C.

(Filed January 7, 1897—Not to be reported.)

1. Burden of proof—The court having required the plaintiff to first produce their evidence upon the idea that the burden of proof was upon them, it would have been error to deny to them the right to conclude the argument to the

jury; therefore, if there was an error in that respect it was in placing upon the plaintiffs the burden of proof at the outset.

2. *Same--Attorney and client*--Where an attorney has collected money for his client, a part of which he refuses to pay over, claiming it as a fee, in an action by the client against him to recover the money thus retained, in which the only issue is whether the defendant is entitled to retain all or only a part of the money, the burden is upon the plaintiff, as he can not recover any part of the money without proving what part he is entitled to, and would, therefore, "be defeated if no evidence were given on either side."

S. D. Rouse and R. E. Simmons for appellants.

D. A. Glenn for appellees.

Appeal from Kenton Circuit Court.

Opinion of the court by Chief Justice Lewis.

Appellants, having received the purchase money of real property sold by appellees, retained and refused to pay over $800 thereof, which they claimed and charged as their proper fee for services in investigating and instituting certain proceedings to make the title good to the purchaser.

In this action by appellees to recover that sum, less amount of reasonable fee, the verdict of the jury was for $300; and the only ground now relied upon for reversal is that the lower court erred in ruling the burden of proof was upon plaintiffs, now appellees.

Having been required under that ruling to first produce their evidence, it would, as heretofore held by this court, have been error to deprive appellees of the right to conclude the argument to the jury. (O'Connor v. Henderson Bridge Co., 95 Ky., 633). So the inquiry is whether it was error at the outset to put the burden of proof upon appellees.

Section 526 provides: "The burthen of proof in the whole action lies on the party who would be defeated if no evidence were given on either side." And such, of course, must be the test in every case like the present, when there is no shifting of the issue.

There was no dispute about the right of appellants to collect the purchase money, nor as to their right to retain a part thereof as fee for their services; but the simple issue was how much thereof, if any, appellees were entitled to recover back. As, therefore, appellants legally and rightfully acquired possession of the money, appellees could not recover it, or any part of it, without proving what part she was entitled to, and of course they would, in the language of the Civil Code, "be defeated if no evidence were given on either side."

In our opinion the ruling of the lower court in question was not erroneous, nor do we perceive error in any other respect.

Judgment affirmed.

The Kentucky Law Reporter.

EDITOR:
WALTER G. CHAPMAN, ... Frankfort, Ky.

VOL. 18. APRIL 15, 1897. No. 20

KENTUCKY COURT OF APPEALS.

COMBS, &c. v. BREATHITT COUNTY.

SAME v. SAME.

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(Filed December 10, 1896—Not to be reported.)

1. *County levy bond—Pleading*—In a suit by a county upon a bond executed by the sheriff for the collection of a special tax, although the act providing for the tax required that the bond should be "approved by the county judge and a majority of the justices of the peace," it was sufficient to aver in the petition that the bond was accepted and approved by the court, for while the court must speak by its records, a record will be presumed upon demurrer; and the fact that the county judge endorsed his approval upon the bond does not negative the presumption that there was an order of approval by the whole court.

2. *Same*—Although the covenants of the bond are not specifically set out in the petition, the pleading must be held good after judgment, the defendants having filed a special demurrer, but no general demurrer. Besides, the bond being referred to as part of the pleading, "as if fully set out," must be held to aid in some degree the averments of the petition.

3. *Verification of pleading*—The county judge was the proper person to verify the petition under the rule awarded requiring a verification of the pleading.

4. *The judgment was properly rendered* without the intervention of a jury or the introduction of proof, as might have been necessary if the proceeding had been summary in its nature.

5. *The suit was properly brought in the name of the county*, although the covenant was to the Commonwealth, the county being the real party in interest.

6. *One who was appointed by the fiscal court to receive the money* from the sheriff will be presumed to have accepted the appointment, as he in fact undertook the duties imposed on him and demanded the money.

7. *Clerical misprision*—The rendition of judgment against defendants for a few dollars more than the prayer of the petition authorized was a clerical misprision, and must be corrected by motion in the lower court.

8. Pleading—The petition admitting a credit of "$—," the defendants can not complain that the blank was not filled and the credit allowed, as they did not ask that this be done.

9. Liability of sureties on county levy bond—Even if the court could presume from the date at which a county levy bond was executed that the sheriff had already collected the county levy, yet as the undertaking was also that the sheriff would "pay over," and this, it is averred, he has not done, the sureties are liable.

J. J. C. Bach for appellants.

Edward W. Hines, J. B. Marcum, T. T. Cope and S. H. Patrick for appellee.

Appeal from Breathitt Circuit Court.

Opinion of the court by Judge Hazelrigg.

These cases are alike in their main features, and, for that reason, are heard together. They are suits by the county of Breathitt against the sheriff and his sureties for revenues due the county for the years 1890, 1893 and 1894, and which, it is alleged, were collected by that officer and not paid over. To none of the suits were any answers filed or offered to be filed.

In the case first named (444), in which special taxes levied for building a courthouse are involved, a special demurrer, for want of parties plaintiff, was overruled, and, no other pleading being filed by the defendants and no other defense being shown, judgment was rendered in accordance with the prayer of the petition.

It is now urged as a fatal objection to the petition that it does not aver that the bond was "approved by the county judge and a majority of the justices of said court," as was required should be done under the special act under which these taxes were levied.

The petition, however, does aver that the bond "was signed and delivered to the judge of the county court in open court, and was accepted and approved by the said court at its ——— term, 18—, and a copy of it was filed and made part of the pleadings, as if fully set out." At the foot of the bond appeared this endorsement: "Approved in open court this 10th day March, 1890," which endorsement was signed by the county judge.

A county court must speak by its records, as is argued by counsel, but, as held in Commonwealth v. Davis, 9 B. M., 128, the record will be presumed on demurrer, when the bond bears on its face the characteristics of an official bond. Here the written statement of the county judge does not negative the presumption that there was an order of approval by the full court, as the special law required, but rather strengthens it. However, as argued by counsel for the State, and as held in the case heretofore cited, the bond is good as a common-law obligation without such order, nothing appearing to the contrary.

It is also urged that the petition fails to set out the covenants of the bond; and it is true that the bond is referred to only in a general way, though made part of the pleading, "as if fully set out."

The bond is alleged to have been executed "*for the collection of the ad valorem tax* of said county for the year 1890;" and it is further alleged that the "sheriff has violated and broken the covenants of said bond by having failed and refused to pay said $1,003.07."

A bond executed "for the collection" of the county levy means that the obligor undertakes to collect that levy, and if a failure to pay it over be a breach of the bond it must be because the bond re-

quires the obligor to so pay it. At any rate the same strictness will not be followed by this court in the construction of pleadings after judgment, and when the party appears and files a special demurrer, but does not raise the question involved by a general demurrer. Besides, the bond was referred to as part of the pleading as if fully set out, and must be held to aid in some degree the averments of the petition. (Totten v. Cooke, 2 Met., 279.)

It would seem to be entirely clear that the county judge was the proper person to verify the petition under the rule awarded requiring a verification of the pleading (Estill county v. Richmond, &c., R. R. Co., 91 Ky., 349); and it is equally clear that the judgment was properly rendered without the intervention of a jury, or the introduction of proof, as might have been necessary if the proceeding had been summary in its nature.

The special demurrer was properly overruled, as the county was the real party in interest. Hagin's acceptance of his appointment by the fiscal court to receive the money from the sheriff will be presumed, as he in fact undertook the duties imposed on him, and demanded the money.

The foregoing applies in the main to all the cases. In the second-named case (436) it is also urged that the judgment is not rendered for the exact amount named in the prayer of the petition. The prayer is for $1,582.16, with interest from January 1, 1894, and judgment is for $1,953.03, with interest from January 1, 1894, less $218.75 as of April 9, 1894, $75 as of June 15, 1894, and $78.12 commissions.

There would seem to be a judgment for a few dollars more against the defendants than the prayer authorized; but, if so, it is a clerical misprision, and must be corrected by motion in the lower court. Again, if the defendants desired the blank space left in the petition for an additional credit to be filled, it was their duty to make known that fact to the court; otherwise this court will presume the defendants not entitled to further credit, or the amount was so small as not to be worthy of notice.

In case No 438 it is insisted that as the bond was not executed until on June 7, 1894, for the collection of the county levy of 1894, the sheriff may have already collected the levy, and hence the sureties can not be held liable. The petition, however, in this case avers that by this bond the obligors covenanted that the sheriff "would well and truly collect, account for and pay over to the persons entitled to receive the same, according to law, the county levy and public dues of the county of Breathitt for the year 1894, etc."

Therefore, even if the revenue for the year 1894 had already been collected, there was an undertaking that the sheriff would *pay it over*, and this, it is averred, he has not done, although a settlement of his accounts had been made by a commissioner appointed for that purpose, and the amount demanded of him.

In No. 439 the judgment appears to be for less than the prayer authorized, and if commissions are not allowed it was because they were not asked for by the defendants.

Judgment in all the cases affirmed.

The court delivered the following response to a petition for rehearing, February 13, 1897:

It is still insisted, as urged in the original brief of counsel for appellants and which we then fully considered, that because the petition averred that the bond sued on was for the collection of the *ad valorem* tax, and the copy of the bond filed showed it was a covenant to

collect and pay over the county levy and public dues of the county, there could be no recovery.

The bond filed purports to be the "sheriff's bond for collection of county *ad valorem*." We considered the question from the standpoint argued by appellant's counsel, and we still think the sureties liable for the reasons indicated heretofore; but if not, still the sureties on the bond sued on, executed on March 10, 1890, as averred in the petition and as shown by the date of the bond, are liable for the taxes collected for courthouse purposes under the provisions of the general law, without reference to any special act authorizing such a levy. (Sections 6 and 7, chapter 89, General Statutes.)

Petition overruled.

WALLING V. COMMONWEALTH.

(Filed December 12, 1896—Not to be reported.)

Evidence—Prejudicial errors—Testimony may be technically competent, but when its rejection below is urged as a ground of reversal the circumstances surrounding it may be such that this court may be entirely satisfied of its worthlessness as a factor in the trial, and where that is true the error in rejecting the testimony can not be said to affect the substantial rights of the accused, and, therefore, this court will not reverse on account of the error.

It being important for the accused to show that he had spent Thursday and not Friday night at a certain hotel, and he himself having testified that he had done so, the refusal of the court to permit him to prove by a friend that he had declared to him his intention of spending Thursday night at the hotel in question was not prejudicial, even if the declaration was competent as a part of the *res gestæ*, the court being convinced that its admission would not and ought not to have affected the verdict.

Other objections urged to the judgment are the same as those made in the case of Jackson v. Commonwealth (*ante*, 795), and the opinion in that case is referred to by the court for an answer to those objections.

George Washington for appellant.

W. S. Taylor and M. R. Lockhart for appellee.

Appeal from Campbell Circuit Court.

Opinion of the court by Judge Hazelrigg.

The appellant was indicted for the murder of Pearl Bryan jointly with Scott Jackson, whose appeal has just been determined by this court, and on his trial below was likewise found guilty and sentenced to be hung.

The case has been gone over carefully, but a restatement of the facts is unnecessary. It is sufficient to say that Walling's connection with the movements of the girl during the week preceding her murder, and his attempts to dispose of her effects after that occurrance, are clearly established by the proof, to say nothing of the direct and conclusive testimony of the negro cab driver. The verdict, therefore, can not be disturbed for lack of evidence to support it. What we determined as to the sufficiency of the indictment and the correctness of the instructions in the Jackson case is conclusive of the same points here raised, and this ground need not be again considered.

We are also of the opinion in this as in that case that the conversations between Walling and Jackson when they were interrogated

by the officers are competent, as well as the statements of the accused to the officers and newspaper reporters when Jackson was not present. These conversations and statements were freely and voluntarily made and entered into, and were not obtained by threats, promises or the like. In fact while Chief Deitsch did say to Walling in one of the talks that "it would be well for him to tell all he knew," yet no confessions were thereby obtained, or any statement intended to be at all inculpatory. Besides, the statements made at the time of the alleged promise or suggestion from the chief were afterwards excluded.

The objectionable remarks of the attorney representing the State with reference to the finding of napkins and tablecloths in Walling's trunk were not calculated to prejudice the accused or have the slightest bearing on the case. Besides, the remarks were denounced as improper by the trial court.

It is most seriously insisted that the rejection of a portion of Fred Albion's testimony was a prejudicial error. This witness was the intimate friend of Walling. He roomed in the same house, was his barber and companion. The valise of the dead girl was found in the barber shop where he worked and in his stand. The proof comes suspiciously near showing that he had some connection or at least some knowledge of the crime or of Jackson and Walling's connection with it. About the first thing said by Jackson to Walling in the "sensitive" cell was, "Fred is all right, ain't he?" He was not present at the trial, but by his deposition taken at some point in Ohio, when he was cross-examined, he proves that he was slightly acquainted with Walling, and was with him on Thursday night, January 30, visiting a number of places in the city in his company (Cincinnati) until about 1 o'clock, when he parted from him.

He then offered to testify, but the State's objection to it was sustained, that when he and Walling separated "Walling told him that he was going to stay at Heider's hotel all night," and that he was going to do so because "he had a fuss with Jackson."

The Commonwealth had shown in the Jackson case and in this that Walling came to Heider's on Friday night, the 31st, or rather on Saturday morning, at about 3 o'clock and stayed there the remainder of the night. This fact is established by Martin and Rogers, night waiter and clerk at the hotel, and circumstances are shown which render it certain that this was on Friday, the night of the murder, and not on Thursday night.

It seemed important, therefore, for the accused to explain away the circumstance of his being out on this night, or rather to contradict it outright, and he attempts to do so by himself testifying that it was Thursday night he stayed at Heider's, and by having his friend corroborate him by testifying to his declared intention of staying there on that night. The value of this declaration of intention, conceding it to have been competent on the ground that it was part of the *res gestæ*, depends on whether it was made by Walling in good faith and in the ordinary course of things, or was manufactured to meet an emergency, and the seeming necessity of rebutting the positive proof for the State. This, it is true, was not a question for the trial court, because if competent the declaration should have been admitted, but when this court is asked to nullify the trial below because it was not admitted, an inquiry into all the circumstances attending the alleged declaration, whether it was genuinely made and by whom it is proposed to show it was in fact made, becomes vital. Testimony may be technically competent, but when its rejection below is urged as a ground of reversal the circumstances surrounding

it may be such as this court may be entirely satisfied of its worthlessness as a factor in the trial, and be convinced, as we are in this case with respect to the testimony offered, that its admission would not and ought not to have affected the verdict. To reverse the judgment below under such circumstances and when so convinced would be to do so on most unsubstantial and unsatisfactory grounds. We are not the triers of the facts, but we are authorized to determine what errors affect or do not affect the substantial rights of the accused.

Besides, if the appellant ever made such a declaration it is entirely satisfactorily established that he did not carry out his declared intention and stay at Heider's on Thursday night. As further discrediting the declaration the motive alleged to be assigned for staying there is shown to have been groundless and evidently the result of an afterthought. Walling had had no fuss with Jackson nor the semblance of one. On the contrary their intimacy continued as usual, even after the pretended suspicions of Walling on Wednesday.

Perceiving no errors of record prejudicial to the substantial rights of the appellant, the judgment below must be affirmed.

GARR, &C. V. BOSWELL, &C.

(Filed January 12, 1897—Not to be reported.)

Sale by joint tenants—Fraud—While one of several joint tenants has the right to sell his interest in land without consulting his co-tenants, and at any time and price he may choose, yet where, as in this case, the parties propose to sell together, and the act of one is dependent upon the act of the others, good conscience and fair dealing require that one should not undertake secretly to procure for himself more than it is understood and agreed each and all shall have; and, if he does so, the money thus fraudulently obtained should be divided between the parties, as the nominal consideration for the land was divided.

Thos. F. Hargis and Oscar Turner, jr., for appellants.

F. Hagan for appellees.

Appeal from Jefferson Circuit Court, Chancery division.

Opinion of the court by Judge Paynter.

The facts of this case sufficiently appear in the opinion of the Superior Court, delivered by Judge Barbour, which is as follows, to wit:

"In 1891 the appellants, Lucinda Garr, Dixie Garr, James Garr and Mrs. Beeler, and the appellees, Mrs. Boswell and Mrs. Blankenbaker, sold and, by a joint general warranty deed, conveyed to Daniel E. O'Sullivan about 20 acres of land in Jefferson county, in consideration of $700 per acre. The appellants, claiming that the appellees had, by a secret arrangement with O'Sullivan, received in addition to their shares, as described in the deed, the one $1,200 and the other $1,750 more than either of the others, brought this action to recover their respective proportions of this $2,950.

"Mrs. Garr, an old woman over seventy, had a life estate in the land—the interest of the others, who were her children, was the remainder in fee. Mrs. Garr, Dixie Garr and Mrs. Beeler and her husband lived as one family in the city of Louisville. Mrs. Boswell

and her husband and Mrs. Blankenbaker and her husband had their respective homes in the same city. James Garr lived in Dakota.

"A park was about to be established in the neighborhood of this land. O'Sullivan offered $700 per acre for it if the owners would give him a perfect title. Mrs. Garr, Dixie Garr and Mrs. Beeler were willing to accept this offer if the others in interest would also accept it, and so expressed themselves to O'Sullivan. O'Sullivan then obtained this writing:

"'LOUISVILLE, June 1, 1891.

"'We, the undersigned, heirs at law of Mrs. L. J. Garr, do hereby give our consent to the sale of twenty acres of ground, more or less, situated on Chestnut street, near the river, in Jefferson county, Ky., provided the said sale is made at a price of not less than $700 per acre,' which was signed by Mrs. Beeler and her husband and Dixie Garr. He then endeavored to obtain the consent of Mrs. Boswell and Mrs. Blankenbaker, but they insisted upon better terms.

"We will have each of them to speak for themselves as to what occurred about this time. Mrs. Blankenbaker says her mother had spoken to her about selling the ground to the park commissioners. 'I never asked her any questions, and this was the last I saw of ma or knew of the thing until Mr. O'Sullivan came. When he came he told me he understood ma wanted to sell, and came to see if I was willing to sell my part, and he also brought an agreement with Beeler's and wife's and Dixie's names signed to it; and wanted to know if I would agree to let ma sell the property at $700 per acre. I said I would not sell my interest for that. He said the others are willing. I said they can sell it to you for what they want to; * * I won't sell for that money. After some talk he said if you will sign this agreement to let your mother sell for $700 an acre I will give you $500. I said no. He finally said I will give you $1,000 in cash if you will sign this. I said I would not take it, and would have to study the matter over. In a few days I wrote and offered to take $2,000, in addition to the $700 an acre. In a few days he came to see me and said, I can not give you $2,000, and I will have to go and tell your mother that you won't let her sell. I said hold on, Mr. O'Sullivan, I don't care to be considered the only black sheep; before I will let you go and tell mother that, I will take $1,750, and he said he would give me $1,750—$1,200 the day the deed was signed, and $550 with interest for a year. That is the only talk I ever had with O'Sullivan about the matter.'

"Never, in all the talks she had with her mother, did Mrs. Blankenbaker allude to her talk with O'Sullivan or say to her or any of the other appellants that she would not be willing to have the land sold for $700 per acre. She does say, though, 'I saw them several times after I signed the agreement, but I never said anything to any of them about the sale of the property. The only thing I said to ma was, are you satisfied? Do you think $700 an acre is enough for the ground? Ma seemed to get excited, and said that is as much as Hiram got and as Dixie got. That was after we had signed the agreement. She never asked me anything, and I never said anything.' It is passing strange if she was dealing fairly that she did not then tell her mother what she was getting.

"Mrs. Boswell, after speaking of the efforts of others to buy the land, said O'Sullivan came to see her and her husband in regard to 'mother's dower, and said she was anxious to sell, and the rest were willing, and had signed a contract to sell. I told him that was none of my lookout, and that the price was too low; that I was looking

out for myself. He said that if we would make a good deed for the ground the day of the sale he would give us $1,000, and would give my husband second superintendent of the park down there. My husband said he would study over it. So when he came back we asked him $1,200. In the meantime mother had never come to consult me about the matter. So when Mr. O'Sullivan came I said it is funny the park commissioners want that land. He said they don't want it; I want it to speculate on. After he left I went down and told ma there is no park commissioners want the ground; it is Mr. O'Sullivan—he told me himself he wanted it to speculate on. In the meantime, after they had all signed it and O'Sullivan had agreed to give us $1,200, there was some trouble about a tenant on the place that was wanted to be gotten off. I refused to give one cent to get him off. In the meantime she (the mother) gave to O'Sullivan, unbeknown to any one, to send on the deed to James Garr. When the deed came back she sent for me, and said the deed has come. I said what deed. She said the deed to the ground. I said that deed is not drawn up right. She said if he buys you out he don't want to wait for the deed. I said he will have to wait for a new deed. She said you and Annie (Mrs. Blankenbaker) will fool around until O'Sullivan won't wait any longer. You will not have another chance to sell that ground;' and still she never told her mother how anxious O'Sullivan was to buy it, and what inducements he had offered to her to get her to consent to the sale.

"The result of all this maneuvering was that Boswell and wife and Blankenbaker and wife signed the writing, dated June 1, 1891, and Mrs. Garr in writing agreed to sell for the $700. About this time Boswell and wife saw Mr. Watts, an attorney, and Mr. Watts wrote to James Garr in Dakota his first letter, which miscarried. On the 12th of June he wrote another letter, in which he said: 'Enclosed is a power of attorney, which is given to your mother for the purpose of enabling her to make a deed in your name, etc. Your mother and the people generally are offered $700 per acre for the nineteen-acre tract. It is quite a good figure for the property, and all are anxious to accept it as soon as possible. In order to do so there must be a good deed given, and, to do that, some one must represent you. * * * I am employed to represent the whole family in arranging this matter. * * * The land is only bringing this figure because a syndicate has thought there is a speck in it. Unless closed shortly it will go back to its old price. The sale, so your people say, is to be one-third cash, the balance in one and two years.'

"That Watts was acting as Mrs. Boswell's attorney in this matter is plain. He says, as to the information conveyed in this letter, 'I got it from Mrs. Garr and Boswell and wife, and Mrs. Garr, at that time, was more anxious to get it through than Boswell.' He further says: 'Mrs. Boswell asked me if I thought $700 was a reasonable price, and said she was going to try to get more, and I advised her if she took more everybody else ought to get the same; and think I advised her that everybody would be entitled to the same under a general rule.' He says, however, that he never knew how much she was to receive until O'Sullivan's attorney paid him the money for her.

"About this time the appellants and the appellees, with perhaps the exception of James Garr, drew up a writing—which seems to have been lost— the substance of which, as proven by the witnesses, was that the amount received from the land was to be invested, and Mrs. Garr was to receive the interest upon it during her life; but they afterwards agreed that Mrs. Garr should have absolutely the

value of her life estate in money—this value was fixed at $2,500, and they entered into this agreement, dated August 21, 1891: 'Whereas, Lucinda Garr is entitled to an interest in the estate, etc.; and, whereas, the said parties, and all of them hereto, are about to and intend to sell said property to O'Sullivan, and desire to pay to Lucinda Garr the value of her interest, now it is agreed that she shall have $2,500, each of the five heirs to pay the one-fifth of said $2,500, or $500 out of their share, and Lucinda Garr accepts said sum and releases all claim, etc. The parties hereto agree that there is to be received from the sale of said property one-third cash, and the balance in one and two years;' and the writing then provides for an equal division of the cash and notes among the five children.

"In the meantime the deed had been drawn up and O'Sullivan had sent it to James Garr, who signed and acknowledged it, and returned it to his mother.

"James Garr had refused to sign the power of attorney sent to him by Mr. Watts. In O'Sullivan's letter to James Garr, which accompanied the deed, he said: 'Your sister has sent you full information about the proposed purchase of your mother's property. It was necessary to gain your consent before the sale could be made. From your letters, however, I would judge that you do not understand entirely the situation here. There is about 20 acres. I have offered your mother $700 an acre for this property, which would come to a little less than $14,000. She has agreed to sell at that price, and all the other heirs except yourself have signed a contract to that effect. It is necessary to have your signature before anything can be accomplished. * * It may seem that you are working in the dark away out there in regard to the property, but, after the sale is made, neither the notes nor the money can be touched without your consent, so you are perfectly protected by the law, even if your mother and sisters wanted to take advantage of you, which they do not. Your mother has acted on the advice of her relatives and friends—$700 is a good price for the property.'

"After James Garr returned the deed the other parties, Boswell and wife, with their attorney, Mr. Watts, Blankenbaker and wife, with their attorney, Mr. Parks, and Mrs. Garr, Dixie Garr, and Beeler and wife, met at Judge Hargis' law office—Judge Hargis was O'Sullivan's attorney—and executed the deed, when the cash payment was made and the notes for the deferred payments executed, as provided in the deed. After this was done Mr. Watts and Mr. Parks—no one else being present—received from Judge Hargis the bonus O'Sullivan had agreed to pay—Mrs. Boswell receiving $1,200 in cash and Mrs. Blankenbaker receiving $1,200 in cash and O'Sullivan's note for $550. Mrs. Garr, Dixie Garr and Mrs. Beeler were kept in absolute ignorance of this matter.

"Some idea of this proceeding may be gathered from Mr. Watts' evidence. He says he didn't count the money Judge Hargis handed him, saying that he was perfectly content in receiving it blindly. 'I thought the other side could not afford to beat us;' and again: 'If everything was open and above board I should probably have counted it, because there was no reason ——.'

"*Question.*—'What (was asked him) was under board on that occasion?'

"*Answer.*—'Simply I was sent into a room to get money when no one else was around except maybe Mr. Parks.'

"We have only stated the evidence of Mrs. Boswell, Mrs. Blankenbaker and Mr. Watts. That their testimony, independent of all the damaging facts and circumstances testified to by other witnesses, es-

tablishes a clear case of fraud we think can admit of no question. We concede the right of one joint tenant to sell his interest in land without consulting his co-tenants, and at any time and price he may choose. But where, as in this case, the parties propose to sell together, and the act of one is dependent upon the act of the others, good conscience and fair dealing require that one should not undertake secretly to procure for himself more than it is understood and agreed each and all shall have.

"The fact that those who do not participate in the secret arrangement receive what they were, with the lights before them, willing to take can not affect the question. The property in a great measure possessed a mere speculative value, and it was not so much a question as to its actual value as it was a question as to what was the best price they could get for it.

"In such a case, considering the relationship existing between the parties--the fact that they were selling for the best interest of all—each had the right to have the opinion and to rely upon the judgment of the others, and it was a most unconscionable deception for two of them to hold out the impression that they were willing and were taking the price named in the deed, when they were in fact each receiving almost double what any of the others were receiving. They knew that O'Sullivan was willing to give more than $700 per acre. This excess they proposed to sequestrate themselves, recognizing the fact that the less their mother and the other children would be willing to take the more they would be able to get.

"The money thus fraudulently obtained should be divided between the parties as the nominal consideration for the land was divided.

"The judgment is reversed and the cause remaded, with directions to enter a judgment to conform to this opinion."

We concur in the conclusions reached by the Superior Court.

Wherefore, the judgment of the Jefferson Circuit Court is reversed, with directions that a judgment be entered in accordance with this opinion.

SMITH V. CORNETT.

(Filed January 15, 1897—Not to be reported.)

1. *Ejectment—Uncertain verdict and judgment*—In this action for the recovery of land, a verdict finding "for the plaintiff and twenty-five dollars for damages" is "not sustained by the law" because it is not sufficiently clear under the pleadings and proof what the jury intended to award the plaintiff.

2. *Same*—Judgment upon the verdict for the recovery of "the boundary of land fully set forth in the petition" is erroneous, because it does not describe or identify the land.

3. *Evidence*—It was error to allow witnesses to testify as to statements made to them as to the location of lines or corners by persons who were still living.

4. *Same—Assignment of deeds*—The assignment of a deed to one of plaintiff's remote vendors did not pass any title to the assignee except an equitable title, and such assigned deed, if competent at all as evidence, was competent only for the purpose of showing the boundary claimed.

5. *It was within the sound discretion of the court to allow or disallow* the filing of a special plea offered by defendant, and at the time it was offered it was no abuse of discretion to refuse to permit it to be filed; but upon the return of the case defendant should be allowed to file the plea.

6. *Undue haste in completing trial*—If the facts are as stated in the grounds for a new trial, there was undue haste in completing the trial, as the members of the jury should have been given time to attend to their horses and to get

supper, if it was important to complete the trial that night or day; and unless it was important to go on with the trial it should have been adjourned until the next day.

7. *Instructions*—The court erred in giving an instruction which left the jury the sole judges of both the law and the facts.

D. D. Fields, John L. Scott & Son and Dishman & Hays for appellant.

Thomas H. Hines for appellee.

Appeal from Perry Circuit Court.

Opinion of the court by Judge Guffy.

The plaintiff, Cornett, instituted this action in the Perry Circuit Court against the appellants, seeking to recover judgment for 50 acres of land and $250 for the wrongful holding thereof.

Appellants denied plaintiffs title and ownership of the land sued for; also claimed that Smith was the owner of a certain boundary of land which, it seems, included part, if not all, of the land sued for.

After the filing of many pleadings, and some amendments thereto, a trial was had, and the jury returned the following verdict: "We, the jury, do agree and find for the plaintiff, and twenty-five dollars for damages. DANIEL DUFF, *Foreman.*"

Thereupon the court rendered the following judgment: "It is, therefore, adjudged by the court that the plaintiff recover of the defendant the boundary of land, fully set forth in his petition and pleadings in the cause, and twenty-five dollars damages and all his cost herein expended, and plaintiff may have a writ of possession for said land."

It seems that appellants excepted to the verdict and judgment, but the same was entered.

Numerous grounds for new trial were relied on by appellants, but their motion for new trial was overruled, and they have appealed.

The verdict of the jury, under the pleadings and proof in this case, is not sustained by the law because it is not sufficiently clear as to what they intended to award to plaintiff, and it is clear that the judgment is erroneous because it does not describe or identify the land adjudged to plaintiff. It has been held by this court that a judgment of sale, directing a sale of the land in the pleadings mentioned, is erroneous. (Ross v. Adams, 13 Bush, 370.)

It was error to allow witnesses to testify as to statements made to them, as to the location of lines or corners, by persons who were still living. It is true that hearsay testimony as to the location of corners to land may be admitted when the parties making the statements, which it is desired to be proven, are dead; but that rule can not be extended to statements made by persons still living. Such persons should be introduced to prove the fact themselves.

The reading of the assignments on the various deeds by plaintiff's alleged remote vendors was error except in so far, if at all, that it tended to make certain the boundary of the land he claimed. Such assignment did not pass any title to the assignee except an equitable one.

It was within the said discretion of the court to allow or disallow the special plea to be filed, and, at the time it was offered, it was no abuse of discretion to refuse to permit the filing, but, upon the return of this cause, appellant should be allowed to file the plea.

If the facts are as alleged in the fifth ground for new trial, there was undue haste in completing the trial. The jury should have had time to have attended to their horses and to get supper, if in fact it was important to complete the trial that night or day; and, unless it was important or necessary to go on with the trial, it should have been adjourned until the next day.

Appellants also complain of the instructions given and refused. The first instruction is as follows: "The court instructs the jury that if you believe from a preponderance of the evidence that the plaintiff, R. N. Cornett, is the owner and entitled to the possession of the land described in plaintiff's petition, you will find for the plaintiff; and if you believe from such preponderance that the defendants wrongfully entered upon said land, and wrongfully held same from the plaintiff, you will fix the damages at any sum you may find he has been damaged, by reason of such wrongful withholding, not to exceed the sum of $250."

This instruction is clearly erroneous. It leaves the jury the sole judges of both law and facts. It is questionable whether the other instructions given are sufficiently authorized by the testimony, but the court can, on the next trial, determine as to the sufficiency of the testimony then introduced to authorize such instructions.

Appellants asked an instruction to the effect that, if the jury believed that defendant Smith had title to the land described in defendant's amended answer older than the one under which plaintiff claimed, they should find for defendant unless they find as in instructions Nos. 1 and 2. This instruction should have been given, with such modifications as would have indicated to the jury what constituted a title.

For the reasons indicated the judgment of the court below is reversed and cause remanded, with directions to award appellants a new trial and for proceedings consistent with this opinion.

VICK'S GD'N, &C. V. HIBBS' GD'N, &C.

(Filed January 20, 1897—Not to be reported.)

W. D. Greer for appellants.

Bush & Worten and John K. Hendrick for appellees.

Appeal from Livingston Circuit Court.

Opinion of the court by Judge Paynter.

The facts of this case are very similar to those in the case of Swaysee v. Miller, 17 B. M., 564. By the authority of that case we are of the opinion that the demurrer should have been overruled to the petition as amended.

Wherefore, the judgment is reversed, with directions that the further proceedings conform to this opinion.

SCANLON V. TORSTADT, &C.

(Filed November 17, 1896—Not to be reported.)

1. *Service of process on lunatic—Return of officer*—In this action for the sale of land to pay the debts of a decedent, in which summons was served on one of the defendants, who was a lunatic, by delivering a copy to the physician in charge of him, who was superintendent of the asylum in which he was confined. the sheriff having neglected to have the physician certify, as required by the statute, that in his opinion the service would be injurious to the lunatic, the court, after the case was ready for submission, properly permitted the physician. in aid of the sheriff's return, to file his affidavit showing the condition of the lunatic required by the statute to be certified.

2. *Same*—Even if the affidavit had not been filed, the court would not disturb the judgment, a summons having been actually served on the lunatic upon a cross petition seeking to foreclose a mortgage on the land, and all of the parties being before the court and a sale of the land being necessary.

Charles M. Lindsay for appellant.

Matt O'Doherty for appellees.

Appeal from Jefferson Circuit Court, Chancery division.

Opinion of the court by Chief Justice Pryor.

Where a lunatic or person of unsound mind is made defendant to an action he must be served with a summons, and also his committee or his father, etc. (Carroll's Code, section 53.)

By an amendment to this section the lunatic may be served by a service on the physician having charge of the lunatic, if the physician give a certificate, attested by the officer making the service, that, in his opinion, the service would be injurious to such person of unsound mind.

In this case the service was on the superintendent, Dr. Pusey, of the asylum in which the lunatic was confined, and the fact existed that the service could not be had on the lunatic without injury to him, but the sheriff neglected to have the certificate made out and returned as part of the mode of service.

After this action had been brought and ready for submission the affidavit of Dr. Pusey was offered as in aid of the sheriff's return, showing that the condition of the lunatic, at the date of service on him as superintendent, was in such condition as would work an injury to the lunatic by making personal service. This was regarded as sufficient, and on the service the judgment was rendered.

The action was for a sale of land to pay debts of the decedent, and to distribute between his five heirs or children. Service was had on the committee of the lunatic, as well as Dr. Pusey, and on all the other heirs. The sheriff amended his return under an order of court, which was proper. Besides, in the cross action of the German Insurance Co. to foreclose a mortgage on this land in this same action, a summons was actually served on the lunatic; and all the parties being before the court, and a sale of the land being necessary, the judgment would not be disturbed or the sale set aside if no affidavit of Dr. Pusey had been filed.

The order overruling the exceptions of the purchaser and the judgment thereon are each affirmed.

TURNER'S ADM'R V. TURNER, &C.

(Filed January 12, 1897—Not to be reported.)

Parent and child—Implied contract—To entitle a daughter to recover for personal care and attention bestowed upon her mother there must be a promise to pay, express or implied. And the law will not imply such a promise from the mother's mere request of the daughter to bestow care and attention on her. Such services were presumptively gratuitous, and there can be no recovery therefor unless the proof shows otherwise.

R. H. Tomlinson, R. P. Jacob and W. J. Landram for appellant.

W. O. Bradley for appellees.

Appeal from Garrard Circuit Court.

Opinion of the court by Judge Hazelrigg.

This is a contest among brothers and sisters—children of Rolinda Turner, who died in March, 1890. Appellant Tain, a son-in-law, qualified as her administrator, and, with his wife, presented a claim for $1,250 against the estate of his intestate for care and attention to her during the last five years of her life.

It appears that for a number of years previous to the five years for which this charge for care and attention is made Tain and wife and their children lived with Mrs. Turner, their mother and mother-in-law, on her farm. They lived as one family, and in large measure used and occupied the lands owned by them respectively as one farm.

In March, 1885, however, the Tains, having moved to their adjoining lands, the mother followed, and, except for a few months, lived there until her death. There is not the slightest circumstance in all this voluminous record of family history and bitterness to establish the fact that the services now charged for were rendered with the expectation on appellant's part of receiving, or on the mother's part of making, compensation therefor. The conditions were not such as to show a mutual intention to contract with reference to the care and attention shown the old lady. Presumptively the services were gratuitous, and the proof does not show otherwise. In such cases there must be proof either of an express contract to pay or of such facts and circumstances as fairly show that both the party rendering the service and the one receiving it expected and understood that compensation would be made. (17 A. & E. Ency., 336; Reynolds v. Reynolds, 92 Ky., 556; Heck v. Heck, 10 KY. LAW REP., 281 [Superior Court]; Hurst v. Stanberry, MS. opinion, 1 Barbour's Digest, 392, 1855.)

Tested by these principles, not only must the claim be rejected on the testimony offered, but the verification and proof accompanying the demand must be held insufficient. This is to the effect merely that the services were rendered at the instance and request of the decedent.

As we have seen in this class of cases the law requires a promise or contract to pay, express or implied, and the law will not imply such a promise or contract from the mother's mere request of her daughter to bestow care and attention on her. This is no more than the daughter ought to bestow without pay and no more than the mother might request without expecting to pay therefor.

The judgment rejecting the claim must be affirmed.

LOUISVILLE & NASHVILLE R. R. Co. v. MATTINGLY.

(Filed January 14, 1897—Not to be reported.)

1. *Personal injuries—Excessive verdict*—A verdict for $10,000 for personal injuries not very serious in their nature, and resulting only in slight lameness, is so excessive as to indicate passion or prejudice on the part of the jury.

2. *Master and servant*—The plaintiff having been injured by falling slate while repairing a tunnel on defendant's railroad, it was error to instruct the jury to find for plaintiff if the injury to him was caused by the gross negligence of defendant's servants superior in authority to plaintiff in permitting the tunnel to be and remain in an unsafe and dangerous condition and to fall or cave in upon the plaintiff, as defendant was not liable unless the foreman knew, or could by the use of reasonable care have known, of the unsafe condition of the tunnel, and the jury should have been so instructed.

Wm. Lindsay, H. W. Bruce and Lisle & McChord for appellant.

Thomas H. Hines and H. P. Cooper for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Hazelrigg.

The appellee was a bridge carpenter, and while he was engaged with other workmen in repairing or taking out the old framework in a tunnel on the line of the appellant a quantity of slate suddenly fell from the walls of the tunnel and seriously injured him. The extent of his injuries is a matter of uncertainty under the proof, and it is doubtful if they are shown to be permanent, save perhaps that which renders one of his ankles somewhat less free in its movements than it was in its natural and original state. In this suit for damages for the injuries he received a judgment for $10,000 was rendered.

One of the physicians called by him testified that he found the left leg of the appellee smaller than the right; that the left ankle seemed to be impaired, but there was no malformation of either ankle or leg; that the right side measured an inch and one-half or two inches larger than the left, and this might have been caused by a hurt, and was perhaps permanent to some extent.

Another physician testified that the ankle was stiffened some, and appellee could not make all the natural movements with his ankle; that when appellee stooped over he did not seem to have good use of his back, and the muscles in the side of his back seemed swollen; that on examination of his urine, two or three times, he found blood in it; and, if this was caused by the injury, it was probably permanent, and would grow worse and chronic.

It seems to us clear that this verdict is excessive, and strikes the mind at first blush as having been superinduced by passion or prejudice. The appellee was confined to his house but a few weeks, and if his injuries have resulted in anything very serious he has not demonstrated it by the proof.

It is further insisted by the appellant that there was no proof of negligence on the part of any of its agents or servants, and the case ought not to have gone to the jury.

It appears from appellee's own testimony that he did not see "any cracks in the wall of the tunnel at the point where the slate fell from, or anything that indicated that the slate would fall;" and it is also true that his opportunity for seeing was as good as that of the foreman. But it appears from other testimony that the foreman, Andes, was not as efficient in making an examination of the walls

as he ought to have been and was not as careful in doing this kind of work as he ought to have been.

This testimony was gotten before the jury mainly by a witness detailing a conversation on the day following the accident between Andes, the foreman of the crew of which the appellee was a member when he was hurt, and one Lee, who was the supervisor of the division, including the tunnel under repair. The conversation was not objected to, and on all the proof, as it is presented in the record, we are inclined to think the motion for a peremptory instruction by appellant was properly overruled.

By the chief instruction the jury were told to find for the plaintiff if the injury to him was caused by the gross negligence of the appellant's agents or employes superior in authority to plaintiff, in permitting the tunnel to be and remain in an unsafe and dangerous condition, and to fall or cave in upon the plaintiff.

This is misleading. Undoubtedly, in a sense, the appellant permitted the tunnel to be in an unsafe condition. Its sides caved in and fell on the plaintiff, hence it was unsafe; but did the appellant's foreman know this or could he have known it by the use of reasonable diligence and care? Unless he so knew or could have so known the appellant is not liable.

For the reasons indicated the judgment is reversed for proceedings consistent herewith.

LOUISVILLE & NASHVILLE R. R. CO. v. BOLTON.

(Filed January 14, 1897—Not to be reported.)

Nuisances—Insufficiently burying dead animals—Punitive damages—In an action against a railroad company to recover damages on account of dead animals being insufficiently buried by servants of the company, near the residence of the plaintiff, an instruction directing the jury to find for plaintiff only in the event they should believe the acts complained of were maliciously and wantonly done was more favorable to defendant than it was entitled to have, as plaintiff would have been entitled to recover compensatory damages upon proof of the acts alleged and consequent injury, and, upon showing, as was done, that it was wanton or malicious, he was entitled to punitive damages. Nor is it material how much it would have cost plaintiff to cover with dirt that part of the dead animal left by the agents of defendant exposed, as it was their duty at first to have so buried it as to prevent offensive stench.

Wilson & Rawlings for appellant.

B. B. Golden, J. D. Tuggle and W. H. Holt for appellee.

Appeal from Knox Circuit Court.

Opinion of the court by Chief Justice Lewis.

This action was brought by appellee to recover of appellant damages alleged to have been done on account of dead animals being put and insufficiently buried by servants of the latter near to the residence of the former.

The lower court instructed the jury as follows: "If the jury believe from a preponderance of the evidence that the defendant by its agents so buried a steer or horse so near the dwelling house of plaintiff that foul and obnoxious stenches and smells arose, polluting the air in and around plaintiff's said dwelling house, and that same was done wantonly or maliciously, they will find for plaintiff such dam-

ages as they may deem right, not exceeding $250 for each. If, however, they shall believe that the burying was done simply in such a negligent manner as to cause such smells, and not from malice and wantonness, they will find for the defendant."

The evidence shows the acts complained of were done against the protest of appellee in such wanton manner and under such circumstances as precludes this court from believing or deciding the verdict of $250 is excessive, or was rendered by the jury through passion or prejudice.

Really the instruction was more favorable to appellant than the law and facts proved authorized, for appellee would have been entitled to recover compensatory damages upon proof of the acts alleged and consequent injury; and upon showing, as we think was done, that it was wanton or malicious, he was entitled to punitive damages, which was in the instruction denied him.

How much it would have cost appellee to cover with dirt that part of the dead animal left by the agents of appellant exposed was immaterial, because it was their duty at first to have so buried it as to prevent noxious and offensive stench, and their failure to do so rendered appellant liable in damages.

Judgment affirmed.

EASTERN KENTUCKY RY. CO. V. BROWN.

(Filed June 23, 1896.)

Petition for rehearing overruled Dec. 2, 1896.

1. *Injunction bond—Jurisdiction of State courts*—A State court has jurisdiction of an action upon an injunction bond executed in the United States Circuit Court.

2. *Same*—It is only where the enforcement of a judgment has been enjoined that the court is required to ascertain the damages at the time of the dissolution of the injunction.

Edward W. Hines, Rodney Haggard, Wm. H. Holt and E. B. Wilhoite for appellant.

W. M. Beckner for appellee.

Appeal from Clark Circuit Court.

Opinion of the court by Chief Justice Pryor.

This action is on an injunction bond, and a demurrer sustained to the petition. The bond was executed in the United States Circuit Court for Kentucky, and, by a mandatory injunction, the appellant was compelled to deliver the appellee, Brown, an engine upon which it claimed a lien for repairs.

It seems the State court had jurisdiction, although the bond was given in the Federal court (Myers v. Black, 120 U. S., ——). Under the rule in this court or in this State it is only where the enforcement of a judgment has been enjoined that the court at the time must ascertain the damages (Alexander v. Gish, 88 Ky., 13).

The demurrer should have been overruled. Reversed and remanded that this may be done.

RICHART v. GOODPASTER.

(Filed September 25, 1896—Not to be reported.)

1. *Judicial sales—Writ of possession—Motion to quash*—Appellant and appellee being the purchasers of different parts of certain real estate sold under decree, a motion by appellee to quash a writ of possession in favor of appellant was improperly sustained, it appearing that the writ embraced no part of the property purchased by appellee.

2. *Same*—Although appellee had not been placed by writ in the possession of the lot purchased by him, it was proper for him to make the motion to quash the writ in favor of appellant in order to ascertain his rights in the premises, since the original action in which the writ was allowed was still pending. Therefore, the court properly overruled the motion of appellant to dismiss the motion to quash.

Reuben Gudgeil & Son for appellant.

C. W. Goodpaster for appellee.

Appeal from Bath Circuit Court.

Opinion of the court by Judge Landes.

The real estate embraced in the mortgage executed by S. E. Fratman to the appellee to secure a note for the sum of $3,750, which was sold by the master on the 9th day of April, 1894, under the judgment of the Bath Circuit Court, in the action of J. B. Goodpaster against S. E. Fratman, &c., to satisfy the said mortgage and other liens, was described as being "bounded on the west by the lot of Miss Jennie Elliott; on the north by the lot of James Donnon's heirs, formerly owned by G. W. Bowen; on the east by Jefferson street, and on the south by Main street," in the town of Owingsville.

This boundary or area embraced the lot which was purchased by Fratman from the heirs of J. M. Nesbitt, which was described as being bounded as follows: "Beginning at the northeast corner of the said large brick building; thence southward with the west margin of the pavements 16 feet; thence westward 32 feet 6 inches; thence northward 16 feet; thence eastward 32 feet 6 inches to the beginning."

The "large brick building" mentioned in this boundary stood on the lot described above, as embraced in the mortgage executed by Fratman to Goodpaster.

In the judgment the master was directed to sell the above-described Nesbitt lot first to satisfy a lien for purchase money owing to the heirs of J. M. Nesbitt, deceased, which was prior to the mortgage lien of the appellee. After directing the sale of some other property, it was adjudged "*that the remainder of the said lot*, lying on the corner of Main and Jefferson streets" (which was the remainder of the lot first described above as embraced in the said mortgage), "including the 12 feet width upon which B. D. Lacy's law office once stood, * * * be next sold, etc."

Thus the judgment in the case of Goodpaster v. Fratman and others provided for the sale of the whole of the lot first above named, and "the remainder of the said lot, lying on the corner of Main and Jefferson streets," evidently embraced the small strip of about 31 inches of ground lying immediately in the rear of the Nesbitt lot above described.

The appraisers, who were appointed to value the lots adjudged to be sold, described the Nesbitt lot as "a parcel of land or lot beginning at the north corner of the property of S. E. Fratman, which lies on the corner of Main and Jefferson streets, * * * and is the lot upon which J. M. Nesbitt's law office formerly stood;" and they described the other as "a parcel of land in said town, and bounded as follows: *On the west by the lot of Miss Jennie Elliott;* on the north by the above-described lot, on which J. M. Nesbitt's law office formerly stood; on the east by Jefferson street, and on the south by Main street, the same being known as *Fratman's corner*, and the lot on which B. D. Lacy's office formerly stood."

In the master's notice of the sale he described the Nesbitt lot as follows: "Also a parcel of land or lot, beginning at the north corner of the property of S. E. Fratman, *which lies on the corner of Main and Jefferson streets*, in aforesaid town; thence northwardly with the west margin of the pavement about 16 feet; thence westwardly about 32 feet and 6 inches, to the property of S. E. Fratman; thence southwardly about 16 feet to said Fratman; thence eastwardly with the lines of the property of said Fratman about 32 feet and 6 inches to the beginning, and is the lot upon which J. M. Nesbitt's law office formerly stood."

In the same notice the rest of the Fratman lot, "*known as Fratman's corner*, and the lot on which B. D. Lacy's law office formerly stood," is described as the appraisers described it.

It appears from the diagram, which is a part of the evidence, that Miss Jennie Elliott's lot lies on the west of and adjoining the Fratman lot along its whole depth northward from Main street.

At the sale made by the master of this property under the said judgment the above-described Nesbitt lot was sold first, and purchased by the appellee. This lot was a part of the lot on which Fratman's storeroom stood, which was known as "Fratman's corner," on the corner of Main and Jefferson streets, and all of which, as we have seen, was covered by the mortgage executed by Fratman to Goodpaster.

After the Nesbitt lot was sold, as directed by the judgment, the master offered the rest of the lot, and it is reported as follows: "I next offered the *Fratman storehouse* (*known as Fratman's corner*), * * * at the same time and place." The appellant, Richart, became the purchaser of it. The sales were reported by the master and confirmed by the court, and the court ordered and adjudged that "the purchasers of the real estate, to wit, J. M. Richart and J. B. Goodpaster, * * * are now adjudged to be the owners of the real estate purchased by them, and each may have a writ of possession for the said real estate so purchased, after the lapse of thirty days from this date, which the clerk of this court is ordered to issue when demanded."

The appellant sued out a writ of possession in due time for the property purchased by him, which was described in the writ as being the whole of the Fratman storehouse and lot, excepting so much of it as was purchased by the appellee—that is, the Nesbitt lot as above described, fronting 16 feet on Jefferson street and running back westward 32 feet and 6 inches. The sheriff executed the writ by placing the appellant in possession of the whole of said lot (with the above exception), which included the small strip of ground in controversy.

The appellee, upon notice, moved the court to quash the said writ, and the return of the sheriff thereon, upon the ground, as claimed, that the writ embraced a portion that was not purchased by the ap-

pellant but that was purchased by the appellee, and was still owned by him.

The court sustained the motion, and by its judgment quashed both the writ and the return of the sheriff thereon, and from that judgment this appeal is prosecuted.

The appellant moved in the court below to dismiss the motion to quash, which was denied by the court. This is complained of as error. But we are of the opinion that, although the appellee had not been placed by writ in the possession of the lot purchased by him, it was proper to make the motion to quash in order to ascertain his rights in the premises, since the original action of Goodpaster v. Fratman, &c., in which the writ was allowed, was still pending and had not been finally disposed of. We, therefore, hold that the motion to dismiss was properly overruled.

But upon the merits of the motion to quash we are of the opinion that the court erred. From the facts of the case as we have gathered them in detail from the record before us it is clear that it was intended by the judgment of sale, and it was in fact expressly provided therein, that there should be a separate sale of the Nesbitt lot before any part of "the remainder" of the Fratman storehouse and lot should be sold, and that the *remainder of the lot*, after selling the Nesbitt lot, which "remainder" it was adjudged could not be divided without materially impairing its value, should be sold as a whole. And that this was intended by the master in making the sale is manifest from the description of the property in the appraisement and in the notice of sale. The notice, as the evidence showed, was read at the time the property was offered, and we can not conceive how the purchaser or purchasers could have been misled or deceived with reference to the property offered. The appellee, under his purchase, acquired the right to no part of the ground in controversy, unless it was embraced in the Nesbitt lot, which is 16 feet in width by 32 feet 6 inches in depth, and it is clearly shown by the evidence that the ground in controversy is not included in the bounds of the Nesbitt lot. In addition to this the description in the notice of the "remainder of the lot," although not as full in detail as it might have been, is sufficiently accurate to enable anyone to identify it as being what was left of the Fratman storehouse and lot, situated on the corner of Main and Jefferson streets, after deducting the Nesbitt lot, which was purchased by the appellee.

The judgment quashing the said writ and the sheriff's return thereon is, therefore, reversed and the cause remanded, with directions to overrule the motion to quash.

CHESAPEAKE & OHIO RY. CO. V. COMMONWEALTH.

(Filed January 11, 1897.)

Taxation of costs in Commonwealth cases—An attorney's fee of $20 is still taxable in favor of the Commonwealth in appeals in Commonwealth cases notwithstanding the provision of section 117 of the Kentucky Statutes, that "the attorney general shall receive an annual salary of $4,000 in lieu of the fees and salary heretofore allowed by law," as the attorney's fee was, by the act of March 2, 1882, required to be taxed "for the benefit of the Commonwealth and paid into the public treasury."

Wadsworth & Cochran for appellant.

W. S. Taylor for appellee.

Appeal from Boyd Circuit Court.

Opinion of the court by Judge Paynter.

The act approved March 2, 1882, provides that, in all cases in the Court of Appeals in which it is made the duty of the attorney general to represent the State, he shall for his services in each case be paid out of the treasury of the State the sum of $20. At the time this act was passed the fees which were taxed in cases to which the Commonwealth was a party were for the benefit of the attorney general, not for the Commonwealth. The act of March 2d *supra* contained this proviso, to wit: "That in all cases in which an attorney's fee is now by law taxed against the unsuccessful party the same shall be for the benefit of the Commonwealth and paid into the public treasury."

In other words the fees that were then taxed for the benefit of the attorney general were taxed for the benefit of the Commonwealth, and instead of having the attorney general depend for compensation for his services upon the contingency of collecting the fee from the unsuccessful litigant the Commonwealth became bound for such fee, and for reimbursement depends upon the contingency of a collection.

Under section 117, Kentucky Statutes, the attorney general is paid a salary for his services. He is no longer paid a given sum per case. This section does not repeal the previous act providing that fees should be taxed for the benefit of the Commonwealth. The section does not relate to the matter of the taxation of costs in Commonwealth cases, but relates alone to the salary of the attorney general. It is in nowise inconsistent with the act which requires that $20 shall be taxed for the benefit of the Commonwealth.

The motion to correct the taxation of costs is overruled.

LEE, BY, &C. v. CHESAPEAKE & OHIO RY. CO.

(Filed January 12, 1897—Not to be reported.)

Master and servant—Negligence—In this action against a railroad company to recover damages for injuries received by plaintiff while in the discharge of his duty as a section hand, the section foreman, who, with another, was assisting plaintiff in carrying a cross-tie, having stumbled and fallen, and thus caused the injury complained of, the evidence fails to establish actionable negligence, as the plaintiff, without compulsion and with knowledge of the attendant perils and difficulties, undertook to perform the service, which was in the scope of his employment, and the section foreman being a stout man and able to carry his part of the load, it was not improper or negligent for him to undertake to assist plaintiff.

James Andrew Scott and Frank Prater for appellants.

John T. Shelby for appellee.

Appeal from Carter Circuit Court.

Opinion of the court by Chief Justice Lewis.

Appellant brought this action to recover for his leg being broken, while in the employ of appellee as a section hand, by reason of the alleged negligence of the section foreman.

The circumstances under which the injury was done, as appears from the evidence introduced by him, is as follows: In putting new in place of old cross-ties at a certain switch station on appellee's road it became necessary to carry the latter across and away from the railroad track, three persons, two of them using a handspike and one of them lifting the rear end, being assigned to each tie.

Three of the hands had in that manner successfully and safely transferred one of the ties, and three others, including the appellant, had lifted and started with another tie when one of them named Tabor, who held one end of the handspike, announced his inability to carry his share of the load and the tie was put down. Thereupon Campbell, the foreman, took Tabor's place, appellant having the other end of the handspike. But they had, after again lifting up the tie, gone but a short distance when Campbell stumbled and fell, causing appellant to also fall, and the tie to fall upon and break his leg.

The evidence shows the ties were about sixteen feet in length, being used for both main and switch track, six inches wide and seven thick, and, being old and soggy, were a heavy load for three men of ordinary strength, but it was demonstrated one of them could be carried in the manner to the place required by three of the hands, and there is no evidence showing a heavier burden was put upon appellant than he was able and willing to bear, for he had shown his ability to carry his share of the load, and if not able to do so he might first, as did Tabor, have either called for assistance or given place to another hand.

It is true the ground over which they were required to carry the ties was rough, but the difficulty or danger arising from that fact was before appellant, and one of the usual and necessary incidents of the service he had undertaken to perform.

Appellant, having then without compulsion and with the knowledge of the attendant perils and difficulties undertaken to perform a particular act in the scope of his employment, can not attribute his injury to the negligence of either the appellee or its section foreman, unless the accidental stumbling and falling of the latter, which might occur to the strongest, most active and vigilant man, should be held actionable negligence.

The evidence is that the foreman was a stout man, able to carry his part of the load, and they had carried it several steps when the accident occurred, and it was not, therefore, improper or negligent for him to take the place of Tabor.

In our opinion appellant showed no evidence whatever of appellee's liability for the injury complained of, and the lower court did not err in giving a peremptory instruction.

Judgment affirmed.

ALSOP V. CENTRAL TRUST CO.

(Filed January 12, 1897.)

1. Power of partner to bind firm—In a commercial partnership the extent of a partner's power to bind the firm is a question of law, while in a non-commercial partnership the power of one partner to bind his co-partner is a question of fact, and the burden of proof to establish the validity of the contract is upon the party seeking to hold the firm liable. Therefore, in order to recover upon a written obligation signed in the firm name by one of the

partners of a non-trading partnership, it is necessary for the plaintiff to allege affirmatively the nature of the partnership, that the obligation was executed for something necessary for the transaction of the business of the firm, or that the partner who made the contract was authorized to do so by the terms of the partnership. And as none of the necessary allegations appear in the petition in this action to recover rent upon a written contract to which a firm name was signed by one of the partners, a demurrer to the petition should have been sustained.

2. *Pleading*—When a petition shows on its face that several paragraphs relate to the same cause of action, the plaintiff should be required to elect which one he will prosecute, and the others should be stricken out.

Reuben A. Miller and Little & Little for appellant.

J. D. Atchison for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Burnam.

This action was instituted in the Daviess Circuit Court by the Central Trust Co. of Owensboro, Ky., against George Griswold and J. N. Alsop, doing business in the firm name of Griswold & Alsop, upon a written contract for the rent of two rooms in the building of the trust company in Owensboro. The contract was signed by the Central Trust Co. of Owensboro, Ky., by J. D. Atchison, president, and in the firm name of Griswold & Alsop, by G. Griswold. The cause of action is set out in two paragraphs. The first paragraph is in the following language:

"1st. The plaintiff, the Central Trust Co. of Owensboro, Ky., states that it is a corporation, duly created, organized and existing by and under the laws of the State of Kentucky, and especially by and under the provisions of an act of the General Assembly of the Commonwealth of Kentucky, which became a law March 28, 1890, and that it was vested with the right to make contracts, sue and be sued, etc.; and the plaintiff further says that on the 22d day of December, 1892, the defendants, George Griswold and J. N. Alsop, partners, doing business in the firm name of Griswold & Alsop, signed and delivered to this plaintiff a certain written contract, whereby and wherein the said defendants rented and leased from this plaintiff for a period of one year, from December 22, 1892, to December 22, 1893, two certain rooms, being rooms situate on the second floor of the south side front, and next adjacent thereto, in its building at the corner of Fredrica and Fourth streets, in the city of Owensboro, Ky. The said defendants agreed and promised to pay to plaintiff, for rent of said rooms, the sum of two hundred ($200) dollars, to be paid in quarterly installments of fifty ($50) dollars each. The defendants used and occupied said rooms during all of said year, and never paid plaintiff any part of said rent except thirty ($30) dollars, paid June 26, 1893, and sixteen ($16) dollars, paid June 28, 1893, which credits are endorsed on the margin of said contract, which is filed herewith as part hereof. Plaintiff says said rent was to be paid in four quarterly installments of fifty ($50) dollars each, the first of which was due and payable on the 22d day of March, 1893, and the second on the 22d of June, 1893, the third on September 22, 1893, and the fourth on the 22d of December, 1893, and it says that it is entitled to recover of defendants interest on each of said installments from the time of their respective due dates, subject to the credits hereinbefore mentioned."

The second paragraph of said petition was as follows: "The plain-

tiff, the Central Trust Co. of Owensboro, Ky., says that the defendants, George Griswold and J. N. Alsop, doing business in the said firm name of Griswold & Alsop, entered into a contract with the plaintiff, whereby and wherein they agreed to pay to said plaintiff the said sum of two hundred ($200) dollars for the rent of two rooms, as set out in paragraph No. 1; and plaintiff further states that defendants used and occupied said rooms from the 22d day of December, 1892, until the 22d day of December, 1893, and that a reasonable rental for the use of said rooms was two hundred ($200) dollars, and that by reason of the use and occupation of said rooms the said defendants, and each of them, became indebted and are indebted to the plaintiff in the sum of two hundred ($200) dollars, no part of which has ever been paid, except thirty dollars paid June 26, 1893, and sixteen dollars paid June 28, 1893."

The written contract referred to in the first paragraph of the petition is filed herewith as part hereof, and said defendants agreed and promised to pay the sum of money aforesaid for the use and occupation of said rooms, closing with a prayer for a judgment for the balance due on obligation against George Griswold and J. N. Alsop.

The defendant, J. N. Alsop, entered a general demurrer to the first paragraph of plaintiff's petition for the reason that same did not state facts sufficient to support a cause of action against him, and defendant at the same time moved the court to require the plaintiff to elect which of the two causes of action set out in the two separate paragraphs of his petition he would prosecute, and also filed answer.

Upon consideration of the demurrer to the first paragraph of the petition the court overruled same, to which ruling of the court the defendant, Alsop, at the time excepted and now excepts. The court also overruled the motion made by Alsop to require plaintiff to elect which of the two causes of action set out in the two separate paragraphs he would prosecute, to which ruling of the court the defendant, Alsop, excepted, and appealed to this court.

We will first consider the questions raised by the demurrer to the first paragraph of the petition. Partnerships, when considered with reference to the business in which they are engaged, may generally be divided into two classes, one of which is known as trading or commercial partnerships, and the other as nontrading or noncommercial partnerships. Any member of an ordinary trading partnership can bind the firm by the signing of the firm name in the usual course of business as a part of the usual routine of their affairs irrespective of restrictions in the articles of partnership not brought to the knowledge of the payee.

In a nontrading partnership, however—that is, a partnership engaged in some occupation which is not of a commercial character—a partner does not generally possess the power to bind the firm, and the extent of his powers are not fixed by the rules of law. The general rule is that the partners in such a firm have no implied power to bind the partnership, but each case is left to be decided upon its particular facts, and one who seeks to hold the firm bound upon a contract made by a single member must be able to show such acts as will warrant the conclusion that the partner had been invested by his copartner with the requisite authority to make the contract.

The distinction, as set out by Judge Cofer in the case of Judge v. Braswell, 13 Bush, 75, is that in a commercial partnership the extent of a partner's power to bind the firm is a question of law, while

in the noncommercial firm the power of one partner to bind his copartner is a question of fact, and the burden of proof to establish the facts as to the validity of contracts so executed by one member of such a partnership rests with the party claiming to hold the firm liable; therefore, it follows that, in order to recover upon a written obligation, signed in the firm name by one of the partners of a nontrading partnership, it is necessary for the plaintiff to allege affirmatively the nature of the partnership; that the obligation was executed for something necessary for the transaction of the business of the firm, or that said partner was expressly authorized to make the contract by the terms of the partnership.

In the case at bar plaintiff's petition fails to make any of these necessary allegations. We are, therefore, of the opinion that the demurrer to this paragraph should be sustained, with leave to plaintiff to amend same to conform to the views of the court herein indicated.

The court is of the opinion that the second paragraph of said petition does not set out any separate or distinct cause of action different from that sought to be set out in the first paragraph. The two paragraphs in reality only tend to set out one cause of action, but as they plainly relate to the same contract, and in fact they both expressly so allege, the only difference between them is there is some amplification of the evidence alleged in the second which was not in the first.

When a petition shows on its face that several paragraphs relate to the same cause of action the plaintiff should be required to elect to prosecute one, and the other should be stricken out. In this case the motion to require plaintiff to elect which paragraph he would prosecute should have been sustained.

In view of the rulings of the court upon the questions raised by the demurrer of defendant, and upon his motion to require plaintiff to elect which paragraph he will prosecute, it will be unnecessary to pass upon the questions raised as to the sufficiency of defendant's answer.

For the reasons indicated herein the judgment of the lower court in favor of plaintiff against defendant on the contract sued on is reversed and this cause is remanded, with instructions to allow the plaintiffs to amend their petition, if they so desire, in accordance with the views herein expressed, and that the case may then proceed in accordance with the rights of the parties.

WOOD, BY, &C. V. WOOD, &C.

(Filed January 12, 1897—Not to be reported.

Judicial sales of property of lunatic - Agreement to prevent competitive bidding- The rights of persons of unsound mind are under the special protection of courts of equity and it is their duty to see that no injustice is done to such persons in the sale of their property under judicial decree. But in this action by a person of unsound mind suing by next friend to set aside the confirmation of a sale of his land under decree, upon the ground that there was a fraudulent agreement by the purchaser with another to prevent competitive bidding, the evidence fails to establish the alleged fraud; and, as it is not obvious that the property would bring more upon another sale, the ends of justice do not require that the sale should be set aside, although the land sold for something less than its salable value.

Winfield Buckler for appellants.

Hanson Kennedy for appellees.

Appeal from Robertson Circuit Court.

Opinion of the court by Judge Burnam.

The plaintiff, who is a person of unsound mind, brings this suit by Winfield Buckler, his next friend, to set aside the sale of a tract of 90¾ acres of land, situate in Robertson county, which was sold pursuant to a judgment of the Robertson Circuit Court, entered at the December term thereof, 1893, in an action instituted by the same party and in the same way against the same persons who are made defendants hereto.

This land was held jointly by plaintiff, who owned one-sixth part of same, and the defendants, J. B. Wood and Elizabeth Taylor, who each owned one-sixth part of same, and Rosa Wood, who owned the other three-sixths of said land. The sale was made by the master commissioner of the court on the 19th day of February, 1894, before the courthouse door, at public outcry, to the defendant, Rosa Wood, who executed bond for same in accordance with the terms of said sale, and same was reported to the court, and was, at its March term, 1894, duly confirmed without exception. This action to set aside said order of confirmation was filed on the 30th day of May, 1894.

Upon the allegation that previous to the sale, and on the same day thereof, the defendant, Rosa Wood, agreed with J. B. Wood that if he would not bid on said land at said sale that she would buy same and convey to said J. B. Wood a portion of said land, the object of the agreement being to prevent competition at the sale, and, to enable defendant, Rosa Wood, to buy same at a sacrifice; and that, by reason of said agreement, the said J. B. Wood did not bid on or buy said land, although he was present for that purpose and would have given much more for same than it brought, except for this fraudulent and collusive agreement with the said Rosa Wood and J. B. Wood.

The defendant, Rosa Wood, denies fully that she had such an agreement with the defendant, John B. Wood, or that he failed to bid on said land at the sale because of such agreement, or that he was present for the purpose of bidding, or that he would have given more for the land than it sold for except for such agreement; denies she was guilty of any frauds in connection with said sale. She admits that she bought said land for about $2 per acre less than its fair saleable value, but that she is entitled to her purchase.

Upon the trial of this action in the lower court a judgment was entered dismissing plaintiff's petition, with a judgment for defendants' cost, to which plaintiff excepted, and brings his appeal to this court, asking a reversal of same.

The rights of persons of unsound mind are under the special protection of courts of equity, and it is their duty to see that no injustice is done to them in the sale of their property by judicial decrees, and, if the ends of justice require it, this court would have no hesitation in setting aside the order of confirmation of the sale of plaintiff's land.

The only question in the case is, was there such unfairness and frauds in the conduct of the purchaser, previous to and on the day of sale, as to affect the rights of the plaintiff, and to warrant the chancellor in setting aside the order of confirmation?

The special acts alleged by plaintiff in his petition stand substan-

tially upon the testimony of J. B. Wood alone; and he is contradicted in his statements by the evidence of defendant, Rosa Wood, Wm. Dryden, James Perkins and Thomas J. Wood, as to what occurred between the defendant, Rosa, and himself on the porch of the jailer just before the sale of the land, the testimony of all these witnesses being in support of the evidence of the defendant.

The plaintiff has failed to establish by the weight of the evidence the fraudulent agreement relied on to vacate the order of confirmation; and, while the evidence tends to show that the land sold for something less than its fair saleable value, there is no gross inadequacy in the price bid for same, and no bid is made by any one, offering any advance upon the price it sold for at the sale of the commissioner. It is not obvious that any greater sum would be realized for same if it were sold over again.

For the reasons indicated we concur in the judgment of the chancellor, and same is affirmed.

CROCKETT V. COMMONWEALTH.

(Filed January 13, 1897.)

1. Change of venue—Discretion of court—The circuit judge has a sound discretion in passing upon a motion for a change of venue, and this court will not disturb his judgment upon such a motion unless it is satisfied that discretion has been abused.

2. Continuance—The court properly refused a continuance asked upon the ground of the absence of a material witness, due diligence not having been used to obtain the deposition of the absent witness.

3. Error cured by instruction—An error in admitting incompetent testimony was cured by an instruction telling the jury to disregard the testimony.

4. Conspiracy—Instruction—As there was competent evidence conducing to show the existence of a conspiracy an instruction upon that subject was not prejudicial.

5. Instruction as to self-defense—Upon the trial of appellant under an indictment against him and his brother jointly for murder, in which the principal defense was that the shooting by appellant was done in defense of his brother, the court properly qualified the instruction as to the right of appellant to act in defense of his brother by telling the jury in substance that they could not acquit upon that ground if the brother "had sought and brought on the difficulty in which the killing was done by drawing a pistol upon the deceased, and thereby made the danger to himself necessary or excusable on the part of deceased." The fact that there had been two or three previous difficulties between the brother and deceased, in which insulting and abusive language had been used to the brother accompanied by threats, did not render the qualification improper, as the difficulty in which the killing occurred was the one for the consideration of the jury, and in the conflict of testimony it was for them to decide who brought on the difficulty.

6. Instruction as to manslaughter—The court properly instructed the jury to find the defendant guilty of manslaughter if he did the killing in sudden affray or in sudden heat and passion and without previous malice and not in self-defense, and "upon some provocation which was reasonably calculated to excite his passions beyond the power of self-control." The words quoted are not open to the objection which the court has made to the use of the words "legal provocation" and "considerable provocation."

Garnett & Garnett for appellant.

W. S. Taylor for appellee.

Appeal from Adair Circuit Court.

Opinion of the court by Judge DuRelle.

The appellant, James Crockett, was indicted jointly with his brother, John Crockett, Charles Helm and Josiah Salms, for the murder of Dan Kidd, it being charged in the indictment that the defendants conspired and confederated together for the purpose of committing said murder, which was effected by James and John Crockett shooting and killing Kidd.

It appears from the evidence that the killing occurred at a picnic near Pellyton, in Adair counly, near the Casey county line. There had been some words between John Crockett and the deceased, and, without stating the evidence in detail, it may be briefly stated that Kidd was very drunk, and, after some words in regard to Kidd's son, who was at the picnic, called John Crockett a "damn son-of-a-bitch." John Crockett thereupon knocked Kidd down. It appears from the weight of the evidence that when Kidd arose from the ground John Crockett had already drawn his pistol. He was seized by one of the bystanders and pulled backwards.

Upon the question of whether Kidd advanced toward John Crockett there is considerable contradiction in the testimony, the evidence for the Commonwealth stating that he staggered away from his enemy, and that Crockett, breaking away from the man who was holding him, pursued Kidd, following a path on the other side of a log from that on which Kidd had fallen.

On the side of the defense there was evidence to show that Kidd advanced upon Crockett with an open knife in his hand, and that Crockett fired over his head the first time, and afterward fired four shots in rapid succession directly at Kidd. Just about the time that John Crockett fired his last shot James Crockett came up behind Kidd and fired at him twice. The evidence upon the subject of the wounds in Kidd's body indicates that several of them were fired into his back and side. He died almost instantly, and the four defendants, who were jointly indicted, then left the picnic, after a challenge from the Crocketts addressed to the crowd in general or any one who wished to take up the difficulty.

The defendants demanded separate trials, and the Commonwealth elected to try the case of James Crockett first. A motion was made for a change of venue, and testimony heard on both sides. It does not appear to us that the trial judge abused his discretion in refusing the change of venue. "The circuit judge has a sound discretion in deciding such motion, and, of course, better opportunity of properly estimating credibility of witnesses and weight of evidence than this court; and, therefore, while we have authority to revise and reverse his judgment on such motion, it is not nor ought to be done except when we are satisfied that discretion has been abused." (Howard v. Commonwealth, 15 Ky. Law Rep., 874.)

The appellant was indicted at the September term, 1895. At the May term, 1896, he applied for a continuance upon the ground of the absence of four witnesses, and on account of the absence of one of his attorneys. The attorney for the Commonwealth agreed that the affidavit as to three of the witnesses might be read as their depositions; as to the witness, Oscar Evans, as to whom the affidavit was not permitted to be read as a deposition, it was stated that he would state that, a short time before Dan Kidd was killed, Ed. Kidd, a son of Dan Kidd, came to the witness, got a pistol, and, during the difficulty between Dan Kidd and the Crocketts, shot at John Crockett.

The lower court, in the exercise of its discretion, ruled that due diligence had not been used to obtain the deposition of Evans, and we are not disposed to disturb his ruling.

It is objected on behalf of appellant that evidence was admitted of conversations between the other defendants and outsiders, at which neither John nor James Crockett was present, but in instruction No. 8 all testimony of that character was excluded from the jury, and they were directed to disregard it. In our opinion the error was cured by this instruction.

It is urged on behalf of appellant that an instruction upon the subject of conspiracy was not justified by the evidence. There was evidence competent to go to the jury conducing to show the existence of a conspiracy. We are of opinion that no error to the prejudice of the substantial rights of appellant was committed in giving this instruction.

The defense mainly relied on was that the shooting by this appellant was done in the defense of his brother John; and upon this the court instructed the jury that if at the time appellant did the shooting charged, aiding and abetting John Crockett in doing said shooting, "he, the said James Crockett, believed, and had reasonable grounds to believe, that his codefendant, John Crockett, was then in immediate danger of losing his life or suffering great bodily harm at the hands of said Kidd, and that the defendant, James Crockett, did said shooting, aiding, abetting or assisting solely to prevent or avert said danger or apparent danger of his said brother, John Crockett, and, in doing so, used no more force than appeared to him at the time to be reasonably necessary for the purpose, they will acquit defendant upon the ground of self-defense, unless they shall believe from the evidence, beyond a reasonable doubt, that his co-defendant, John Crockett, had sought and brought on the difficulty in which the killing was done by drawing a pistol upon the deceased, and thereby made the danger to himself necessary or excusable on the part of the deceased, and in the event they do so believe from the evidence, beyond a reasonable doubt, that the defendant, James Crockett, can not avail himself of the danger to his brother, so incurred as an excuse for said shooting, aiding, abetting or assisting."

The objection to this instruction is that the qualification should have been omitted which instructed the jury that if John Crockett sought and brought on the difficulty, by drawing a pistol on the deceased, the defendant could not rely upon the plea of self-defense. The ground of this objection is that there had been two or three previous difficulties between John Crockett and the deceased, in which insulting and abusive language had been used to John Crockett, accompanied by threats, and that these facts rendered the qualification unnecessary and improper. We do not think so. The difficulty in which the killing occurred was the one for the consideration of the jury, and, in the conflict of testimony, it was for them to decide who brought on the difficulty.

There remains but one important objection to the instructions, and that is to the instruction upon voluntary manslaughter.

In instruction No. 4 the jury were told that if the defendant, "in a sudden affray, or in sudden heat and passion and without previous malice and not in self defense, and *upon some provocation which was reasonably calculated to excite his passions beyond the power of self-control*, shot and thereby killed said Kidd, or aided, abetted or assisted the said John Crockett in said shooting and killing, they will find the defendant, James Crockett, not guilty, as

charged in the indictment, but will find him guilty of voluntary manslaughter, and fix his punishment at confinement in the penitentiary not less than two nor more than twenty-one years."

The objection is to the words "upon some provocation which was reasonably calculated to excite his passions beyond the power of self-control." This instruction is not open to the objection which has been heretofore made by this court to the use of the words "legal provocation" and "considerable provocation." The true test is "whether the law deems the provocation calculated to excite the passions beyond control; if so, it reduces the offense from murder to manslaughter." (Lewis v. Commonwealth, 93 Ky., 242; Bishop's Criminal Law, 711.)

In fact in this case the language is very similar to the language suggested in the case of Lewis v. Commonwealth, *supra*, where the court said: "It would have been better to have told them that the provocation must be such as was ordinarily calculated to excite the passions beyond control."

In our opinion the instructions given properly stated the law, and the verdict was fully sustained by the evidence.

Wherefore, the judgment is affirmed.

CROCKETT V. COMMONWEALTH.

(Filed January 13, 1897.)

Amendment of verdict—Where defects of substance or form appear in a verdict upon its rendition the jury should be required to perfect it either in the presence of the court or by returning for the purpose to their room.

The jury having returned a verdict finding the defendant guilty of murder and fixing his punishment "at confinement in the penitentiary for ninety-nine years," the court properly required them to return to their room and make their verdict in accordance with the instructions, which they did by so amending their verdict as to fix the punishment "at confinement in the penitentiary for life," and the verdict as thus amended was properly received by the court, especially as the verdict as amended was in substance the same as the original verdict.

Garnett & Garnett for appellant.

W. S. Taylor for appellee.

Appeal from Adair Circuit Court.

Opinion of the court by Judge DuRelle.

In this case the facts have been sufficiently stated in the case of James Crockett against the Commonwealth, this day decided, and the questions of law raised in argument are the same as in that case with one exception.

After being instructed and hearing the argument of counsel the jury retired to their room to consider, and, after some time, returned into court and offered and read the following verdict: "We, the jury, find the defendant, John Crockett, guilty as charged in the indictment, and fix his punishment at confinement in the penitentiary for the period of ninety-nine years.

"P. H. BRIDGEWATER,
"*One of the Jury.*"

Thereupon the court said to the jury that he would not receive that as a verdict; that it was not in accordance with the instructions, and called their attention to the instructions, and directed them to return to their room and make their verdict in accordance with the instructions.

Proper objections were made and exceptions taken at the time. A motion was made to discharge the jury and another motion to discharge the appellant from custody. Appellant's objections and motions were overruled by the court, and the jury then retired to their room, and, after some time, returned into the court and delivered the following verdict: "We, the jury, find the defendant, John Crockett, guilty as charged in the indictment, and fix his punishment at confinement in the penitentiary for life.

"P. H. BRIDGEWATER,
"*Foreman.*"

The objection to the course of the trial court as to this verdict is based upon the case of Roberts v. Commonwealth, 90 Ky., 655. In that case a verdict had been returned, correct in form and substance, imposing the lowest punishment permitted in a case of voluntary manslaughter, *as given in the instruction.* The instruction, however, was erroneous, in that the court, through inadvertence, instructed the jury that if the accused was guilty of manslaughter his punishment was confinement in the State prison for not less than *ten* nor more than twenty-one years. The jury under this instruction fixed the punishment at ten years' confinement. The verdict had been announced and the jury was being polled, when it was suggested that the instruction was erroneous because it fixed the minimum at ten instead of two years. The court then gave another and correct instruction, and required the jury to return to the jury-room and further consider the case.

This court held in that case that while the jury in their second verdict lessened the punishment imposed from ten to four years, yet they might have made the punishment, when considering the case for the second time, greater than was originally found, and that the court, *finding the instruction first given erroneous*, should have permitted the verdict entered and then set it aside, granting the appellant a new trial. That, however, is not the case at bar. In this case the instruction given was correct, and it was no more erroneous to require the jury to make their verdict conform to the instruction given than it would have been to send them back to the jury room to further consider of their verdict if they had announced that they were unable to agree. Moreover, the verdict rendered after the second retirement of the jury was the same in substance as that rendered when they retired the first time.

Mr. Bishop, in his new Criminal Procedure, volume 1, section 1004, says: "A verdict inadequate in form and substance should not be received, but the jury should be required to perfect it, either in the presence of the court or by returning for the purpose to their room, due consultation having been had with the judge, and, if necessary, further evidence delivered."

And in the American and English Encyclopedia, volume 28, page 365, it is said: "Where defects of substance or of form appear in the verdict upon its rendition the jury may be allowed to alter or correct it at their own request, or the court may require the proper amendments to be made." (See also Abbot's Trial Brief, page 512, and authorities there cited.)

The judgment in this case is affirmed.

BARTH V. BARTH, &C.

(Filed January 13, 1897—Not to be reported.)

1. *Construction of devise—Life estate*—Under a devise by a testator to his widow of all his estate, real and personal, "absolutely and forever, with power to sell or dispose of as she deems proper, the widow took the fee notwithstanding a subsequent provision of the will that all the property that remained at her death should be equally divided among the testator's sons, the devise over of what might remain being inconsistent with the fee, and, therefore, void.

2. *Mental incompetency of executrix*—The evidence fails to show such want of capacity upon the part of the widow to manage the estate as executrix as to authorize the appointment of a committee or receiver, or at least the chancellor's finding upon that question will not be disturbed.

Humphrey & Davie and Burwell K. Marshall for appellant.

Dodd & Dodd and Phelps & Thum for appellees.

Appeal from Jefferson Circuit Court, Chancery division.

Opinion of the court by Judge Guffy.

Geo. W. Barth departed this life in Jefferson county, Ky., in 1886, having first published his last will and testament, which is as follows:

"I, Geo. W. Barth, of the city of Louisville, Ky., make and declare this my last will and testament, hereby revoking all former wills by me heretofore made.

"1st. I direct my executrix and executor hereinafter named as soon after my decease as possible to pay all my just debts and funeral expenses.

"2d. I devise and bequeath to my wife, Sarah Ann Barth, all my property, real and personal, and choses in action of every description of which I may be the owner, or to which I may be entitled to at the time of my decease; also any and all insurance on my life absolutely and forever, with power to sell or dispose of as she deems proper, and all the property of whatever kind and description which remains at her death to be equally divided among my three sons, John C. Barth, Philip Barth and Charles Barth, each to receive share and share alike.

"3d. I appoint my said wife, Sarah Ann Barth, and my son, John C. Barth, executrix and executor of this my last will and testament, and request the honorable judge of the Jefferson County Court to let them qualify as such without giving bond or security. In testimony whereof I have hereunto set my hand this 17th day of March, 1886.

"GEORGE W. BARTH."

The will was duly probated and the executrix and executor qualified as such, but within less than a year the executor, John C. Barth, either resigned or was removed, and afterwards the appellee, Sarah A. Barth qualified as sole executrix.

It seems that appellant made a proper settlement of his accounts, so far as he attended to the business; was allowed full commission for his services, and paid over the few dollars shown to be in his hands to the executrix, who seems, by herself or agent, to have taken and exercised the sole control of the business without complaint until the institution of this suit.

This suit was instituted in March, 1892, by the appellant, John C. Barth, against the appellees. The substance of the petition and com-

plaint is that Mrs. Barth took only a life estate under the will with remainder to appellant and the two other appellees, and that she was wasting the estate, giving large sums of money to appellees, Philip and Charles Barth, to the extent of perhaps $7,000 in cash, and had conveyed to them some valuable real estate, and that they had undue influence over her, and that she would convey other property to them unless restrained; that she had not settled her accounts as executrix, and was mentally and physically unable to attend to the business.

An injunction to restrain her from further waste was asked, as was also an injunction asked to restrain the other appellees from selling the property conveyed to them. Appellant also sought to have a committee or receiver appointed to take charge of the business and care for the appellee, Mrs. Barth.

Upon final hearing the chancellor dismissed the petition and plaintiff has appealed.

It is very ably and earnestly argued for appellant that Mrs. Barth only took a life estate under the will of her husband, but it seems to us that the language of the will is such that there can be no doubt but that the fee passed to Mrs. Barth. The language of the will under consideration is quite as clear and emphatic as the will of Lord Sterling, decided by the Court of Appeals (9 New York) in Jackson v. Rebins, 16 Johns, 537.

It was held in that case, after a careful review of the authorities, that an absolute devise to the wife passed the fee, and that another clause providing that such property as remained undisposed of by the devise should go to a certain person was void, being inconsistent with the fee or as seeking to limit or restrict it. We are not aware of any decision of this court in conflict with the decision *supra*. We do not so understand any of the decisions of this court quoted by appellant, and we have examined them carefully. It may be that some wills that devised property without saying that it was for life only have been held to pass only a life estate, but in such cases there was something in the will that indicated that such was the intention of the testator.

We recognize the force of the argument that the last part of a writing must control rather than the first when there is a contradiction or inconsistency. In this case, however, the wish or direction as to the disposition of the residue of the estate remaining after the death of the devisee does not contradict the preceding portion of the will, and can not amount to more than an expression of desire on the part of the testator as to the disposition of property, the title to which he had already passed to another. It is, therefore, clear that appellant had no vested interest in remainder in the property in question, hence no ground of complaint on that account. He does not claim to be a creditor of the decedent, hence can not maintain a suit for settlement of the estate. In fact it is evident that the debts of the testator have all been paid.

It is further insisted by appellant that Mrs. Barth is old, feeble, and her mind so impaired that she is not capable of attending to the business, and that her own interest requires that a committee or receiver be appointed. It may be conceded that if that fact was made sufficiently clear to the chancellor that he ought to make proper orders or cause proper proceedings to be had for her protection. More than forty depositions were taken in the action, making more than a thousand pages, and embracing more than nine thousand questions. Hence it is impracticable to recite even the substance of the testimony.

It may be that Mrs. Barth is old-fashioned and somewhat peculiar or eccentric, and might many years ago have been so distressed by the loss of some of her children as to have been entirely out of her right mind, but it is pretty evident that she is as capable now as she had been for twenty or thirty years before the death of her husband, and he ought to have been a pretty good judge of her capacity to take charge of the property, having lived with her about forty years or more.

The proof tends to show that she is very close, almost if not quite parsimonious; so much so that she will keep a servant who mistreats her for the sole reason that she can not get another so cheap. She may not have that high degree of business capacity that would be required of a person who essayed to control any of the important business meetings frequently held in the nation, but we think that she is competent to manage the business entrusted to her by her husband.

It is urged that Philip and Charles have much influence over her; too much it is said. She would be an unnatural mother if they did not have some influence with her. Charles Barth is a member of the city council of Louisville, elected by the voters of the commercial metropolis of the State, if not of the whole South. That should be a sufficient guaranty of his business capacity and integrity, for it is to be presumed that a very large majority of the city favor the very best business methods and men known to our civilization. Besides, it isclaimed by appellees that the reason for the gifts to Charles and Philip was that appellant had received much financial aid from his father, and was at the time of the gifts in good financial condition, and that the appellees had not had any such assistance and were needy, and that Mrs. Barth would not give them anything more.

Upon a careful consideration of the law and facts we are of opinion that the judgment of the court below should be sustained, and the same is, therefore, affirmed.

FUQUA & SMITH v. MASSIE & SONS.

(Filed November 11, 1896—Not to be reported.)

Breach of contract—Damages—Under a contract by which appellees agreed to assist appellants in purchasing and putting up tobacco, appellees, having by fraudulent practices violated the contract and thereby rendered themselves properly amenable to discharge from service, occupied the same attitude as if they had voluntarily quit the service of appellants; but, as it does not appear that appellants sustained any actual damage, they are not entitled to recover anything on that account. The fact that appellants suspended purchasing and putting up tobacco does not show that they were damaged by the breach of appellees, as such suspension may have been for other reasons.

C. S. Walker for appellants.

Noe & Massie and Sweeney, Ellis & Sweeney for appellees.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Lewis.

April 1, 1889, Fuqua & Smith entered into a written contract with John Massie & Sons, in which, following a recital they had secured,

an order for 400 or 500 hogsheads of strips to be put up in Owensboro was an agreement that in consideration of John Massie & Sons leasing their tobacco factory and putting in their services in assisting to purchase and put up the tobacco, Fuqua & Smith were to give them a half interest in the commissions. It was further agreed that Fuqua & Smith were to take tobacco already purchased by John Massie & Sons at cost originally paid by them.

In August of that year John Massie & Sons brought an action to recover for the tobacco sold by them, also damages for an alleged breach of the contract by defendants in refusing to allow plaintiffs to continue their services in purchasing and putting up the tobacco.

The lower court adjudged that plaintiffs had made fraudulent representations as to the quality of the tobacco sold to defendants, and had consequently received from the latter an excess of $1,212.88, being the difference between the value of the tobacco as represented and what it was actually worth.

It was also adjudged that although plaintiffs had used false weights and loaded peas, and defendants had the right to discharge them from the employment, they were still entitled to half the commissions on the tobacco stemmed and prepared up to the time of the discharge.

That judgment upon appeal was reversed (see 95 Ky., 387), it being held that John Massie & Sons having been rightfully discharged were not entitled to any part of the commissions on the tobacco purchased and put up, but were entitled to rent for the use of their building, and though having grave doubt whether they were entitled to recover for services rendered this court remanded the case for the lower court to ascertain and determine the value of the services up to the date of the discharge and rent of the factory building, subject to the claim of Fuqua & Smith for damages on account of the breach of contract.

The chancellor has found and fixed the value of the rent and of the services of John Massie & Sons, and looking to the testimony we do not think he erred to the prejudice of Fuqua & Smith, but he refused to adjudge that Fuqua & Smith had sustained damage by reason of the alleged breach.

It was held in the former opinion that John Massie & Sons, having by fraudulent practices violated the contract and thereby rendered themselves properly amenable to discharge from service, occupied the same attitude as if they had voluntarily abandoned the contract and quit the service. But it does not necessarily follow Fuqua & Smith sustained, by reason of such abandonment, any actual damage.

The conduct of John Massie & Sons caused the loss to themselves and gain to Fuqua & Smith of half the commissions or profits on the tobacco, which would have been much more than the chancellor has adjudged to be the value of the services rendered by them up to the date of their discharge.

If, then, Fuqua & Smith have or could have sustained damage as the proximate result of the alleged breach by John Massie & Sons, it was because their business of purchasing and putting up tobacco was thereby stopped or in some way interfered with. But it does not appear that Fuqua & Smith failed to procure, tried or even desired to procure other persons to supply the places of Massie & Sons; for anything appearing to the contrary Fuqua & Smith suspended purchasing and putting up tobacco of their own volition, and either

because they did not desire or were not able to continue it longer. There is no evidence showing such suspension was caused by the breach of John Massie & Sons.

Judgment affirmed.

BUGG V. COMMONWEALTH.

(Filed January 13, 1897—Not to be reported.)

1. *Homicide—Instructions*—Upon the trial of appellant for murder the instruction given by the court to the jury as embracing the whole law of the case, and which is set out in the opinion in full, was unobjectionable.

2. *Same*—The court properly refused instructions asked by defendant as to self-defense, as to insanity and as to manslaughter, there being no evidence upon which to base such instructions.

3. *Reversible error*—There can be no reversal because of the refusal of the court to permit the defendant, while testifying as a witness, to answer a particular question propounded to him, there being no avowal as to what his answer would be.

E. H. Gaither for appellant.

W. S. Taylor for appellee.

Appeal from Mercer Circuit Court.

Opinion of the court by Judge White.

At the October term, 1896, of the Mercer Circuit Court the appellant, J. W. Bugg, was indicted, tried and convicted, and given a life sentence on the charge of murder by shooting and killing Wm. Board, and his motion for a new trial having been overruled he has appealed to this court and asks a reversal.

The reasons assigned for a new trial are that the court misinstructed the jury; second, the court refused to properly instruct the jury; third, verdict is against the law and evidence; fourth, the court admitted improper evidence against the protest of defendant; fifth, the court refused to admit competent evidence offered by defendant.

The evidence in the case, as shown by the Commonwealth's witnesses, was that they were at a meeting house known as Benton Church, in Mercer county, on the day of the killing; that about sundown the appellant drove up to the church with his wife, and that the deceased (Board) arrived about the same time, accompanied by his wife and child, and his wife and child went into the church, Board remaining on the outside, and very shortly afterwards appellant Bugg and his wife passed into the church, passing not far from Board; that after Bugg had gone into the church Board, the deceased, and several others took seats upon a stile, Board facing the north, the stile being east of the church; that shortly after this Bugg came out of the church walking towards the stile, stopping an instant at the well, passed to the south side of the stile, spoke to one of the witnesses sitting on the stile and almost immediately aftewards a shot was fired striking Board in the back. Board fell off the stile on his hands and knees, and as he (Board) arose Bugg shot two more shots in Board's back. Witnesses did not see Bugg when the first shot was fired, but hearing the report immediately saw Bugg with a pistol, and saw the other two shots fired by him. After Board had risen up he fired one shot at Bugg and threw his pistol at him. Bugg walked off snapping his pistol at Board. Board staggered a few steps and fell

and died in about half an hour from the effects of the wounds. Bugg then went to the corner of the church, returned with his pistol in his hand near where Board was lying. One witness stated that Bugg said on his return that "no damn man can talk about my wife and live." Another said his statement was, "I tried to kill the damn son-of-a-bitch." Bugg then called his wife from the church and drove off, but afterwards surrendered to an officer. Defendant being sworn, made his statement, in which he says that about the 26th day of May, 1896, he was living close neighbor to the deceased; that he was an intimate friend of Board's, and that their families were very intimate; that he had known Board and lived near him most of his life; that on that date Jake Brady told him Board was too intimate with his (Bugg's) wife, and that he was carrying a pistol for him; that Tom Claunch could tell him everything. Appellant saw Claunch, who told him of Board's connection with his wife, and that Board said he would tell him (Bugg) the truth if he asked him about it, but he must come to him in a good humor or he would kill him; that he (Board) did not intend that Bugg should get the advantage of him.

Claunch also told him that Board was carrying a pistol for him; that the circumstances detailed to him so upset him he hardly knew what he did, but he determined to see Board and ask him about it, but before he went to see Board Claunch and wife, who was appellant's sister, made him promise to go to Board in a good humor. If he did not they assured him that Board would kill him. The appellant went to see Board about it. When he called Board out Board came out with his hand on his pistol, which was in his right pants pocket. When he asked Board about it Board said, partly drawing his pistol at the same time, sit down and I will tell you all, when Board said it is all true, and by G— if you had been in my place you would have done the same thing with my wife, wouldn't you? Appellant says, being very much distressed and wholly unarmed, he does not remember what he answered, but may have given his assent to the proposition. Appellant then says he left the State to avoid the disgrace, and not wishing to commit a crime by killing Board that he went to the State of Indiana to his brothers and returned about four weeks before the killing; that while in Indiana he purchased a small pistol, 38 caliber, but did not buy it for the purpose of killing Board. After his return home he avoided Board; that Board passed appellant's place several times and he kept out of his way and avoided meeting Board; that on the week of the killing Will Smith told appellant that Board had said to him (Smith) that he (Board) had something, here indicating his pistol pocket, that would settle him.

On Wednesday before the killing Lyman Brunfield told appellant that Board was doing as he pleased with his wife, and that he (Bugg) could not help himself; if he made any move about it he would kill him, and during the same conversation Board said he would not let defendant get the drop on him; that on the day of the killing, sometime in the morning, he met several parties on a bridge near his house; that Board was with them. As he passed he did not speak to Board, but did speak to the persons with Board; that in the evening of the killing, about two hours before sundown, he was catching his horse to go to church when James Cary came along and asked defendant where he was going. Defendant told him he was going to church. Then Cary said to him he had better look out for Board, for Board had recently told him that he was sleeping with his (Bugg's) wife whenever he wished, and offered to make arrange-

ments with Bugg's wife for the witness; and then witness told him (Board) that he had better look out as some day Bugg would slip upon him and kill him. Board drew a pistol, showing it to the witness, and said if that son-of-a-bitch made a move I will kill him; I have got this timed for him. He said on hearing these statements he made up his mind to kill Board, and went home, examined and loaded his pistol and went to church. When he got to the church he saw Board with his wife and child. Appellant went into the church with his own wife, sat there an instant and came out. When he left the church it was with the determination of hurting Board. He felt that either he or Board must die. He says he lost control of himself and killed Board; that appellant and his wife had had some domestic trouble, but it was no such trouble as this; he had never suspected his wife of infidelity.

John Claunch, witness for appellant, testified on behalf of defendant, and corroborated the appellant in his testimony as to the conversations detailed by defendant as having been had with him. Claunch also stated that Bugg was terribly distressed, and when spoken to on the subject cried like a child, and that Board told him, when speaking of the visit of Bugg to Board in reference to the matter, that he was prepared for Bugg and that he got a shotgun and pistol; that he had gun on one side and pistol on the other, and made Bugg admit he would have done the same to Board's wife under like circumstances.

Jake Brady corroborated him as to what Brady told him what Board had said about his wife. In fact the testimony of the witnesses corroborates all the statements made by appellant in his testimony as to what said witnesses had told him what Board had said about his wife. Many of defendant's witnesses testify that appellant, on account of these charges, said to have been made by Board, was much distressed and would break down and cry when spoken to on the subject.

This extended statement of the evidence is necessary to determine whether the instructions given covered the whole law of the case, and whether the refused instructions should have been given by the court. At the conclusion of the evidence the defendant asked the court to instruct the jury as to the whole law of the case, whereupon the court gave instruction No. 1, as follows: "If you believe from the evidence in this case, beyond a reasonable doubt, that the defendant, J. W. Bugg, in Mercer county, Kentucky, and before the finding of the indictment herein, willfully, feloniously, and with malice aforethought, shot and killed Wm. Board with a pistol, you will find defendant Bugg guilty of murder, as charged, and fix his punishment at death, or at confinement in the State penitentiary for life, in your discretion, under the evidence. If you have a reasonable doubt that the defendant has been proven guilty, you will render a verdict of not guilty."

By the word "feloniously," as used in the preceding instruction, is meant a deliberate intent to do a "wrong act." This instruction was excepted to by defendant, but we are unable to see any objection to this instruction, and no defect in it has been pointed out by the able counsel that represents the defendant.

The defendant then asked the court to give to the jury instruction No. 2, which was refused, as follows: "If the jury believe from the evidence, beyond a reasonable doubt, that the defendant, J.W. Bugg, shot and killed Wm. Board, yet if they further believe from the evidence that when he shot and killed said Board he had reasonable grounds to believe, and did believe, that the said Board was

then about to inflict upon him loss of life or great bodily harm, and that the killing of Board was necessary, or apparently necessary, to to protect himself from such loss of life or great bodily harm, they should acquit him."

The third instruction asked for and refused is as follows: "If the jury believe from the evidence that J. W. Bugg, at the time he killed Wm. Board, if they believe he did kill him, was so mentally insane as not to know that such act was either legally or morally wrong, or not to have sufficient power of control to govern his actions, they should acquit him."

No. 4, also refused, is as follows: "The word 'willful,' as used in the first instruction, means an intentional act done by one in the sufficient possession of his faculties to control his action."

Instruction 5, also refused, is as follows: "If the jury believe from the evidence that at the time of the killing the defendant was acting under excitement or passion, and not through malice, they should find him guilty of manslaughter, and fix his punishment at not less than two nor more than twenty-one years' confinement in the State penitentiary."

Sixth, also refused by the court: "If the jury believe from the evidence that at the time of the killing the defendant, Bugg, had been recently informed of any acts and threats of Board, and that the said information had so unsettled defendant's mind that the sight of Board caused in him an ungovernable passion, they are instructed that while these facts would not excuse *Board* for killing the *defendant*, they would reduce the offense from murder to voluntary manslaughter, and the jury should so find. It is not necessary that the circumstances revealed to the defendant should be true, but it is sufficient if the defendant believed them to be true."

Without commenting on these instructions as abstract principles of law—for neither of these instructions were authorized by the proof in this case—no such facts were shown to exist that would authorize the court to instruct the jury on any other hypothesis but that of murder, and no error was committed by the refusal to give the instructions asked for by appellants.

During the progress of the trial the appellant, while testifying, was asked by his counsel to state to the jury what Claunch had told him Board had said about his (appellant's) wife, the attorney for the Commonwealth objected, and the court sustained the objection and refused to let appellant state what Claunch told him Board had said, to which ruling of the court appellant excepted. The bill of exceptions does not show what the witness would have answered if permitted to answer. The rejected testimony should have been made known to the court, and certified in the bill of exceptions to authorize this court to pass on it.

We find no reversible error in this record, and the judgment of conviction is, therefore, affirmed.

McBRAYER V. DEAN, &C.

(Filed January 13, 1897.)

Assignment of judgment—Set-off.—The defendant in a judgment may set-off against it a judgment against the plaintiff which has been assigned to him by another; and it is immaterial, as far as this right is concerned, whether or not there was any consideration for this assignment or whether, if there

was a consideration, it was conditional merely. Nor does it make any difference that the judgment against which the right of set-off is claimed has been assigned to another if the defendant had no notice of such assignment when he received the transfer of the judgment which he seeks to use as a set-off.

P. B. Thompson, sr., for appellant.

L. C. Willis for appellees.

Appeal from Anderson Circuit Court.

Opinion of the court by Chief Justice Lewis.

In June, 1890, Joe E. Cohen recovered judgment for $938.52 against John H. McBrayer, and in March, 1892, the latter brought this action to have various demands he then held set-off against that judgment upon the ground of insolvency of the former who, with others, his creditors, were made defendants.

By the judgment in this action the one of 1890 was by credits allowed on account of payments made thereon and debts against Cohen subsequently acquired by McBrayer reduced to the sum of $711.12, which was applied according to priority first to a demand of appellee, W. R. Dean, and, next, to one of appellee, K. B. Cohen, administratrix of G. C. Cohen.

In his petition McBrayer set up and asked said judgment of 1890 be credited by the amount of a judgment for $315 and interest, which Murphy & Co. had recovered against Joe E. Cohen, and in December, 1890, sold and assigned to him (McBrayer.) But precedence and priority of the claims of Dean and the administratrix of G. C. Cohen having been adjudged, there was nothing of the fund of $711.12 left to satisfy the judgment of Murphy & Co., hence this appeal by McBrayer.

Neither validity or subsistence of the judgment in favor of Murphy & Co. appear to have been controverted, but we suppose the lower court was of the opinion McBrayer had not acquired such interest as would entitle him to the benefit of it as a set-off.

The writing showing a transfer or attempted transfer and assignment of it is as follows:

"JANUARY, 15, 1892.

"Whereas, I have this day sold unto John H. McBrayer a judgment against Joe E. Cohen for $315, now I hereby agree to receive only one-half of the amount that said McBrayer may recover on the same and no more. Signed: ED. MURPHY,

"By ROARK."

Whether the true meaning of that instrument is that the payment by McBrayer of any part of the consideration for the assignment of the judgment is wholly dependent upon his recovery of the same is not entirely plain. But it was proved that McBrayer did in fact execute his unconditional promissory note to Murphy & Co. in consideration of the assignment, and such being the case we do not see anything to hinder him from pleading and relying upon it as offset to the judgment of 1890. But however that may be he did unquestionably acquire legal title to the judgment of Murphy & Co., and, whether held by him in trust or his liability to pay therefor was dependant upon the amount of it he might succeed in setting off and having deducted from the judgment of 1890, he had the right, according to decisions of this court in such cases, to plead and rely on it as set-off.

In the case of Dorsey v. Reese, 14 B. M., 157, it was distinctly held that a judgment debtor, being invested with title to a note executed by his judgment creditor to a third party, it was wholly immaterial whether it was assigned without any consideration or upon one that was conditional, his right existed to make that use of it which the law authorizes owners to make of such demands as belong to them, including the right to set it off against a judgment that had even been assigned to another.

In Otwell v. Cook, 9 B. M., 357, it was held that a plaintiff, having acquired a note after defendant acquired the note offered as a set-off, can not resist the set-off on the ground that the latter note was assigned to the defendant for the benefit of a third person, especially when it appears that the beneficiary concurs in the set-off. And the same doctrine was held in Graham v. Tilford, &c., 1 Met., 112.

There is no evidence showing that McBrayer had, at the time the judgment of Murphy & Co. was assigned to him, notice of the assignment by Joe E. Cohen of the judgment of 1890 to either Dean or Geo. C. Cohen, and we see no reason why his demand should not, in application of the fund of $711.12, have precedence and priority of the demands of both.

Wherefore, the judgment is reversed and cause remanded for proceedings consistent with this opinion.

LOUISVILLE GAS CO. V. DULANEY & ALEXANDER.

SAME V. STONE.

(Filed January 14, 1897.)

1. Right of gas company to charge meter rent.—Where the charter of a gas company limits the amount which it may charge for gas the company can not charge small consumers an additional amount as "meter rent," it being the duty of the company to provide some means of measuring the gas which it furnishes; and the fact that the charter provides that the company shall furnish gas "under reasonable rules and regulations" does not authorize such a charge.

2. If the price of gas were unrestricted by the charter the rule charging a higher price to small consumers might be upheld, and the question would then be the ascertainment of what is a reasonable rate.

Humphrey & Davie for appellant.

Dulaney & Alexander, Stone & Suddeth, J. M. Chatterson and Laf Joseph for appellees.

Appeal from Jefferson Circuit Court, Chancery division.

Opinion of the court by Judge Hazelrigg.

The charter of the appellant confers on it the exclusive privilege of erecting, maintaining and operating gas works in the city of Louisville for the manufacture and sale of gas for illuminating purposes, and section 12 thereof provides that "said company shall furnish illuminating gas to private consumers who may apply therefor, under reasonable rules and regulations to be prescribed by the company, at a price not to exceed one dollar and thirty-five cents for one thousand cubic feet, less a discount of five cents per one thou-

sand cubic feet, to all persons, including the city, except as to street lamps, paying their bills within five days after same are due." * *

The appellees are private consumers of the appellant's gas, and upon their refusal to pay a charge for meter rent the company was about to shut off the supply. This the appellees enjoined, relying on the provisions of the section quoted as furnishing the total charge for gas to which they could be subjected.

The meter rent is sought to be upheld as a "reasonable rule and regulation," within the meaning of those terms in the charter, and is not imposed on consumers, as appears from the answer, unless they fail to use a minimum amount of gas in a given month.

This process of charging rent is illustrated by the memorandum on the back of the gas bills on file, as follows:

"METER RENT.

"3 light meter, consuming 500 cubic feet or less, 10 cents per month.

"5 light meter, consuming 800 cubic feet or less, 12 cents per month.

"10 light meter, consuming 1,000 cubic feet or less, 15 cents per month.

"20 light meter, consuming 1,200 cubic feet or less, 17 cents per month.

"30 light meter, consuming 1,500 cubic feet or less, 20 cents per month.

"45 light meter, etc."

Appellees, Dulaney & Alexander, used (in their law office) a three-light meter, and, having consumed in a given month only 200 cubic feet, were charged ten cents in addition to the regular price of the gas. Appellee Stone used a 30-light meter (in his residence), and, having consumed less than 1,500 cubic feet in three given months, was charged sixty cents in addition to the price of the gas.

It is averred in the answers that there are many persons in the city to whose fixtures in their houses, stores and offices the appellant has attached its pipes, but who procure their lights from certain electric light companies, and who use the gas light furnished by the appellant only occasionally, and when by accident they are deprived of their electric lights; that these persons, therefore, use a very small quantity of gas, and are the persons mainly affected by the meter charge; that in adopting this rule to furnish gas to all who apply, however small a quantity may be demanded, and fixing a uniform charge on rent of meters when a minimum amount of gas is consumed, it has attempted in good faith to do justice to all without discrimination. A demurrer was sustained to the answer in each case, and the injunction perpetuated. In this we concur.

The gas meter is the property of the company, and is as necessary to the company in the measurement of its gas as are its works for its manufacture. At least some process of measurement is as necessary, and while other methods have been used, the meter, we believe, is regarded as the best known method, and is generally adopted. While the consumer may cause it to be inspected, and may test the accuracy of its work, his concern is only to ascertain and pay for what gas he has consumed, and can not be called on to pay for the apparatus used in its measurement any more than he can be made to pay for the machinery used in its manufacture. He is required to pay the legal rate for the quantity consumed, and this quantity must be ascertained by the company by some correct method.

The company can only charge for the quantity it actually furnishes, and, to ascertain what it furnishes, it must measure it—how, the consumer does not care, so it is measured correctly.

The appellees, therefore, are entitled to have their gas furnished to them already measured; and, for it so measured, they can be made to pay at the price of $1.35 per thousand feet, and no more.

If the price of gas were unrestricted in the organic law of the corporation, the rule charging a higher price to small consumers might be upheld. A wholesale merchant sells for a less price than does the retailer, and this is entirely reasonable. The question would then be the ascertainment of what is a reasonable rate, and this is the question involved in this case, relied on by the appellant, of the State of Missouri, *ex rel.*, &c. v. Sedalia Gas Light Co., 34 Mo. App., 501. There the company required the payment by the consumer of $1.25 per month when the amount of gas used was less than 500 cubic feet, and this sum was denominated "rent of meter." It was held that this charge was not unreasonable, and that while the sum fixed was designated as "rent of meter," it was in fact pay for all gas consumed by the customer to the extent of 500 cubic feet.

Presumably the company was aware when it obtained its charter and established its monopoly that there would be small consumers as well as large ones, and there would be less profit in furnishing the one class than the other, but it did not on that account reject the charter or obtain the right to add to the price of the small consumer's bill.

The judgments are affirmed.

CLORE, &C. V. ROBINSON.

(Filed January 14, 1897.)

Sales of personal property—Refusal of purchaser to receive—Where the purchaser of personal property refuses to receive it the seller may sell it at the best price that can by reasonable effort be obtained, and recover of the purchaser the difference between what he has received for the property and what it would have amounted to at the contract price. And in order to give the seller this right it is not necessary that he should give to the purchaser notice of his intention to sell.

S. B. & R. D. Vance for appellants.

Wilfred Carrico for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Chief Justice Lewis.

In May, 1893, appellee Robinson sold to appellants, F. L. Clore & Co., all saw logs cut from a certain class or description of timber growing upon a certain tract of land at fixed prices, the logs to be delivered on the cars at the mill of the latter. After receiving a portion of the logs appellants declined to receive any others, and at their instance appellee agreed to stop cutting upon condition they would receive all up to that time cut and placed at the railroad station, whence they were to be shipped to the mill of appellant. But afterwards appellants refused absolutely to receive them, and then appellee brought this action to recover the difference in amount at which he had sold those remaining logs to other parties and the

amount to which he was entitled at the prices agreed on between him and appellants.

A jury having been waived and the law and facts submitted to the court, we must accept its finding, supported as it is by evidence, to be true. Indeed there is no objection made by counsel to the correctness of that finding of facts, but the principal ground for reversal relied upon is that appellee sold the logs to another party without first giving to appellants notice of his intention to do so. The material inquiry in all such cases is whether the seller, after the refusal of the purchaser to receive personal property according to contract, made due effort to sell at the best attainable price, and did in fact sell at the best price that could by reasonable effort be obtained, and if so it is certainly not indispensable and hardly material or necessary that he should have given previous notice to the purchaser. Courts in some of the States do hold such notice to be requisite in order to entitle the seller to recover the difference between what he sold the property for and what it would have amounted to at the contract price, but such has never been the announced doctrine of this court.

Nor do we now see any reason for holding the notice to be a prerequisite to recovery where the purchaser has abandoned the property to destruction or decay, and but for the voluntary act of the seller, who might have also abandoned it, a total loss to the former, not to the latter, would have resulted.

The lower court not only found as a fact in this case that appellee sold the logs in question at the best price he could obtain for it after due effort, but found and determined, as we think correctly, that appellant by a written communication to appellee waived notice of such sale.

The point made by counsel that it does not appear all the logs were cut from the particular tract of land in contemplation of the parties can not avail, because there was an agreement by appellants in consideration of forbearance of appellee to cut more logs to take those already at the railroad station.

Judgment affirmed.

JOHNSON'S ADM'R V. HASKINS.

(Filed January 15, 1897—Not to be reported.)

1. *Premature rendition of judgment*—Where summons in an equity action was served August 28th, judgment rendered at a term beginning September 7th was not premature, there being ten days between the service and the beginning of the term.

2. *Judicial Sales—Death of defendant before conveyance*—Where one whose land has been sold under decree dies after the confirmation of the sale, although before the expiration of the period allowed for redemption, no revivor is necessary in order to give validity to the conveyance to the purchaser. (Kentucky Statutes, section 521.)

Hill & Hill for appellant.

Carrico & Miller for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge DuRelle.

This was an action by the administrator and children of Granville Johnson, deceased, for the recovery of real estate alleged to be held by the defendant, Haskins, for a sale thereof, and a settlement of the estate of the decedent.

The petition as amended shows that the property was sold under a judgment of the Daviess Circuit Court; that Haskins was the purchaser, and that after the equity of redemption had expired it was conveyed to him. It was claimed on behalf of appellant that the judgment was prematurely rendered; and further, that Johnson died before the equity of redemption had expired, and that, therefore, the proceedings in that suit were void.

As to the first objection the petition in this case shows that the service of summons in the suit on the mortgage was on the 28th of August, and the first day of the term was on the 7th of September, which makes ten days between the service and the first day of the term.

As to the second objection the petition shows that the sale was made, reported and confirmed before Johnson's death, but that, as the property had sold for less than two-thirds of its appraised value, the deed was not made until after his death.

As to this objection it is only necessary to cite section 521 of the Kentucky Statutes, as follows: "If by the judgment of any court of this Commonwealth having jurisdiction thereof real estate shall be sold, and any party to the action shall die after the sale has been confirmed, or if any conveyance of real estate shall be ordered by such court to be made by a commissioner, and a party to the proceeding die before the conveyance is perfected, it shall not be necessary on that account to revive the action; but such sale or conveyance, when perfected, shall be effectual to pass title to the same extent as if all parties were living."

The judgment is affirmed.

SHIRE'S ADM'R, &C. V. JOHNSON, &C.

(Filed January 15, 1897—Not to be reported.)

1. *Verification of claim against decedent's estate*—Even if it is required that all of several joint claimants against the estate of a decedent shall verify the claim, the failure of one or more to join in the verification in this case is not sufficient to authorize the reversal of a judgment upon the claim, as the objection not being made in the court below was waived.

2. *The recital in a deed* that the purchase money has been paid is, at most, only *prima facie* evidence of payment; and, under the facts and circumstances in this case, was fully overcome.

3. *Acceptance of deed by administrator*—Where the purchaser of land, by parol contract, died before the deed was delivered, his administrator had no power to bind his estate for the purchase money by accepting the deed; and, therefore, it was error to render personal judgment against the administrator therefor. But the heirs can not hold the land without paying for it; and, therefore, a judgment for the sale of the land to pay the purchase money was proper.

Wright & McElroy and Edward W. Hines for appellants.

Lewis McQuown for appellees.

Appeal from Allen Circuit Court.

Opinion of the court by Judge Guffy.

It appears that in April, 1892, W. L. Hollis purchased of the appellees the small tract of land mentioned in the pleading at the agreed price of $125, but that no written contract was entered into, although it seems that Hollis took possession of the land. The vendors lived in different parts of the country—some in Tennessee and some in different counties in this State—and the deed to the land was not fully acknowledged until the 30th day of December, 1892, at which time it appears that Hollis was dead.

It further appears that the sale of the land was made by the vendors through or by their father as agent for them, who also died about the time of the death of Hollis; at any rate was dead before the deed was delivered to appellant Shire.

Miss Morehead, who seems to have been the last one to acknowledge the deed, sent it to the administrator of Hollis by her brother, and that, too, without any direction to demand payment, and it was so delivered. The administrator, it seems, received the deed, and it was put to record on the 6th day of March, 1893. Afterwards some request by some of the vendors for payment was made, and, the same being refused, this suit was instituted. The deed acknowledged payment in full, but appellees alleged that such recital was a mistake, and that no part of the purchase money had been paid, which was denied by appellants.

The court upon final hearing rendered judgment against the administrator for the amount claimed, and adjudged a sale of enough of the land to pay the same, and from that judgment this appeal is prosecuted.

It is insisted for appellants that the judgment should be reversed because of the insufficiency of evidence, and for the further reason that all the claimants had not verified the demand as required by law. Several of the claimants made the proper affidavit, and, as no objection was made in the court below on the ground of failure of all the parties to verify, that objection must be now held to have been waived, if indeed any further verification was required.

The recital in the deed that the purchase money had been paid was at most only *prima facie* evidence of payment, and, under the facts and circumstances in this case, was, we think, fully overcome or disproved by the deposition of Mr. Read.

It would have been negligence on the part of Hollis to have paid for the land before he had an enforcible contract, and it was but the ordinary way of doing business to recite payment in the deed, if payment was to be made upon the delivery of the same.

The administrator, Shire, had no power to bind the estate of Hollis for the purchase of real estate, hence his acceptance of the deed did not create any obligation upon the part of Hollis' estate to pay for the land, the title to which passed directly to the heirs of Hollis, if it passed at all; but the heirs can not hold the land free from the purchase-money lien, and not having distinctly repudiated the contract or conveyance, the judgment for a sale of the land to pay the purchase money was proper, and is affirmed, but the judgment against the administrator, James M. Shire, is reversed and cause remanded for proceedings consistent with this opinion.

JUNG BREWING CO. V. CITY OF FRANKFORT.

(Filed January 15, 1897.)

1. *Constitutionality of ordinance—Discrimination*—A city has no right to make a discrimination in the imposition of a license tax as between the sales of goods manufactured in the city and goods manufactured outside the city. But a city ordinance providing for the payment of a license fee by "every person or corporation who will engage in the business of selling or delivering any beer, ale or porter, or any kind of malt or fermented liquor, which has been brewed out of the city, to a licensed dealer in the city," will not be declared unconstitutional in the absence of an averment that such a license fee is not required for the sales of such goods manufactured in the city, the presumption being in favor of the constitutionality of the ordinance.

2. *License tax*—Where a corporation which manufactures goods outside a city places them in the hands of an agent in the city, who delivers them to its customers as they need them, the sales of the goods must be regarded as completed in the city, and the city may require the payment of a license tax therefor.

Newton G. Rogers and W. McKee Duncan for appellant.

Hugh Rodman and James A. Violett for appellee.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Guffy.

The plaintiff in this action sought a judgment against the defendant for $250 license fee or tax which, as alleged, had been wrongfully collected of appellant by appellee, upon the assumption that appellant was subject to be charged that sum for the privilege of selling beer, etc., in the city of Frankfort.

The material portion of the petition alleges that the following ordinance was enacted by the city council of Frankfort: "Each and every person, firm or corporation who will engage in the business of selling or delivering any beer, ale or porter, or any kind of malt or fermented liquor, which has been brewed out of the city, to a licensed dealer in the city, shall be treated as wholesaling beer, ale or porter, and shall pay to the treasurer of the board of sinking fund commission a license therefor of two hundred and fifty dollars per annum."

It is also alleged in the petition that "appellant is a corporation organized under the laws of Ohio, and has no place of business except in Cincinnati, Ohio, and no other place of sale for such products aforesaid; that heretofore various persons engaged in business in the city of Frankfort desiring to purchase beer of it (the plaintiff), the product of the said plant in Cincinnati, and it desiring to supply such demand, employed a representative in the city of Frankfort to deliver its said product to such persons, and did proceed to employ such person or representative, who did deliver said product in said city, and was engaged in so doing prior to May 1, 1894; that it made no sales of said products in Frankfort before nor since 1st of May, 1894, except as above set forth; that its patrons, who desired its products, purchased the same from it in Cincinnati, and that it sold said products to its said patrons in Cincinnati, and that its only connection with the city of Frankfort, in any manner, was to deliver said product, as so sold by it in Cincinnati, to its patrons in Frankfort; that the necessities and demands of said business requiring that said product or beer should be kept cold or in cold storage, it did make arrangements with a certain person in Frankfort to keep said beer in cold storage, and deliver it from time to time as those who

had purchased it might desire the same; that it simply did this as a matter of compliment or accommodation to its said patrons in the premises."

The circuit court sustained a demurrer to the petition, and, appellant declining to amend, the action was dismissed, and to reverse that judgment this appeal is prosecuted.

It is claimed in the petitition, and earnestly argued in the brief of appellant, that the ordinance is void, being unconstitutional because it discriminates between persons whose preducts are manufactured outside of Frankfort and those who manufacture beer in the city. If such discrimination was really made the ordinance would be void and unconstitutional, and appellant would be entitled to recover the money paid, if paid under the conditions alleged in the petition; but there is no averment in the petition that any person in Frankfort is allowed to manufacture such articles in the city and sell them there without paying the $250 license fee.

Indeed it rather seems that appellant carefully refrained from making any allegation as to what license was required for the sale of beer, etc., made and sold in the city, and, under the well-established rule that pleadings are construed most strongly against the pleader, it follows that the presumption is that no one was exempt from paying the license fee, and that presumption is strengthened by the general presumption that legislative acts are not generally unconstitutional; and before a law can be so declared it must be made to clearly appear that it was enacted without constitutional authority.

The contention of appellant that all his sales were in Ohio can not be sustained. It is perfectly clear from the averments in the petition that the sales were perfected and completed in the city of Frankfort. If appellant's contention is sound, then it would be an easy matter for manufacturers outside of the city to sell to the people in the city all the beer, etc., they needed, and thus deprive the city of any license fees for the sale of beer and all other liquors.

The case of Commonwealth v. Russell, 11 KY. LAW REP., 576, does not sustain appellant's contention. It is not at all in point. The other questions argued by counsel on each side need not be discussed.

Judgment affirmed.

The Kentucky Law Reporter.

EDITOR:
WALTER G. CHAPMAN, ... Frankfort, Ky.

VOL. 18. MAY 1, 1897. No. 21

KENTUCKY COURT OF APPEALS.

STONE, AUDITOR, v. THOMPSON.

(Filed December 18, 1896.)

Fees for holding examining courts—Under section 353 of the Kentucky Statutes the county judge, and other magistrates sitting as examining courts in felony cases, are entitled to receive for such services $2 in each case, but not to exceed $4 in any one case where the trial takes more than one day.

Petition for rehearing overruled March 13, 1897.

W. S. Taylor for appellant.

Kohn, Baird & Spindle for appellee.

Appeal from Franklin Circuit Court.

Opinion of the court by Chief Justice Pryor.

This question involves the construction of the statute, fixing the fees of the courts in this Commonwealth for holding examining courts in felony cases.

In the General Statutes, under the title of "Fees," we find this item: "For presiding at examining courts in felony cases, per day, to be paid out of the treasury, $2.00."

This court, in a case reported in Auditor v. Kinkead, 80 Ky., 596, in determining the legislative intent, said that the purpose of the Legislature was to allow only $2.00 per day, and no more, although the judge or magistrate might try as many as two or more cases on the same day; that he was paid by the day, and not for the trial of each case. Under this construction, the magistrate or justice of the peace, if trying only one case, could prolong the trial from day to day; and if the trial continued as long as five days, and it lasted sometimes longer, the magistrate would be entitled to $2.00 for each day, making $10.00 for the one case, increasing thereby the burden on the treasury, and offering an inducement to prolong the trial that the fee might be enlarged. To remedy this evil, or at least to make the fees of such officers more definite and certain,

the Legislature changed the statute, and the fees of examining courts so regulated as that no greater fee could be charged for holding an examining court in any *one case* than $4.00.

The statute, as it now stands, reads: "To county judges and other magistrates *for holding examining courts* in felony cases, for the *first day's service*, $2.00; for each additional day, $1.00, *not to exceed* $4.00 *in any one case.*" The Legislature, by the act just quoted, was more explicit and certain as to its meaning than in the General Statutes, and limited by the language used "not to *exceed* $4.00 *in any one case*," the magistrate to that sum, and no greater, where he held his examining court longer than four days; in other words, you shall not charge more than $4.00 *in any one case*, $2.00 *for the first day and* $1.00 *for each day thereafter*, not to exceed $4.00 *in any one case*, making manifest an intention on the part of the Legislature to pay for each case tried, not to exceed $4.00, instead of permitting such courts to be held for an indefinite period that greater fees might be obtained.

It is insisted that this view of the question is in conflict with the case of Auditor v. Kinkead, 80 Ky., 596, when it is apparent the language used, "not to exceed $4.00 in any one case," which is not in the General Statutes, was intended to explain the legislative meaning, and give to the magistrate his fees in each case, but not to exceed the sum fixed by the statute.

Judgment affirmed.

Judges Lewis, Guffy and DuRelle dissenting.

ADAMS' ADM'R, &C. V. REED.

(Filed December 19, 1896—Not to be reported.)

Life insurance -Insurable interest—To give one an insurable interest in the life of another, it is enough that in the ordinary course of events loss or disadvantage will naturally and probably arise to him from the death of the insured. Therefore, while a mother-in-law had no insurable interest in the life of her son-in-law by reason of that relation alone, yet as the two were living together under an arrangement by which each was to pay one-half the living expenses, and to divide between them the profits derived from keeping boarders, the assignment by the son-in-law to the mother-in-law of a policy of insurance upon his life, taken out for the benefit of his wife, who had since died, was valid, although the arrangement under which the two were living together was not for any definite period; and the assignee, having paid the premiums, was entitled upon the death of the insured to the proceeds of the policy, the assignment of the policy having been made with the consent of the company, which does not now question the validity of the assignment, but has deposited the fund subject to the order of the court.

C. W. Milliken, G. H. Galloway, Whitesides & Moore and Edward W. Hines for appellants.

Thos. H. Hines, Geo. C. Harris and Goodnight & Roark for appellee.

Appeal from Simpson Circuit Court.

Opinion of the court by Chief Justice Pryor.

This controversy is between the appellee, India Reed, on the one side, and M. C. Adams, as the administrator of D. C. Adams, on the

other, and originates from the claim of each to the proceeds of a policy of insurance issued by the Mutual Benefit Life Insurance on the 22d of May, 1885, on the life of D. C. Adams for the benefit of his wife; or, if she should die, then to his children; and, if no children, to his personal representatives or assigns. The wife, for whose benefit the policy was issued, died childless, and some four or five years after her death the insured, D. C. Adams, died, and the appellant is his personal representative.

The facts of the case are these: The insured was the son-in-law of the appellee, and during the life of his wife, and for some time after, they lived together as one family, each contributing to the support of the other. They lived from the proceeds of their daily labor; and, in order that each should contribute to the support of those having claims upon them, it was agreed that each should furnish one-half the supplies, the mother-in-law agreeing also to do the housework. They kept boarders and divided the profits. When the wife of the insured died the same arrangement continued, and, in looking for a beneficiary and some one to keep the policy alive, the proof tends to show that the relatives of the insured were asked to advance the money to pay premiums but declined; and, after much persuasion from the insured, the mother-in-law, the appellee, finally consented to pay the premiums, and have the policy assigned to her. This was done by the consent of the company, and she paid the premiums annually for several years, and up to the death of the insured. After her death the company was willing to pay her the money, and, in fact, she gave them a receipt acknowledging payment; but the next of kin of the insured, or his personal representative, appeared and asserted their claim; hence, the present action by the appellee to recover on the policy. The insurance company paid the money into court, leaving the chancellor to determine which of the claimants were entitled to the fund, and a judgment was rendered in favor of the appellee.

The policy had been assigned to her by the insured upon notice to the company, and the latter is making no claim as against her right to the money, as from year to year she had paid them the annual premiums. There is nothing in the policy or charter of the company preventing the assignment of the policy, and, the wife of the insured leaving no children, there is no reason why the assignment to the appellee by the consent of the company is not binding on all the parties, unless in violation of a sound public policy.

The company is making no question with the appellee upon that or upon any other ground; but it is contended by the appellant that public policy forbids the recovery by the appellee, and that the personal representative, who occupies no better position with reference to the appellee than the insured, is entitled to the money.

This is not a charter embodying any other idea of benefits than the payment of the premiums by the insured for the beneficiary named in the policy. The case of Bayse v. Adams, 81 Ky., 368, is relied on by the appellant as conclusive of this case; but when considered with reference to the relation existing between the insured and his mother-in-law, and the actual interest the latter had in the life of the assured, there is but little reason in the attempt to apply the rule in Bayse v. Adams to the facts of this case.

In fact, if the appellee had no other claim to this fund than the high and pure equity she presents, the chancellor would not hesitate to give her this money as against those who, neither in law, equity or good morals, are entitled to it; and, in recognizing to the fullest extent the rule of public policy as settled in Bayse v. Adams, and

applying it to the facts of this case, the judgment in favor of the appellee was proper.

It is true the mother-in-law, by reason alone of her relation to the son-in-law, could not enforce the collection of this policy, as she would not have an insurable interest; but when this case is considered with reference to that relation, and the facts inducing the appellee to become the beneficiary, her right of recovery is based upon both equitable and legal grounds.

In the case of Bayse v. Adams, this court said: "In all cases there must be a reasonable ground founded on the relation of the parties to each other, either pecuniary or of blood or affinity, to expect some benefit or advantage from the continuance of the life of the assured."

The facts of this case bring it directly within the doctrine of that case, and the expectation of pecuniary benefit was the mutual agreement between the assured and the appellee by which they undertook to live as one family and divide between them what little was made. That this agreement existed when the policy was assigned clearly appears, and that it was for an indefinite period, or such as either could have abandoned, can make no difference. It had not been abandoned at any time, and was the basis for the assignment of the policy, that the comfort and welfare of the appellee and her child might be secured under the assignment as long as the assured lived, and after his death.

In Hoyt v. New York Life Insurance Company, 3 Bos., 440, it is said: "It is not necessary in life insurance that the one for whose benefit the life of another is insured should be a creditor of that other. It is enough that in the ordinary course of events loss or disadvantage will naturally and probably arise to the party in whose favor the policy is written from the death of the person whose life is insured."

Under this rule the partner may insure his co-partner, the employer the life of his employe, and in all cases where from the relation the parties sustain toward each other, whether from near kindred or from a contractual relation, such policies have been upheld. This appellee realized the benefits resulting to her from the agreement between herself and her son-in-law, and to provide against want paid these premiums for years from her daily labor, and the question of lapses of policy is not involved.

Judgment affirmed.

McLAUGHLIN V. WHEELER.

(Filed January 6, 1897—Not to be reported.)

1. *Contested election—Failure of one member of board to act*— The fact that only two of the three members of the county board, provided by section 1534 of the Kentucky Statutes for determining contested elections, take part in deciding a contest does not invalidate a finding in which both members acting concur, they being a majority of the board. Nor is their finding invalidated by the fact that the place of the member who did not act was taken by an unauthorized person, and not by the officer designated by the statute to take his place.

2. *It is competent in the contest of an election* to show that an error was made by the officers of election in making their return, and that a certain candidate received at a particular precinct more votes than were certified in his favor.

Wm. A. Byrne, D. A. Glenn, Walker Hall and Wm. Goebel for appellant.

Tisdale & Gray for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Paynter.

The appellant, W. P. McLaughlin, and W. H. R. Wheeler were opposing candidates for justice of the peace in Kenton county in the city of Covington at the November election, 1894.

The certificate of election was given to McLaughlin. Wheeler contests and claims that he received 119 votes at precinct B, Ninth ward, instead of 19 as returned by the officers of election. If this claim be correct then Wheeler was elected and is entitled to the office.

It is contended that the county board of contest was not properly organized, because the county judge did not act as a member of it, and further if he properly declined to so act then the board was unlawfully constituted because Wes. B. Wilson, clerk of the Kenton County Court, did not act as a member of the board of contest.

Section 1531, Kentucky Statutes, provides that the judge of the county court and two justices of the peace residing nearest to the courthouse shall be a board to determine the contested election of any officer elective by the voters of the county or any district therein, except a member of the general assembly and certain municipal officers.

The county judge declined to sit as a member of the board because, as stated, he could not "properly act." No further reason was given. It is insisted that the judge should have stated the facts upon which he based his conclusion that he could not properly act. Two of the members of the board of contest who, under the law, were entitled to act, did act and concurred in the finding. It is, therefore, unnecessary to inquire whether the county judge or county clerk were properly excused from acting as members of the board.

Under section 448, Kentucky Statutes, "words purporting to give authority to three or more public officers or other persons shall be construed as giving such authority to a majority of such officers or other persons."

Section 679, Civil Code of Practice, provides that "an authority conferred by law upon three or more persons may be exercised by a majority of them concurring; and an act directed by law to be done by three or more persons may be done by a majority of them concurring."

It seems to us if the justice who took the place of the county judge on the board of contest was not authorized to do so (which we do not decide), the fact that he concurred with the two who did act and concur would not render invalid such finding. The mere fact that they allowed an unauthorized person to act with them would not render invalid a judgment in which both concurred.

Under the rule enunciated in Broaddus v. Mason, 95 Ky., 421, it is competent to show an errer was made by the officers of election in making their return.

We think the evidence in this case sufficient to show there was an error in the certification of the returns, and that Wheeler received 119 votes at the precinct in question instead of the 19 as certified.

The judgment is affirmed.

KING'S ADM'R V. ROSE, CURATOR, &C.

(Filed January 13, 1897.)

1. *Administrator*—Where, after an order by the county court admitting to probate the will of the testator, the appellant was appointed administrator, with the will annexed, of the estate of the decedent, the powers of the appellee as curator, who had been appointed by the court under section 3901, Kentucky Statutes, during the contest over the will, ceased, and his only duty left was to settle his accounts as curator and to turn over what remained in his hands to the appellant as administrator.

2. *An appeal to the circuit court from the orders of the county court* admitting the will to record did not have the effect to suspend the appellant's powers as administrator, no appeal having been taken from the order appointing him, which order was entered at a special term of the court subsequent to the order probating the will.

3. *Supersedeas*—To suspend the powers of the administrator appointed by the county court, it was necessary to execute a supersedeas bond.

K. D. Perkins, Tye & Sharp and John T. Hays for appellant.

R. D. Hill for appellees.

Appeal from Whitley Circuit Court.

Opinion of the court by Judge White.

The will of E. J. King was presented to the county court of Whitley county at the January term, 1894, of said court, and some of the heirs of said King resisted its probate, and during the pendency of the contest the county court appointed the appellee curator of said estate, who executed bond and qualified as such curator, and as such took possession of the personal effects of the decedent. At the April term, 1894, the court, on the trial of the question will or no will, adjudged the said paper to be the true last will and testament of the decedent, and thereupon ordered the same to record, and from this order admitting said will to record some of the contestants prayed an appeal to the Whitley Circuit Court, but took no appeal until after the appointment of the curator, and at a special term, April, 1894, the appellant, Sharp, was appointed by said court administrator, with the will annexed, of the estate of said King.

The appellee refusing to deliver up to the administrator the property belonging to the estate, he, after demand of appellee, brought this action in the Whitley Circuit Court to recover possession of the same, setting out a list of property in the hands of said appellee belonging to the decedent's estate.

The appellee filed answer to this petition, in which he alleges that "the order of the Whitley County Court, admitting the will of E. J. King to record, was appealed from by Nan E. Laforce, H. Catleff; * * * that the appeal was taken from the order probating said will to the Whitley Circuit Court, and the same has been filed in the circuit court; that the appeal was taken and record filed in the circuit court within twelve months after the said will was probated by the county court."

Defendant says that the Whitley County Court has no right or authority to appoint the plaintiff *administrator*, with the will annexed, of the estate of E. J. King; that the said appointment by the Whitley County Court is void.

To this answer appellant filed a reply, in which he denied that the Whitley County Court had no authority to appoint appellant *administrator*, with the will annexed; denies the appointment by the Whitley County Court was void, or the Whitley County Court had

no jurisdiction to appoint an administrator, etc., and further says that said Sharp was appointed administrator of the estate of E. J. King long before any appeal was taken to the Whitley Circuit Court from the orders probating the last will and testament of the said E. J. King in the Whitley County Court, and he was appointed *administrator* some time after the orders probating the will of said King, and that no appeal was taken from the orders of the Whitley County Court probating the said will until after the institution of this suit.

On this state of the pleadings the court adjudged the law was for the defendant, and dismissed plaintiff's petition, rendering judgment for defendant for costs, and from this judgment appellant has appealed to this court and asks a reversal.

By section 3901 of the Kentucky Statutes, during the contest about the probate of a will or when the court, for any valid cause, shall be delayed in granting letters testamentary or administrative, it may appoint a curator to collect and preserve the estate of the decedent until probate of the will be granted, etc.

The will of King having been admitted to record it was then the duty of the county court to permit the executor named in the will to qualify as executor; and should the person named in the will as executor decline to qualify, then the court should appoint some suitable person as administrator, with the will annexed.

The county court of Whitley had the jurisdiction and authority to appoint an administrator of said King's estate, and, by the appeal to the circuit from the orders of the county court admitting said will to record, did not have the effect to suspend his powers and duties as administrator of said estate.

There was no appeal from the orders of the county court appointing the appellant administrator, with the will annexed. These orders were made sometime after the orders probating the will. By the appointment of appellant the powers of appellee as curator ceased, and his only duty left him was to settle his accounts as curator, and turn over whatever remained in his hands belonging to the estate of the decedent to the appellant as administrator.

The appeal from the orders of the county court, admitting to record the will of E. J. King, did not have the effect to suspend appellant's powers as administrator, and was not an appeal from the orders or the Whitley County Court appointing appellant *administrator*. The orders appointing an administrator by the county court may be appealed to the circuit court by anyone who is interested, but to suspend the powers of the appointee a supersedeas bond must be given.

But we are referred to section 4851, in which appellee contends that the mere fact of an appeal to the circuit court would have the effect to supersede the appointment of the administrator. We are of the opinion that the only effect of said appeal is to prevent a division, distribution and final settlement of the estate, and are strengthened in this view by the proviso to said section authorizing the circuit court in which proceedings may be thereafter pending an appeal to make an order restraining the further distribution and division of the estate, which shows the meaning of the legislature; and, if taken as a legislative interpretation of said section, would make it harmonize with sections 3901 and 3902.

We think the court erred in its judgment. We are of opinion that upon the pleading the appellant was entitled to judgment for the recovery of the property belonging to the estate of decedent.

Wherefore, the judgment of the lower court is reversed and cause remanded for further proceedings consistent with this opinion.

SCHAEFER-MEYER BREWING CO. V. CITY OF FRANKFORT.

(Filed January 15, 1897—Not to be reported.)

Constitutionality of ordinance—License tax—Discrimination—Affirmed for reasons given in case of Jung Brewing Co. v. City of Frankfort, reported above.

Newton G. Rogers and W. McKee Duncan for appellant.

Hugh Rodman and James A. Violett for appellee.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Guffy.

This action is in all respects similar to that of Jung Brewing Co. against the appellee, city of Frankfort (*supra*, 855), this day decided, except that the appellant does business in Louisville, and claimed that the sales were made there.

The court below sustained a demurrer to the petition, and, appellant declining to amend, its action was dismissed, and from that judgment it has appealed, and its contention is the same as that of the appellant in Jung Brewing Co. against this appellee.

For the reasons given in the opinion in that case the judgment of the court below in this case is affirmed.

HON V. HARNED.

(Filed January 15, 1897—Not to be reported.)

1. *Exceptions to depositions* not passed upon by the trial court were waived.

2. *Suit on forged notes*—As the entire basis of appellant's claim consists of the notes sued on, and there was ample evidence upon which to hold these notes to be forgeries, a judgment denying a recovery thereon was proper.

G. W. Stone for appellant.

J. S. Wortham and J. C. Graham for appellee.

Appeal from Grayson Circuit Court.

Opinion of the court by Judge DuRelle.

This action seeks to hold appellee liable upon three notes, one for $125 and two for $70 each, alleged to have been executed by Lide Carroll for the deferred payments upon a piano purchased by her. At the time the notes are alleged to have been executed she was unmarried, but subsequently became the wife of appellee, and had died prior to the institution of this action. The petition also prayed for a lien upon the piano.

It is alleged in the petition that appellee acquired by his marriage property sufficient to pay the claim. The answer is a plea of *non est factum*, denying specifically the execution and delivery of each of the notes, and that any of them was her act and deed.

It is not necessary to pass upon the competency of the depositions taken for appellee, which were excepted to, but the exceptions not passed upon by the trial court.

It is also unnecessary to pass upon the plea of payment to Reinhart, the agent of Hon, of the two notes for $70 each. It is conceded by the appellant that he can not recover upon the note for $125, it being shown to be a forgery.

Appellant's own deposition, which was practically all the testimony on his behalf, shows that the entire business with Mrs. Harned was transacted by Reinhart, and that all that he (Hon) knew of the transaction was obtained from Reinhart, who is not produced nor his absence accounted for.

It is sufficient to say that the entire basis of appellant's claim consists of the notes sued on; that there was ample evidence upon which to hold those notes to be forgeries, and that the trial court so held.

The judgment is affirmed.

ROBINSON, &C. v. ÆTNA INSURANCE CO.

(Filed January 16, 1897—Not to be reported.)

Fire insurance—Effect of house becoming vacant—Where an insured house was vacant and unoccupied at the time it was burned, a tenant having left it in that condition fifteen or twenty days before that time, the owner, although he expected the tenant to return, was not entitled to recover upon the policy of insurance, which provided that the company should not be liable if the house should become vacant and unoccupied and so remain for more than ten days.

R. H. Tomlinson for appellants.

Wm. Herndon for appellee.

Appeal from Garrard Circuit Court.

Opinion of the court by Judge Hazelrigg.

To a suit against it by the owners of a small house in the village of Kirksville, which it had insured for the sum of $400 and which had been destroyed by fire, the appellee company answered that the house had become vacant and unoccupied, and so remained for more than ten days prior to the fire, and relied on a clause to that effect in the policy of insurance as releasing it from liability.

The proof showed that the house had been occupied by a stonemason as tenant, with a wife and child; that the husband went off in search of work, and the wife went to live with her brother, carrying her bed and bedding with her; she lived at her brother's, her husband providing provisions for her; she also sent back to the house and got her wearing apparel.

It appears that the owner or his agent knew all this, and, while they may have expected the tenant to return, no steps were taken to have the house occupied or watched over. Only a naked bedstead and a few articles of very small value remained in the house belonging to the tenant.

The fire originated in the house some fifteen or twenty days after it became unoccupied, and was the work of an incendiary or of the carelessness of loose characters who, as the proof conduced to show, infested the place after night. Under these circumstances the court properly instructed the jury to find for the defendant company.

Judgment affirmed.

BOSTICK V. HOPKINS.

(Filed January 16, 1897—Not to be reported.)

Settlement of partnership—In this action for the settlement of partnership accounts, growing out of the joint ownership of an orange grove in Florida, the evidence is sufficient to support the chancellor's finding that plaintiff and defendant each is entitled to one-half of the assets of the firm.

D. G. Park and S. H. Crossland for appellant.

Robbins & Thomas for appellee.

Appeal from Graves Circuit Court.

Opinion of the court by Judge Paynter.

Appellant and appellee each owned an undivided half of an "orange grove" in Florida. For something over four years they continued to improve it. During that time it paid but an inconsiderable part of the expenses incurred, but during the time Hopkins remained on it, and labored to improve it for the benefit of both. Nearly all this time Bostick remained in Kentucky. Bostick furnished some means to be used in improving the property, while Hopkins made a large contribution in labor (for which he was to be paid), as well as contributing otherwise to the same end. Bostick loaned Hopkins $750, which was used in purchasing his interest in the "grove," and the question of Hopkins' liability therefor is involved. In fact there are various transactions between the parties sought to be settled in this action. The action was brought to settle the partnership between them. They sold the "grove," and the notes for the balance were executed to Bostick & Hopkins, three of them remaining unpaid, amounting to something over $3,000, and there is in the hands of the receiver of the court $1,049.76, which notes and money constitute the partnership assets.

The court below adjudged that "upon a full and fair statement of their accounts between them, the plaintiff and defendant each is entitled to one-half of the assets of the firm."

There was a great deal of testimony taken by the parties as to their respective accounts and demands. The issue before the court was largely one of fact. After having reviewed the case we are of the opinion that the judgment of the court should not be disturbed.

The judgment is affirmed.

GRAUMAN & CO. V. CLARK, &C.

(Filed January 16, 1897—Not to be reported.)

New trial—In this ordinary action in which a jury was waived and the law and facts submitted to the court, the plaintiff was entitled to a new trial upon each of the three grounds of accident and surprise, of newly-discovered evidence and of the insufficiency of the evidence to support the findings of fact.

Tinsley & Faulkner for appellants.

Appeal from Clay Circuit Court.

Opinion of the court by Judge Burnam.

This suit was instituted in January, 1893, in the Clay Circuit Court by the plaintiffs, Grauman & Co., against defendants, Robert Clark and David Bowman, alleging that they were a firm, doing business in the firm name of Louis Grauman & Co., and that the defendants were indebted to them in the sum of $175.55 for goods and merchandise sold and delivered by the plaintiffs to the defendants at defendants' instance and request. The same was sold and delivered on the 11th day of October, 1890, and by the terms of the said sale the money was due and payable in thirty days. The prices charged were reasonable, etc., and they, therefore, prayed for a judgment for the debt and interest.

No answer was filed by David Bowman, but Robert Clark filed a separate answer, in which he denied that he and the defendant, Bowman, were indebted to the plaintiffs in the sum of $175.55, or any other sum, for goods and merchandise or anything else or in any manner. He denied that he and Bowman bought from plaintiffs any goods, or that plaintiffs delivered same at the instance and request of himself and Bowman in 1890 or any other time; denies that any bill was ever rendered him, and prays that plaintiffs' petition be dismissed; and at the October term, 1893, of the Clay Circuit Court both parties announced themselves as ready for trial.

The law and facts were by agreement submitted to a special judge, J. W. Baker, who, after hearing the testimony and argument of counsel, dismissed plaintiffs' petition against the defendant, Robert Clark, with a judgment for defendants' costs. A motion for a new trial was made by appellant upon several grounds:

1st. That of accident and surprise, which ordinary prudence could not have guarded against.

2d. That the verdict was not sustained by sufficient evidence, and was contrary to law.

3d. Upon the ground of newly-discovered evidence, which was material to appellant, and which they could not, with reasonable diligence, have produced at the trial.

In support of this motion appellant filed the affidavits of Silas Field, D. A. Jones and the deposition of David Bowman, whose statements tend very strongly to establish the contention of the appellant herein; that the goods were purchased, received and appropriated by Bowman and the defendant, Clark. The motion for a new trial was overruled by the special judge, which ruling was excepted to by the appellant at the time, and to reverse said judgment this appeal is prosecuted.

A careful examination of the record satisfies this court that there were good reasons why the new trial should have been granted upon each of the grounds relied upon, and it clearly appears to us that the decision of the special judge, who passed both upon the law and the facts of the case, was flagrantly against the weight of the evidence, and is contrary to the law, and that the ends of justice require that plaintiff should have a new trial.

Wherefore, the judgment of the lower court is reversed and this cause is remanded for proceedings consistent with this opinion.

LOUISVILLE & NASHVILLE R. R. CO. v. WHITLEY COUNTY COURT.

(Filed January 16, 1897.)

New trial--Newly-discovered evidence. Newly-discovered evidence, which will entitle a party to a new trial, was not intended to be confined merely to testimony given or that might be given by living witnesses, but applies to any character of evidence competent and allowable to illustrate and determine an issue of fact involved.

A large verdict having been returned against a railroad company in favor of a county court for injury to a public highway, caused by the construction of the railroad below the highway, so as to cause the sliding away of earth forming the foundation of the highway, the evidence in the case showing that it was impossible to stop sliding of the earth and preserve the bed of the highway without expenditure of a large sum of money, in this action to vacate the judgment upon that verdict and for a new trial, it appearing that since the trial of the original action the county court has, by the expenditure of two or three hundred dollars, placed pipes under the highway, so as to conduct away the water of a spring previously hidden, and that as the result sliding of earth has been stopped, and also that there is now exposed a rock bluff above the loose earth, existence of which, not hitherto known, shows entire practicability of preserving the highway at comparatively small cost, these facts were sufficient to entitle the railroad company to a new trial.

J. W. Alcorn and R. D. Hill for appellant.

Tinsley & Faulkner and K. D. Perkins for appellee.

Appeal from Whitley Circuit Court.

Opinion of the court by Chief Justice Lewis.

April 14, 1892, a judgment was rendered in favor of the Whitley County Court against the Louisville & Nashville R. R. Co. for $10,000, and, on appeal to this court, was affirmed.

This is an action for vacation of said judgment and for a new trial upon the ground of newly-discovered evidence; and the inquiry is whether that evidence is material for the party applying, and could, with reasonable diligence, have been discovered and produced at the trial.

As appears from the record of the original action, made part of this, the railroad bed of appellant was located and constructed on the side of a certain hill in Whitley county, below a public highway, and, as a consequence, there was such sliding of earth away from the foundation of the highway as to render it almost, if not quite, impassable and useless. Moreover, at the time of trial of the original action it appeared, and evidence introduced showed, that it was impossible to stop the sliding of the earth and preserve the bed of the highway without the expenditure of a very large sum of money, witnesses putting such required sum at $10,000 and more.

What appellant alleges in this action is that since the trial of the original action the Whitley County Court has, by the expenditure of $200 or $300, placed pipes under the highway so as to conduct away the water of a spring previously hidden, and, as the result, sliding of earth has been stopped. They also say there is now exposed a rock bluff above the loose earth, the existence of which, not hitherto known, shows the entire practicability of preserving the highway at comparatively small cost.

Notwithstanding appellant alleged and proved on the trial of this action said facts, the lower court decided the evidence offered by it

"in support of its allegation of newly-discovered evidence was and is not, within the meaning of the law, newly-discovered evidence."

In our opinion newly-discovered evidence was not intended to be confined merely to testimony given or that might be given by living witnesses, but applies to any character of evidence, competent and allowable, to illustrate and determine an issue of fact involved. To reject the alleged newly-discovered evidence in this case would involve the rejection of a newly-discovered landmark, showing the location of an ancient survey or the newly-discovered fact that what was believed to be human blood, and upon the faith of which an accused person had been convicted, was since the trial demonstrated not to be blood, or indeed any other physical fact.

The unusually large verdict the Whitley County Court obtained against the Louisville & Nashville R. R. Co. was rendered because the jury believed, and were induced by the evidence to believe, the highway could not be reclaimed and preserved without the expenditure of that sum of money. If the newly-discovered evidence shows it to be practicable to accomplish such object at greatly less than that amount, the Louisville & Nashville R. R. Co. should not be required to pay, and the Whitley County Court can not, in justice and good conscience, ask for such sum.

In our opinion the new trial ought to have been granted, and the judgment denying it is reversed and cause remanded for proceedings consistent with this opinion.

GATEWOOD V. COOPER.

(Filed January 16, 1897—Not to be reported.)

Passway--Obstruction of—In this action brought by appellant to enjoin appellee from passing over her land except by a particular route, in which appellee claimed the right, by adverse use for more than fifteen years, to a passway other than that admitted by appellant, the evidence is sufficient to establish appellee's right to the particular passway claimed by him, and appellant, therefore, did not have the right to obstruct that passway, or to make any change in its location. If she desires to change the location of the passway she can petition the county court, and that court can take into consideration all the equities of the case and act accordingly.

J. M. Benton and L. H. Bush for appellant.

Leland Hathaway for appellee.

Appeal from Clark Circuit Court.

Opinion of the court by Judge Burnam.

The appellant instituted her suit in the Clark Circuit Court alleging that she was the owner and was in the possession of a tract of 90½ acres of land situated on the waters of Howard's creek in said county; that there was a passway through said land which followed the course of Duncan's branch, which the defendant, Cooper, had the right to travel, but that said defendant, instead of traveling over said passway along the proper course of same, had gone out of same and had trespassed upon the bottom lands of plaintiff by passway over same with his horses and wagons and teams; that he had broken down her fences around her said bottom and threatened that he would cut and tear away her fencing around said bottom, and

that he would continue to do so unless restrained by the court, and she asked for damages against defendant and for an injunction restraining him from passing over said land or from interfering with her fences around said bottom.

Appellee in his answer filed herein denies that he passed over the said lands of appellant unlawfully. He claims in substance that for more than twenty-four years there has been a public passway over the lands of appellant along the route taken by him; that the passway was over a well-defined roadbed that had been continuously used by him and the public as a matter of right for more than twenty-four years; that his father, W. C. Cooper, had opened this way and taken the passway out of the branch at that date, and that such change had been acquiesced in by the public all that time, as they were given a better road, and that its use had been uninterrupted and continuous, and charges appellant with wrongfully obstructing said passway by plowing up said passway and erecting fences across same, and asks damages on cross petition and for an injunction restraining appellant from future acts of obstruction of said passway.

On these issues raised by the pleadings a large number of witnesses were examined, and upon the trial of the case the petition of appellant was dismissed by the lower court, and she was enjoined and restrained from obstructing the passway over and through the shore bottom land. To the entry of this judgment appellant excepted and brought her appeal to this court.

Without entering into any elaborate review of the evidence introduced on the trial of the action we will say that in our view it clearly supports the contention of appellee as to the character, location and duration of said passway, and raises the presumption that said passway over the bottom lands of appellant had been used by the appellee and the public for more than fifteen years, and the right of appellee to its continued use was fully established. We, therefore, conclude that appellant did not have the legal right to obstruct said passway or to make any change in its location. To concede that she could make such change in said passway at her pleasure or convenience would in effect convert the right of appellee to use same into a mere privilege, dependent upon the will of appellant.

If she desires to change the location of the passway from the place it occupies over and through the bottom lands aforesaid "she can petition the county court to make such change, and said court can take into consideration all the equities of the case and act accordingly." See Hansford v. Berry, 95 Ky., 56.

For reasons indicated the judgment of the lower court is affirmed.

SWEATMAN V. HOLBROOK.

(Filed January 16, 1897—Not to be reported.)

1. *One acquires title by accretion* when real estate owned by him is gradually added to by alluvial deposit. But when a stream which forms the line between two estates suddenly changes its course, as by a freshet, the original thread of the stream continues to mark the line between the estates; and, therefore, in this action, involving the title to a point of land which had thus been cut off from the main body of plaintiff's land and joined to the land of defendant, it was misleading to instruct the jury as to title by accretion.

2. *Adverse possession*—It was error to give an instruction to the jury from which they might have believed that it was necessary for plaintiff to show, in

order to recover, that he had been in the "actual, continual adverse possession of the tract of land" for fifteen years next before the suit was brought. If he acquired title to the land by possession or by deed, he might have been out of possession for any period short of fifteen years next before the suit was brought, and defendant might have been in possession for the same period, and still he would have been entitled to recover.

3. *Testimony as to land that had been added by accretion* to plaintiff's land at some other point on the stream than that in controversy was incompetent, but there seems to have been no objection thereto.

F. R. Moore, J. M. Riffe, R. T. Burns and Wm. H. and M. J. Holt for appellant.

G. E. Fugett, G. W. Skaggs and Alexander Lackey for appellee.

Appeal from Lawrence Circuit Court.

Opinion of the court by Judge Paynter.

Since 1883 the appellant has lived within a boundary of land situated on the north side of Big Blaine creek in Lawrence county, claiming it as his own.

Some time after he had thus taken possession of the land his father made him a deed thereto, which described the southern boundary line of the land as follows, to wit: "Beginning on top of the bank of Blaine on the northwest side of the upper end of the farm now occupied by C. L. Sweatman on a stone set up for a corner; thence three poles to the middle of Blaine; thence with the meanders of said creek * * * to the mouth of Hood's fork of Blaine; thence, etc.," giving the courses and distances of the other lines of the tract.

Those under whom appellee Holbrook claim owned land on South side of Big Blaine, opposite that belonging to Sweatman, claiming as did Sweatman to the meanders of Big Blaine creek.

In fact the deeds conveying land on the south side of the creek call for C. L. Sweatman's line. Some time between the close of the late civil war and 1876 there was a freshet in Big Blaine creek that caused it to leave its original channel and make a new one through the lands of Sweatman, thus cutting off a point of his land and leaving it on the south side of the new channel. Upon this point thus cut off trees were left standing, and which were remaining on the point when this cause was tried.

The petition alleges that Holbrook has wrongfully taken possession of the land, and Sweatman asks to have it restored to him.

The land in controversy was on the north side of the creek before the freshet, and it is not pretended that Holbrook or those under whom he claims owned or had possession of any of the land which was situated on the north side of the creek as the channel originally existed. The witnesses for both plaintiff and defendant who testify in relation thereto prove that the point of land in controversy was left on the south side by the creek changing its channel in the manner stated. The point was not added to the south side of the creek by accretion.

When one acquires title by accretion is where real estate possessed is gradually added to by alluvial deposit.

When a stream changes its course so as to perceptibly cut off a point of the property of a land owner and leave it beyond the thread of the stream the ownership will not be changed.

There are two acres and three roods in controversy. The original channel still exists. From the undisputed testimony the land was

added to the south side of the thread of the stream not by accretion but by avulsion.

"If the change is violent and visible, and arises from a known cause, such as a freshet or a cut through which a new channel is formed, the original thread of the stream continues to mark the limit between the estates." (Gould on Waters, section 159.)

The only way Sweatman has been deprived of his right to the possession of the land in controversy, if at all, is by continuous, adverse possession.

While it was proper for the court to tell the jury the effect of the freshet in leaving the parcel of land on the south side of the thread of the present channel as to its ownership, it was improper to give instructions Nos. 4 and 5 as to the subject of title by accretion. The undisputed facts, as we have said, show the land was not added by accretion; therefore, it was misleading to the jury to instruct them on that question. Besides, undue prominence was given in these instructions to a question not involved, because instructions 4 and 5 as copied in the record are literally the same. They were calculated to mislead the jury.

As instruction No. 1 was offered by the appellant no reversal could be had because the court gave it. It is inartificially drawn. Under it the jury might have believed that before Sweatman was entitled to recover it was necessary for him to show that he had been in the "actual, continuous, adverse possession of the tract of land" for fifteen years next before the suit was brought.

If he acquired the title to the land by possession or the deed from his father, he might have been out of his possession for fourteen years and 364 days next before the suit was brought, and for the same period it might have been in the possession of Holbrook and still he would have been entitled to recover. There seems to have been no objection to the admission of testimony as to land which had been added by accretion to Sweatman's land at a point on the creek other than the one in controversy; in fact it is proven by appellant and his witnesses. Of course this testimony was incompetent and misleading.

The fact that Sweatman gained land by accretion at another point on the creek did not affect his title to the land which had been left on the south side of the stream by the freshet.

The judgment is reversed, with directions to grant appellant a new trial and for further proceedings consistent with this opinion.

The court delivered the following response to petition for rehearing February 25, 1897:

The court understand that Sweatman is seeking to recover the land which lies between the thread of the channel of Big Blaine creek as it ran before the freshet and the thread of its present channel—that is to say the point of land which was left on the south side by avulsion. If this point of land has been added to by accretion since the avulsion then Sweatman became the owner of the soil thus added by accretion as much so as if such addition had been made by accretion on the other side of Blaine, opposite the point in question, for he owned the land on both sides of the new channel at that point.

The court on another trial of the case can give an instruction embodying the principle we have stated as to the right of Sweatman to the land which may have been added by accretion to the point which was left on the south side by Blaine changing its channel in the manner stated.

The deed of C. L. Sweatman to A. M. Holbrook purports to con-

vey an undivided interest in certain lands, and it was made before the freshet. It calls to run to the mouth of Spring branch, "thence meandering Blaine to the beginning," and conveys an interest in land on the south side of Blaine creek.

ROBERTS, DEPUTY SHERIFF V. ROSS, &C.

(Filed January 16, 1897—Not to be reported.)

School tax—District including parts of two counties—The county superintendents of two adjoining counties may lay off a school district composed of parts of both counties, such district to be reported only as belonging to the county in which the schoolhouse of same is situated. And the evidence in this case is sufficient to show that appellees were included in a district thus laid off, the schoolhouse of which is in a county other than that in which they reside, and they are, therefore, not liable for a tax levied to build a schoolhouse in a district including them subsequently laid off in the county of their residence.

J. M. Lassing for appellant.

G. G. Hughes for appellees.

Appeal from Boone Circuit Court.

Opinion of the court by Judge Hazelrigg.

In this action the appellees seeks to enjoin the collection of a tax levied to build a a schoolhouse in district No 26 in Boone county, on the ground that they are residents of school district No. 22 in the adjoining county of Gallatin, and which was laid off in 1869 by the two superintendents of common schools in and for the counties of Boone and Gallatin.

The appellants deny that such a district was laid off, or that there is any record of it in Boone county, and aver that district No. 26 in Boone county has always included the appellees.

The proof shows that in 1869 a district was laid off by the two superintendents, and that since that the appellees have contributed to the building, repairing and furnishing a schoolhouse in that district, No. 22, and have sent their children there and not to the school in district No. 26, and if any of the children have been listed in the latter district it has been done over their protest.

The Boone county record does not show this, but on the contrary shows at least since 1874 that district No. 26 includes these appellees. It would seem, therefore, that they are included in both districts. As the law existed in 1869, and as it still exists (volume 1, Acts 69 and 70, page 124, Kentucky Statutes, sections 4427-4430), the county superintendents of two adjoining counties might lay off a district composed of parts of both counties, and such district was to be reported only as belonging to the county in which the schoolhouse of the same was situated. For this reason, perhaps, the Boone county records do not speak of district No. 22 of Gallatin county and show its boundary, though the school officials had ample notice of its existence.

The superintendents making this district are both dead, but the proof is conclusive that they made it. There is some confusion as to the time it was done, the appellees proving it in 1869, while it appears that Foster, the superintendent of Boone county, whom the

appellees say did it, was not superintendent until 1872. That, however, is earlier than any record evidence of district No. 26. The oral testimony offered does not contradict but supplements the record evidence of the establishment of district No. 22.

The judgment enjoining the tax is affirmed.

BRACKETT v. CARRICO.

(Filed January 16, 1897—Not to be reported.)

1. *Continuance*—In the equitable action tried at the September term, 1894, of the Boyle Circuit Court, the issues having been made up at the January term, 1893, the court properly refused a continuance asked by defendant in order to enable him to take depositions to prove the contents of an important letter which had been lost, the desired testimony being in chief, and defendant's affidavit failing to show that he had used any diligence in making his investigation as to the whereabouts of the letter. The fact that he had acted upon the supposition that one of the defendant's witnesses, to whom the letter had been written, had it in his possession, and did not know that such was not the case until that witness gave his deposition a short time before the trial, did not excuse his failure to search for the letter before he testified in chief, he having admitted that he had it in his possession at one time.

2. *Vendor and vendee*—The evidence is sufficient to sustain the chancellor's finding that no fraudulent representations were made by plaintiff in the sale of the land for the purchase price of which he sues, extraordinary opportunities having been given to defendant to thoroughly inform himself as to the character, the quality and the condition of the land and the improvements thereon.

Robert Harding and C. C. Fox for appellant.

R. P. Jacobs for appellee.

Appeal from Boyle Circuit Court.

Opinion of the court by Judge Burnam.

This suit was instituted in the Boyle Circuit Court by plaintiff Carrico against the defendant, Brackett, upon a written obligation dated October 7, 1890, in which the defendant agreed to pay to the plaintiff, twelve months after date, $3,629.85, with interest thereon at the rate of 6 per cent. per annum from date until paid, the allegation being that the note was given by the defendant to the plaintiff as a deferred payment on a tract of land situated in Boyle county, sold by plaintiff to defendant, and conveyed to said defendant by deed dated October 7, 1890, in which a lien was reserved to secure the payment, in which suit plaintiff asked for a personal judgment for the amount of the obligation with interest, and for an enforcement of his lien on said land by a sale of same for the payment of his debt.

This petition was filed May 3, 1892, and on the 20th day of September, 1892, the defendant filed his answer, set-off and counterclaim, in which he admits the execution of the note sued on, and that it was for the purchase price of the land described, but he seeks to avoid the payment of said note and asks a rescission of the contract of sale upon the alleged grounds that before the execution and delivery of said note the plaintiff falsely, fraudulently and with the intention of defrauding the defendant, represented to him that the

land for which said note was given as a deferred payment had upon it two never-failing ponds of water, which statement as to both of said ponds was false and was known by plaintiff at the time he made it to be false, and were made with the fraudulent purpose of inducing the defendant to buy the land; that this statement did induce him to buy the land, and except for the aforesaid false representation he would not have purchased the land or executed the note.

He charges that after he got possession of the land one of the ponds became dry and there was no water in it for four months in 1891, and for one month in 1892, and that the water had repeatedly failed in said ponds since his purchase, and that they had repeatedly gone dry before the purchase, and that plaintiff knew it. He says that at the time of the purchase both of said ponds were full of water.

2d. He seeks to avoid the payment of said note upon this additional ground that the plaintiff, in order to induce him to purchase the land and execute the note sued on and make the cash payment, falsely and fraudulently represented to him that said land was clear of rock except near certain sinkholes, and that said rock was not close enough to the surface to be reached by a plow in the cultivation of said land, which statements, defendant says, were false and fraudulent and were known to be false and fraudulent at the time of plaintiff's making them, and that they were made with the fraudulent intent of inducing defendant to buy said land and execute the said note and make the cash payment; that he did rely upon said statements, believing them to be true, and that he would not have purchased said land except for such belief, and alleging further that at the date of the purchase the farm was covered with grass and weeds, and the rocks were not visible, except in the sinkholes, but that he found when he attempted to cultivate the land it was full of rocks near enough to the surface for a plow to strike them and to interfere with the cultivation of it, and that said rocks materially affected the value of the land, and on account of the aforesaid fraudulent misrepresentations he asks for a rescission of said contract and to have the cash payments made by him paid back to him.

In a second paragraph of said answer he claims that by reason of the aforesaid false and fraudulent representations as to the water and rocks on said land he has been damaged in the sum of $1,000, and that if he is not entitled to a rescission that he is entitled to have the purchase price of said farm abated by said sum of $1,000.

In addition to these things the defendant alleges that the plaintiff sold to the defendant twenty-five head of hogs, and that he paid him therefor, which hogs were left upon the farm; that plaintiff, without his authority or consent, took possession of fifteen of said hogs and converted same to his own use and has never accounted to defendant for same, and that said hogs were reasonably worth $225.

He also charges that plaintiff is indebted to him for $20 for two weeks board for himself and family, furnished at his special instance and request in 1890. He also charges that he bought of the plaintiff a certain mare at the price of $150; that plaintiff represented said mare to be sound and free from defects, and warranted her to be sound, while she was in fact unsound, in that her eyes were defective; and he pleads each of the aforesaid items as a set-off against the note sued on.

All the affirmative allegations of this answer were denied in detail by the plaintiff herein, and on the issues raised by the pleadings

a large amount of proof was taken. The case was continued from term to term until the September term, 1894, at which term the plaintiff pressed for a submission of the case. At this term the defendant moved the court for a continuance upon the grounds that previous to the purchase of the land the plaintiff, Carrico, had written to one Tom West a letter, in which he gave a description of the land, and which was written before he ever saw same; that in said letter the land was represented as being well watered, and that it it had on it two never-failing ponds, or words to that effect; that said West was the agent of plaintiff in making the sale to this defendant; that said letter was given to him for his information, and as an inducement for him to buy said land, and that he relied upon the statements in said letter.

He alleges further that he made diligent search for this letter and could not find it, and supposed it was in the possession of said West until he gave his deposition a short time before that term of the court.

Immediately after West gave his deposition the defendant, who had previously given his deposition in this case, gave a new deposition, in which he and several members of his family proved the contents of said letter.

Upon exceptions being made to the competency of this evidence as to the contents of said letter, the court sustained the exceptions and ruled out said testimony upon the ground that the same was testimony in chief and could not be given by way of rebuttal, and by such action of the court the contents of said letter were eliminated from the consideration of the court. He says that same was material and important for his defense, and that a continuance ought to have been granted him in order to enable him to take the deposition of his son, Gail Brackett, and one Robert Goodwin to prove the contents of said letter.

First, upon the question of the continuance the pleadings show that the issues were made up in this record at the January term, 1893, and that this action was not tried until the September term, 1894. The burden of proof was upon the appellant to establish the defenses relied on by him, and if he regarded the letter to West as important in establishing his defense it was certainly necessary for him to produce this letter or testify as to its contents in his deposition in chief, if the letter itself could not be found.

His affidavit for continuance does not state any fact showing why he had not introduced West as a witness if he desired to take his testimony, or why he could not have discovered, during this long interval of time, more than a year and a half from the completion of the issues to the trial of the case, as to whether he had said letter in his possession or where same was. We do not think that the affidavit of the defendant shows that he used any diligence in making his investigation as to the whereabouts of the letter. He admits that the letter was given to him by West, and says that he had made search for it and could not find it. It is not apparent why he could not have done this before he testified in chief.

It seems to us that all the evidence set forth in appellant's affidavit, and upon which he based his motion for a continuance, were matters in chief. The burden was on him to make out his defense. In view of all these facts in the case it seems to us that the court below properly overruled his motion for a continuance.

Now, as to the judgment on the merits of the case, the facts show that the plaintiff was exceedingly anxious to sell this property; that he had spoken to Tom West, a neighbor of his, who was at that time

residing in Bell county, Kentucky, about the matter, and had promised to pay him liberally if he would send him a purchaser as early as July of that year; that West, mindful of this agreement, had called the attention of the defendant in this case to the place, knowing that he desired to purchase land; that said West had written to the plaintiff, and that said plaintiff had written back to him a letter pricing this property at $45 an acre and describing same, which letter was delivered to the defendant herein. The testimony of West shows that several different dates were fixed when said defendant should come and examine said land; that finally in August, 1890, the defendant did go to Boyle county pursuant to an arrangement made with plaintiff and West; that he went out to this place and went over the entire farm, going over every field on the place; that he spend the night on the farm of the plaintiff; that he had with him his son, A. L. Brackett, who seems to have been a practical farmer at the date of this inspection; that he saw both ponds which were, to furnish the water supply necessary for the farm.

The proof shows that this son actually moved to this place in September, and that he engaged in the cultivation of that land, sowing wheat, rye, timothy and other small grain, until some time in October, when the the defendant came again to the premises and consummated his agreement to purchase.

It seems to us that extraordinary opportunities were given to the defendant to thoroughly inform himself as to the character, the quality and the condition of this land, and the ponds and other improvements on same.

The evidence conduces to show that these two ponds were simply artificial depressions made to hold water, and the cost of same would not have exceeded $25 to $30 each.

The evidence also conduces to show that in order to make these ponds a source of water supply they must be frequently cleaned out and kept in order. The evidence of the son of the defendant shows that the large pond was situated in a field which was broken up and had been cultivated the year after the purchase, and had been in continued cultivation up to the date of the suit. This deposition also shows that all the land was cultivated, except about fifteen acres, for the years 1892, 1893 and 1894.

Whilst it may be deduced from the evidence in this case that the price paid for this land by the defendant was a liberal one, it seems to us that the evidence entirely fails to sustain the contention of the appellant as to any fraud or fraudulent misrepresentations in regard to the same by the appellee. Nor is it apparent that the court may reasonably conclude that any fraud which this court could relieve against was practiced upon the defendant by the plaintiff or by his agent, West, from the fact that the plaintiff executed his note to the said West for $500 upon the condition that same was not to be paid until plaintiff had collected the whole of his purchase money from the sale of the land in question as compensation for his services. The compensation was doubtless liberal, but the conditions attached to it that same should not be collectible until after the payment of the full amount due upon the land were more reasonable on this account, as the said West understood that he would have to wait a long time for his compensation for the services rendered.

We do not think that the contentions of the defendant as to the representations and guaranties made by appellee in regard to the rocks and ponds on said land have been sustained by the evidence, or that this court would be justified in setting aside said sale on ac-

count of said misrepresentations, or in allowing to appellant any credit by way of compensation.

We are further of the opinion that the conclusions reached by the chancellor as to the justness and legality of the credits claimed by appellant on account of the fifteen head of hogs, which appellant claims appellee appropriated, valued at $225, or the two weeks' board, valued at 20, and the allegations as to the unsoundness of the mare, valued at $150, were fully supported by the evidence in the record.

For the reasons indicated the judgment of the lower court is affirmed.

TRUMBO, &C. V. RICHARDSON, &C.

(Filed January 19, 1897—Not to be reported.)

Jurisdiction to appoint administrator—Domicil of infant ward—Upon an issue in this case as to the jurisdiction of the Montgomery County Court to appoint an administrator of the estate of a minor who died intestate in Montgomery county, the evidence is sufficient to show that the residence of the intestate was in that county, where his guardian resided, and not in the State of Kansas, where he had remained with his father for eighteen months prior to his return to Kentucky a few weeks before his death, the guardian being given by the statute the custody and control of his ward.

J. J. Cornelison for appellants.

O'Rear & Bigstaff and Fenley E. Fogg for appellees.

Appeal from Montgomery Circuit Court.

Opinion of the court by Judge Guffy.

In 1889 James W. Coons, a minor, departed this life intestate in Montgomery county unmarried and without descendants, and in 1893 the plaintiff, Richardson, was granted administration upon the estate of the decedent, and afterwards brought this suit for a settlement of the estate of his intestate, and sought a sale of twenty-one acres of land, owned by decedent, situated in Bath county. It seems that the parents of the decedent had been separated by a decree of divorce in Bath county several years before, and that the custody of the children had been adjudged to the wife, Anne E. Coons, who is also dead. The father, Thos. Coons, removed many years ago to Kansas. It also appears that T. J. Coons, a brother and two sisters survived the decedent, and being informed that they inherited the land aforesaid, two of them united in a deed to Jos. E. Roberts, conveying their supposed interest in the land to him. The father, Thos. Coons, brought suit and recovered the land, and afterwards sold it to appellant Trumbo, but the sale was made after the institution of this suit. Thos. Coons made defense to this suit, as also did Trumbo, claiming that the residence of decedent was in Kansas, and that the court of Montgomery county had no jurisdiction to appoint an administrator, also disputing the claims of T. J. Coons and Ramey. The cause was referred to the master commissioner for settlement. A considerable amount of proof was taken and exceptions filed to the commissioner's report, etc.

The court, upon final hearing, confirmed the report, which allowed part of the claims filed, and adjudged a sale of the land, and also allowed appellant Trumbo a lien for the $60 that he had paid Thos.

Coons on the purchase price of the land; and, from the judgment allowing the claims and adjudging a sale, Trumbo and Thos. Coons have appealed.

The contention of appellants is that the decedent was a resident of the State of Kansas, and only on a visit to Kentucky when he died. The proof shows that T. J. Coons, a resident of Montgomery county, was the guardian of decedent, appointed, however, in Bath county in place of a former guardian; that decedent had resided for a time with his guardian in Montgomery county, and afterwards went to his father's in Kansas, and was absent from this State about eighteen months, and became afflicted with diarrhœa, and returned to Montgomery county, and in a few months died of said disease, and the claims of T. J. Coons and of Ramey was for care and attention to him in his sickness. It may be conceded that the proof is, to some extent, conflicting as to the residence of decedent, but it is clear that most all his life had been spent in Kentucky; that he had lived with his guardian, T. J. Coons, before going to Kansas, and resided with him part of the time after his return, and by section 2032 of Kentucky Statutes the guardian is given the custody and control of his ward; hence, we conclude that the evidence shows, with reasonable certainty, that decedent's residence was in Montgomery county at the time of his death, and, therefore, the county court of that county had jurisdiction to grant letters of administration. The proof also sufficiently sustains the report of the commissioner as to the allowance of the claims reported by him, and it was, therefore, proper to confirm his report.

Judgment affirmed.

McKEE'S ADM'R V. PURNELL, &C.

(Filed January 20, 1897—Not to be reported.)

1. *Obligation of lunatic*—The civil acts of a lunatic are on a parallel with those of an infant, and he can not bind himself by contract. Therefore, a note executed by a person of unsound mind has no obligatory force as such.

2. *Attorney's compensation*—For the necessary services of an attorney, rendered for one on the trial of a proceeding to have such one adjudged of unsound mind, the attorney is entitled to be paid a reasonable compensation.

G. C. Lockhart and Hanson Kennedy for appellant.

Wm. J. Hendrick for appellees.

Appeal from Bourbon Circuit Court.

Opinion of the court by Judge Paynter.

The action is on a note executed by Dinwiddie McKee, now deceased. It imports that the consideration therefor is "professional services on second hearing, inquest as to said McKee's capacity to manage his estate."

The petition is in the usual form of petitions on promissory notes, except it recites the consideration of the note in the language quoted.

The answer pleads that McKee was of unsound mind at the time he executed the note, and did not have sufficient mind to know the nature and effect of it, etc. To this answer a demurrer was sustained.

In Breckinridge's Heirs v. Ormsby, 1 J. J. M., 238, it is said: "A parallel is supposed to exist between the civil acts of lunatics and infants. This is the well-established doctrine of the law as evidenced by a series of decisions in England and the American States."

This court said, in Beeler v. Young, 1 Bibb., 520: "Even for * * necessaries an infant cannot bind himself in a sum certain, if that sum be an unreasonable price, for an infant is incapable of *contracting;* therefore, the bond, note, or promise or deed of an infant does not bind him as a *contract*, although for necessaries; but as an infant must live as well as a man, therefore the law allows a reasonable price for necessaries to those who furnish him. A count upon an *insimul computassent* will not lie against an infant, although it should be for necessaries; for he, having no discretion in contemplation of law, is incapable of stating an account, and is not liable to false or unreasonable accounts."

Neither has a note executed by a person *non compos mentis* any obligatory force as such.

If the facts are as alleged in the answer there could be no recovery on the note in suit, and the demurrer thereto should have been overruled.

For necessary services of an attorney, rendered for one on the trial of a proceeding to have such one adjudged of unsound mind, the attorney is entitled to be paid a reasonable compensation. As this question was fully discussed in the opinion this day delivered, in the case of Dinwiddie McKee's adm'r v. Ward & Dickson, we deem it unnecessary to discuss it further here.

The judgment is reversed, with directions to overrule the demurrer to the answer, and for further proceedings consistent with this opinion.

JUDY V. FIRST NATIONAL BANK OF NEWPORT, KY.

(Filed January 21, 1897—Not to be reported.)

Construction of order of submission—The plaintiff having entered upon the motion docket a motion "for judgment," and an order being subsequently entered at the same term reciting that the plaintiff "moves to submit the cause for judgment," and that "on motion of plaintiff this cause is submitted," the plaintiff must be regarded as having by this motion submitted the whole case, there being nothing to show that it was merely the motion upon the motion docket that was intended to be submitted. And as the petition and answer were the only pleadings filed, and the answer presented a good defense, the judgment dismissing the petition must stand.

M. H. McLean for appellant.

Wright & Anderson for appellee.

Appeal from Campbell Circuit Court.

Opinion of the court by Judge White.

Appellant sued appellee in the Campbell Circuit Court to recover $200, alleging that he had deposited large sums of money with appellee, which appellee agreed to repay to him on appellant's written order, and that on the —— day of ——, 189–, there was in said bank of appellee the sum of $200 due him; and on said date he drew his check or written order, addressed to said bank for said sum, which was presented to said bank for payment and payment was re-

fused by it, and said check or written order was duly protested for nonpayment, and for which sum he now sues and asks judgment.

Appellee answered and denied that it at any time agreed to pay back to the plaintiff, on the written order of plaintiff or otherwise, the $200 herein sued for. It says that the $200 herein sued for was a part of $1,150 deposited by plaintiff in its bank, and charging that N. H. Walthal owed the appellee a large sum of money, which was a lien on a planing mill in the city of Covington. After the creation of said lien on said planing mill the plaintiff, Judy, bought the said mill property of the said Walthal, and assumed the payment of the said debt due from Walthal to appellee bank, and in consideration thereof appellee agreed to receive said money from appellant, and apply to the debt of said Walthal; that it applied all of said money, including the $200 sued for in this action, to said Walthal debt, and there still remains due on Walthal debt to appellee $400, claiming appellant was estopped to claim said money, and asking to be dismissed.

No further pleadings were filed in the case. On the 4th of May, 1894, appellant entered on the motion docket of the court a motion as follows: "Plaintiff moves the court for judgment in the above-styled case." What disposition was made of this motion the record does not show.

On the 14th of May the record shows this order was made: "Comes plaintiff and moves to submit this cause for judgment, and defendant objected. The court overruled the objections, and, on motion of plaintiff, this cause is submitted, and defendant excepts."

This motion of plaintiff was made in open court, and on the 16th day of May the court on said submission rendered judgment dismissing plaintiff's petition and adjudging cost against him, and from which judgment appellant has appealed to this court.

On the 28th of May appellant moved to set the judgment aside, but filed no reasons therefor, and on the hearing of said motion it was overruled, and appellant excepted. Plaintiff then entered a motion to set aside the judgment, charging clerical misprision, and this motion was overruled by the court. On this motion there is nothing in the record to show what evidence was heard by the court. There is no statement made by the clerk to show, in transcribing the motion from motion docket, any error was committed by him, and, therefore, we can not say that the court erred in overruling said motion.

There is nothing to show in this record that there was any attempt to submit the motion on the motion docket for judgment, but, from the record before us, it appears that plaintiff comes and moves the court for judgment, etc. This was in open court on the 14th of May, 1894, sometime after the entry of the motion on motion docket.

We think that plaintiff by this motion submitted the whole case, and upon the pleadings the appellee was entitled to judgment.

The judgment is affirmed.

BECKER V. CITY OF HENDERSON, &C.

(Filed January 22, 1897.)

1. Defect in record of passage of city ordinance—Where the journal of a city council shows the names of the members who were present at a particular meeting, and that the whole number present voted upon a certain ordinance, and the names of those who voted "nay" are given, the record shows, with

reasonable certainty, the names of those who voted "yea" as well as those who voted "nay." As the evidence in this case was sufficient to authorize the conclusion of the trial court that the interlineation of the names of those who voted "yea," which now appears on the record, was made before the minutes were signed by the presiding officer, the requirement of section 3279, Kentucky Statutes, that the yeas and nays shall be entered on the journal, is satisfied.

2. *Necessity for mayor's signature*—An ordinance for the improvement of a street is not an ordinance "involving the expenditure of money," within the meaning of section 3304, Kentucky Statutes, and need not be signed by the mayor, although it provides that the council, in its discretion, may advance the money to the contractor on the cost of such improvement and take an assignment of his lien.

Yeaman & Lockett, John L. Dorsey and Montgomery Merritt for appellant.

Clay & Clay for appellees.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge Burnam.

Section 3449 of the Kentucky Statutes gives to the common council of cities of the third class the power to pass ordinances to require the improvement of streets and alleys by grading, paving, etc., any portion thereof, not less in length than one block.

Section 3450 provides that, upon the passage of any ordinance requiring the improvement of a street as contemplated in section 3449, it shall be the duty of the mayor to enter into a contract with persons offering to do the work required to be done by such ordinance upon the best and most advantageous terms, and to do this he is directed to advertise the letting of such work in some newspaper published in said city for at least ten days for sealed proposals for doing said work and report such contracts in writing as he may be able to effect to the common council for its acceptance or rejection, and such contracts are not binding until ratified by the common council; and it is the duty of the common council to require such contractor to give bond with security for the faithful performance of his contract.

By section 3451 the work contracted to be done must be performed under the supervision of the mayor and the engineer, and is subject to the acceptance of the common council, and it is made the duty of the engineer to make out and report to the common council accurate estimates and apportionments of the cost of said work and improvement against the owners of property liable to pay same, designating each one's liability.

Section 3452 says that when the common council shall have passed an ordinance requiring said improvements to be made, and when the contract in pursuance of such ordinance shall be executed and ratified, and the common council shall have received the report of the engineer estimating and apportioning the cost of the work, and by order or resolution shall have received said work as done according to contract, then the liability of the owners of the property chargeable with the cost of said work shall be fixed, and there shall be a lien on the property for same.

Section 3453 provides that a lien given for the purposes named in the above section may be enforced by a petition in equity in favor of the contractor or his assignee against any or all the persons liable for the cost of said work, and that it shall only be necessary for the

plaintiff in the action to file a copy of the ordinance of the common council requiring the work to be done, a copy of the contract for doing same, a copy of the engineer's report showing the respective liability of each person sued and a copy of the order or resolution of the common council receiving the work as done according to the contract, which shall be, together with the corresponding allegations in the plaintiff's petition, *prima facie* evidence of the plaintiff's right to recover, in which it shall be lawful for the court to adjudge a sale of the lot of each person as will pay his or her part of the cost according to the estimate of the engineer against him or her for such, and it shall be lawful for the court hearing the case to adjudge a sale of so much of the lot or lots as will pay his or her part, and may have personal judgment against the defendants liable for the cost of the work also.

Pursuant to the authority conferred by the aforesaid sections of the charter of the city of Henderson, the common council of that city passed an ordinance ordaining that the south side of Washington street, from Main to Green streets, be graded and improved by a gutter and pavement in accordance with the specifications of said ordinance.

The records of the city show that this ordinance was first read and adopted on the 9th day of May, 1894; that it had its second reading on May 10, 1894; that at these readings same was passed by a vote of more than two-thirds of all members of the common council present upon a yea and nay vote, yeas and nays being recorded. The records further show that this ordinance was published in the *Daily Journal*, a newspaper published in the city of Henderson, for at least ten days, and that a contract was entered into to do this work between the city of Henderson on the one part and one Ed. Mamion, with Gabe as his security, on the 24th day of May, 1894, and that this contract was approved by the common council on the same date, the contract being signed by J. B. Johnson, mayor *pro tem*.

Section 4 of the ordinance aforesaid provides it is further ordained that "the city of Henderson shall not in any event be held liable for any of the costs of furnishing any materials or doing said work. The contractor furnishing the material and doing said work shall look exclusively to the property holders fronting said improvement for his pay; provided, however, that the common council may, in its discretion, advance the money or any part thereof to the contractor on the cost of said improvement on the condition that the said contractor assign to the city his lien on the property fronting on said improvement on which said advance is made."

And the contract aforesaid also stipulates, in addition to agreeing to do the work in accordance with the specifications, "that in the event the city of Henderson advances the money on the cost of said improvement that the said Mamion will assign the city his lien on the property fronting on the improvement. Said ordinance is made as in said ordinance provided."

On the 30th day of June, 1894, S. H. Kimmel, the city engineer of the city of Henderson, reported to the common council of the city that the work of constructing the brick sidewalk and the brick gutter on Washington street, between Main and Green streets, as authorized by the ordinance adopted by the common council of the city of Henderson on the 10th of May, 1894, and recorded in the proceedings of the common council, had been completed as contracted for; that there was on the south side of Washington street, between Green and Main streets, 449.1 lineal feet; that the cost of the work at $1.42 amounted to $637.72; that Nick Becker owned 207.05 of said

feet, and that he owed for the work so done $294.01, at the rate of $1.42 per front foot.

It also appears from the record that on the 5th day of July, 1894, the contractor, Mamion, assigned all his right, title and interest to said claim against the said Becker and others to the city of Henderson for the work done as aforesaid in front of his property in accordance with the ordinance heretofore recited.

And it is to enforce this lien that this suit has been instituted by the city of Henderson against said Becker, and same is resisted by said Becker upon a number of grounds: First, by demurrer to the plaintiff's petition, which was properly overruled, and then by answer, in which the following defenses are relied upon:

1st. They charge that the copy of the ordinance filed with plaintiff's pleading was not a true copy; that the yea and nay votes were not recorded when the ordinance was passed or approved or signed; that the names of the councilmen voting for the passage of said ordinance were inserted in the journal of the proceedings of the council after said ordinance had been passed and approved, and after the contract for doing the work had been let, and when same was without authority, and upon the further claim that same was not passed by a two-thirds vote of the council at any session.

2d. That the ordinance itself authorized the city to advance to Mamion, the contractor, the money to do the work in question, and that this money was furnished by the said city; that the city had no power to advance money to improve streets that by ordinance are required to be improved at the expense of the abutting property, and that plaintiff voluntarily paid said debt, and had no cause of action.

3d. Upon the ground that the charter of the city required every ordinance involving the expenditure of money within three days after its passage to be correctly and legibly engrossed by the clerk and presented to the mayor, approved by him or returned to the council with his objections in writing before the first regular meeting, which shall not be held within five days after it is presented to him; and if he returns same with his objections it is not valid until it is passed by a vote of two-thirds of all the councilmen then in office, the yeas and nays being recorded in the journal, the defendant alleging that said ordinance was an ordinance involving the expenditure of money, and it was necessary to its validity that it should have been engrossed and presented to the mayor, and that it was never presented to the mayor for his approval, and was, therefore, void.

Let us take up these defenses in the order in which they are made. First, section 3279 provides that no ordinance shall take effect and be binding until same shall be twice publicly read and passed by the common council at two sessions held on different days, a majority of those present voting for same on both passages, the yeas and nays being called and entered upon the journal; provided, however, that all ordinances requiring the improvement of streets and alleys or the construction of sewers or fixing salaries, etc., or appropriating money where the amount appropriated is in excess of $100, shall on each passage receive the vote of two-thirds of all the councilmen then elected, yeas and nays being called and entered on the journal.

Section 3246 provides that at each regular meeting the proceedings of the preceding regular meeting and any intervening meeting or meetings shall be publicly read, corrected, approved and signed by the *presiding officer* and attested by the clerk.

Now the facts in this case seem to be that this ordinance was twice publicly read and passd by the common council at two sessions held on different days. It further appears from the proof that the clerk failed to record the yea and nay votes, simply noting that of the eleven members of the council present nine had voted in favor of the ordinance and two against it, giving the names of the two who voted against it. The minutes of the meeting show the names of the members of the common council who were present, and the record, therefore, with reasonable certainty shows both the names of those who voted yea and those who voted nay. The evidence for plaintiff conduces to prove when the proceedings of these two meetings were read by the clerk at the regular meeting held by the common council on the 15th day of May, 1894, the presiding officer called the attention of the clerk to the fact that it was his duty to write out fully the names of the members of the council who voted yea, and this was done by the clerk on the 15th, and before said minutes were signed by the presiding officer.

About the date when this interlineation occurs there is some contrariety of proof, the mayor *pro tem.*, the clerk and four of the members of the council all swearing positively that this interlineation was made on the 15th, before the minutes were signed or the contract let.

The appellant, on the other hand, proves by his own testimony and that of his attorney, J. L. Dorsey, that they examined this record as late as the 24th, after the ordinance was signed and the contract let, and that at that date the names of the councilmen voting yea had not been interlined, and same was done after that date.

It is very difficult for the court to determine what are the exact facts in regard to this matter, but we think the conclusions reached by the trial court are sustained by the weight of the evidence and should not be disturbed.

Appellant in this case stakes his claim for reversal chiefly upon the fact that the ordinance for the improvement of Washington street was an ordinance appropriating or involving the expenditure of money, and that it was necessary, in order to give validity to said ordinance, that same should have been correctly and legibly engrossed by the clerk and presented to the mayor for his approval, and that this was not done, and that for that reason the ordinance was void.

Section 3304 requires every ordinance, resolution, order or measure appropriating or involving the expenditure of money, etc., to be so engrossed and presented to the mayor by the clerk for his approval; that if he approves same he shall sign it; that if he does not approve same he shall return it with his objections in writing to the common council at the first regular meeting, which shall not be held within five days after the same shall have been presented to the mayor, and same shall be immediately reconsidered by the council, and shall not take effect and be binding unless again passed, two-thirds of all the members elected voting for same, and the yeas and nays being called and recorded upon the journal; or, if the mayor fail to return the ordinance or resolution or measure as herein provided, it shall take effect and be in force from the time he should have returned it.

Section 3309 provides that a mayor *pro tem.* shall be chosen by each common council at its first regular meeting after its organization, or as soon thereafter as practicable, from among its members, and he shall, in the absence of the mayor, or during his disability, or in case of a vacancy, perform the duties and exercise all the pow-

ers vested in the mayor, but he shall not approve or veto an ordinance, resolution or measure during the absence or disability of the mayor, unless such absence or disability shall have continued longer than ten consecutive days.

It is an admitted fact that this ordinance was never presented to the mayor; it is also an admitted fact that the mayor, at the time of the passage of the ordinance on the 15th day of May, 1894, was in the city of Henderson, and the records also show that on the 19th he approved a considerable number of other ordinances.

It is manifest that the validity of this ordinance at last turns upon the question as to whether the ordinance itself was a measure involving the expenditure of money by the city. It is very earnestly contended for the appellant that it did involve the expenditure of money, because the ordinance itself provided that the council, in its discretion, might advance the money or any part thereof to the contractor, on the cost of such improvement, on condition that said contractor assign to the city his lien on the property fronting on said improvement, and that in the contract made with Mamion he agreed to assign to the city his lien in the event the city advanced the money to him.

It is true that these provisions, both in the ordinance and the contract, seem to contemplate the possibility of the city becoming the purchaser of the liens, which would inure to the contractor upon the completion of the work in accordance with the terms of the contract; but primarily it was in no sense an ordinance involving the expenditure of money by the city, as the ordinance clearly provides that the work should be done at the expense of the property holder. It was one of the usual and customary orders passed by the common council in the discharge of the necessary duties imposed upon it by law. "An ordinance for the improvement of a street by building a pavement and sidewalk does not necessarily involve an appropriation of money because none is appropriated; it does not involve the expenditure of money because none is expended through the ordinance, and same is not such an act or ordinance as is required by the charter to be approved by the mayor." (Preble v. Portland, 45 Maine, 241.)

"The signature of the mayor of a city incorporated under the general laws of a State is not usually essential to the validity of an ordinance of such city when it is regularly passed by the proper body, and has been duly recorded by the proper officer." (Martindale v. Palmer, 2 Ind., 411; Fisher v. Graham, 1 Cin., 113; Chaffee v. Grainger, 6 Mich., 651.)

There is nothing in the charter of cities of the third class which requires the mayor's signature to the ordinances, minutes or resolutions passed by the common council, unless they appropriate money, or involve the expenditure of money, or grant some license, privilege or franchise. All other proceedings may be approved and signed by the presiding officer at a regular meeting of the council.

The only resolution of the council directing an expenditure of money in connection with this work was the resolution accepting the work and directing the clerk to issue the scrip advancing the money to the contractor, and same is the only resolution involving the expenditure of money. There is no controversy as to the signature and approval of the mayor to that resolution and contract.

It does not seem to us that appellant in this case should complain, because the contractor who did this work has reason to believe that he could collect the money due him for same without being driven to the expense of enforcing his lien against the property of the ap-

pellant. Certainly the knowledge that he could sell his claim and realize the money for same at its full value did not add anything to the cost of the improvement for the appellant.

It is not apparent to us why the city of Henderson could not become the purchaser of this claim and be invested with all the rights of an assignee to collect same, or how such transfer or assignment in any way was injurious to the rights of this defendant. There is nothing in section 3304 which is mandatory upon the mayor; he can sign the ordinance or not sign; he can return it either with or without his veto, or he can do neither, the whole object of this section being to bring to the attention of the mayor as chief executive officer of the city all ordinances which require the expenditure of money, or the grant of license, franchise or privilege.

We conclude that the ordinance in question was not such an ordinance as by law had to be presented to him for his approval, as provided in section 3304, but that same was such an ordinance as the common council of the city had full power and authority to pass; and, when the minutes adopting said ordinance were approved and signed by the presiding officer and attested by the clerk, they had all the binding force and legality which could be given them.

For the reasons indicated in this opinion this cause is affirmed.

HILL V. RUDD, &C., AGENT, &C.

(Filed January 23, 1897—Not to be reported.)

Hill & Hill for appellant.

Wilfred Carrico for appellees.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge White.

This is an appeal from a judgment of the Daviess Circuit Court in favor of appellee and against appellant. The suit was instituted by appellee to recover of appellant installment due on contract or lease of house in the city of Owensboro, Ky. The same issues were tried by this court in the case of Hill v. Rudd, decided by this court April 20, 1896, and reported in *ante*, page 55, and in that case the court decided against appellant, and this court affirms and adopts the opinion in that case as being decisive of the issues in this case.

The judgment appealed from is affirmed with damages.

JOHNSON V. TRUSTEES COMMON SCHOOL DISTRICT NO. 13, &C.

(Filed January 22, 1897—Not to be reported.)

Liability of trustees of common school district—In this action against "The Trustees of Common School District No. 13, Mason County," as a corporation, to recover a balance alleged to be due plaintiff as teacher under a contract of employment with the trustees, the court erred in sustaining a demurrer to the petition, the trustees being a body corporate, with perpetual succession, and their corporate name being that quoted. It is not necessary to determine what is the appropriate remedy to enforce payment of the judgment that may be rendered.

L. W. Galbraith and E. L. Worthington for appellant.

Cochran & Son for appellees.

Appeal from Mason Circuit Court.

Opinion of the court by Judge Paynter.

The trustees of Common School District No. 13, Mason county, entered into a contract with Milton Johnson to teach the common school of the district, beginning on the 2d of September, 1889, for the consideration of $1,350, for a ten months' school. Johnson was to employ and pay an assistant teacher, and also the janitor. The amount was to be paid in monthly installments. The trustees were not to be responsible further than for the special tax, and the amount to be furnished by the State. It was also agreed that if the "tax and public money do not amount to $1,350 that the school shall run at that rate, and not for ten months."

The year following a similar contract was made with the trustees of the district with Johnson to teach the school, etc.

The petition fully alleges the terms of the contract, and that he had fully complied with it, etc. He alleged facts showing that a tax had been properly levied in the district to supplement the amounts which would come to the district from the State; that for the year of 1889 the fund from the State was $246 and district tax $1,034, making $1,280; that the State fund was paid the plaintiff and $950 of the district tax, leaving due him for that year $84. It is also alleged that the State fund for 1890 was $322.34 and district fund was $1,061.18; that the State fund was paid him and $900 of the district fund; that on these balances the sum of $100 has been paid.

The balance due for the year of 1890, before the payment of the $100, is erroneously alleged to be $161.18, as under the contract he was to receive $1,350 for teaching the school, etc., on which he was paid the sums of $322.34 and $900; total $1,222.34. This amount, deducted from $1,350, left the balance due $127.66, as the contract does not provide that he shall have an amount equal to the State fund and district tax, but only $1,350 for the ten months.

The trustees of the district were authorized to make the contracts. The plaintiff rendered the services as required by the contracts. He has not been paid the amounts to which he is entitled under them. The trustees and their successors are a body-politic and corporate, with perpetual succession by the name of trustees for their district, and as such may sue and be sued, etc.

For whatever amount that may be due the plaintiff under his contracts, he is entitled to a judgment against the "Trustees of Common School District No. 13 of Mason County."

In this action we are not called upon to consider the question as to what is the appropriate remedy to enforce payment of the judgment. The court erred in sustaining a demurrer to the petition and in dismissing it.

Wherefore, the judgment is reversed, with directions that further proceedings conform to this opinion.

POWER V. WALKER.

(Filed May 18, 1896—Not to be reported.)

Damages for breach of building contract—Judgment sustained by evidence—In this action against a building contractor upon a written contract, and an alleged modification thereof, by which plaintiff undertook to furnish to defendant for the building of a courthouse "all the galvanized iron work, slating and tin work," and to put up and complete same according to certain plans and specifications, the defendant pleaded as a counterclaim the damages he had suffered by plaintiff's abandonment of the work before it was completed; and plaintiff, having pleaded as an excuse for his abandonment of the work the defendant's failure to comply with the alleged modification of the contract as to the terms of payment, the evidence being conflicting upon the issues of fact as to whether there was a modification of the contract as alleged, and as to the amount of damages, this court will not disturb the finding of the lower court upon these issues.

Tyler & Apperson for appellant.

J. L. Elliston for appellee.

Appeal from Montgomery Circuit Court.

Opinion of the court by Judge Paynter.

John H. Walker had contracted with Montgomery county to build a courthouse at Mt. Sterling.

Power entered into a written contract with Walker, by which he agreed to furnish all the galvanized iron work, slating and tin work put up, complete the same in every particular in a neat and workmanlike manner according to certain plans and specifications which had been prepared by certain architects. He agreed to complete the work as fast as the "general progress" of building would permit, and for which Walker agreed to pay him $1,625, eighty per cent. of "all work executed under this contract and put up in said building, once every thirty days," and the balance was to be paid when the work was completed.

Power proceeded to execute the work, but before its completion abandoned it, as, he claims, because Walker failed to pay him according to the terms of the contract. He claims that the written contract was modified in this, to wit: Instead of Walker paying him every thirty days eighty per cent. of all work executed under the contract and "put up in said building," Walker agreed to pay him every thirty days eighty per cent. of whatever material he should have on the ground for the purpose of being used in the building in addition to that which should be "put up" in the building.

This action was brought on the written contract and the alleged modification of it.

It is clear from this record that when Power abandoned the work Walker had paid him more than eighty per cent. of the work under the contract which he had "put up in the said building."

It follows then, if the contract evidenced by the writing was not modified, Power had no excuse in law for refusing to complete the work which he had undertaken to do.

The court dismissed the petition in this case by which Power sought to recover the difference between the contract price and the amount which he alleges he had been paid thereon. The court necessarily passed upon the question as to whether there had been a modification of the contract.

The case seems to have turned principally upon this question. Walker claimed it cost him $554 to complete the work which Power had undertaken to do; that he had been damaged several hundred dollars because of Power's failure to execute the work in such manner as his contract required him to do; that he had paid Power on on the work $983.20, which was more than he was entitled to receive.

These were all questions of fact, as well as was the question as to the modification of the contract. There was much testimony taken upon them. We will not disturb the conclusions of the learned judge on these issues of fact.

Therefore, the judgment is affirmed.

Judge Hazelrigg not sitting.

The court delivered the following response to petition for rehearing February 27, 1897:

We will assume that Power had the right to abandon the work because Walker had failed to comply with the terms of the contract. From this point of view the judgment must be affirmed.

This action was upon the covenant, and Power had the right to maintain an action upon the covenant, if anything was due him thereunder. (Jewell v. Blanford, 7 Dana, 472; Rankin v. Darnell, 11 B. M., 30.)

Under the doctrine enunciated in Elizabethtown & Paducah Railroad Co. v. Pottinger Bros , 10 Bush, 188, he had the right to maintain his action for the value of the work done under the contract, and also for damages which he had sustained for its breach by way of profits.

Under the rule announced in Rankin v. Darnell he could not have maintained an action of assumpsit, but only an action on the covenant.

The fact that Power may have had the right to abandon the work under the contract did not entitle him to recover the contract price. (Chamberlain v. McCallister, 6 Dana, 352.)

This is in accord with the current of authorities. He did not seek to recover damages in this case, nor did he allege or prove what his profits would have been had he completed the work under the contract.

He alleges the contract price for the work and the amount that had been paid him thereon; he did not allege the value of the work which he did in the performance of the contract, but said that the work could have been completed for $100. He asked judgment for the difference between the amount which had been paid him on the work and the contract price.

The testimony in this case overwhelmingly shows that $100 or anything like that amount would not have completed the work under the contract. He was entitled to recover the value of the work done under the contract, and the contract must furnish the rule for the measurement of the recovery. (Western v. Sharp, 14 B. M., 177.)

Power in his deposition said that he could not give the value of the material or labor which he furnished under the contract. Having failed to establish inferentially the value of the work done by showing the amount necessary to complete it, we are left without any basis upon which to calculate the value of the work performed under the contract, unless we assume that the amount which Walker contracted to pay for the completion of the work was reasonable.

The contract between Walker and Montgomery county has not

been made part of the record, and we do not know the prices which Walker was to receive for the work which Power had contracted to perform, nor is it material to know. Power is not entitled to recover the prices which the county agreed to pay Walker, nor upon a *quantum meruit*. Neither does he seek a recovery to be measured by either of those methods, but, as we have said, seeks a recovery on the covenant.

It is contended, however, that the superintendent of the work for the county estimated the value of the work at over $2,000 in furnishing a basis for a settlement between Walker and the county. This in nowise is competent to show the value of the work Power performed under the contract. There is no pretense that Walker ever agreed to pay Power more than $1,625 for the work. Had he completed it he was only entitled to the contract price, regardless of the amount which Walker was to or did receive for it. When Power abandoned the work he was not entitled to be paid for his work according to Walker's contract with the county, but according to Walker's contract with him.

Assuming the proper way to ascertain the value of Power's work is to take from the contract price the expense Walker incurred to complete the work, we will proceed to state the account.

We think Walker is entitled to the credit for the $25 paid Vogler for Power September 20, 1890, and which is embraced in Walker's account. McKee testifies that he paid the $65 to Vogler. Vogler admits Walker paid him some money. Walker testifies that he paid this $25, and it appears this $25 is not part of the $65, which is the total of the amounts paid Vogler by McKee. Walker claims he has paid Power and furnished material to complete the work Power undertook to perform $983 87

Take from it sheet lead	$33 55	
Expressage and cartage on it	6 40	
		39 95
Leaves amount		$943 92

With which Power should be charged as payments on the work which he did. Add the amount of $554 which Walker contracted to pay to complete Power's work and it would make $1,498.92 which Walker has paid Power for work and contracted to pay another to complete it.

We think the item for sheet lead is incorrect, because Power's contract did not require him to put up sheet lead. There is some dispute as to $23.40 claimed for extra galvanized iron work. Power's contract required him to put up the galvanized iron work, and, as it is not clear from the evidence that this galvanized iron work, claimed to be extra, is not embraced in the contract, it should be disallowed. Walker was entitled to credit for the valne of the tower belt which he furnished to complete the work, as Power never furnished the one which he said he made and kept in his shop. Of course it was not used in completing the work he had undertaken.

Assuming that Power had the right to abandon the work, he could not be made to pay any damages which resulted to Walker subsequent to the time of the abandonment. Walker asserted a claim for damages to the walls of the building in consequence of Power failing to construct pipes so as to carry off the water from that part of the roof on which he had put slate, and in not putting the slate on a part of the roof completed ready for it, and thus al-

lowed the water to run down on the walls, greatly damaging them. If at all, this damage resulted before Power abandoned the work.

There was considerable testimony offered on this claim, and, while it is not of an entirely satisfactory character as to the exact amount of damages sustained, the judgment of the court below should not be disturbed because the court may have reached the conclusion that the damage Walker so sustained was equal to the difference between the contract price and the amount he paid Power and the amount he contracted to pay to complete the work as heretofore stated.

The court did not give any reason for dismissing the petition, but he necessarily did so for the reason given in the opinion or in this response.

WHITE V. WILSON'S ADM'RS.

(Filed January 9, 1897.)

1. Right to recover money advanced to pay losses at gaming—Where one who has advanced money to another to pay losses at cards after the losses have been incurred was jointly interested with the winners, however small the extent of his interest, he can not recover the money thus advanced.

Where there was a "take-out" in a game of cards which was run continuously at a club, a member of the club who, to some extent at least, managed the game for his own profit, which was to come out of the "take-out," was jointly interested with the winners, and, having advanced to a player money with which to pay his losses, he can not recover the money so advanced, being a joint wrongdoer.

2. The law does not permit corporations to be formed to carry on gaming, and, as soon as a corporation is used for that purpose, the stockholders so using it cease to act as stockholders and act individually and for themselves. Therefore, it is immaterial in this case whether or not the club at which the game was carried on was incorporated or not.

Burnett & Dallam and Samuel S. Blitz for appellant.

Robbins & Thomas for appellees.

Appeal from Graves Circuit Court.

Opinion of the court by Judge DuRelle.

This suit was brought by J. T. Wilson's administrator against his heirs and creditors to settle his estate. Among the claims filed with the commissioner was a note in favor of appellant for $138.50, and an account in his favor for $325, aggregating $463.50. They were proven in the usual form, the additional witness to the account being T. H. Glover.

Exceptions were filed to the claims upon two grounds. First, that the claims were all for money borrowed from appellant for the purpose of betting on and playing at a game of cards called "poker," which purpose and use of said sums was known to appellant; or, second, that appellant won said sums from Wilson at poker, and that one or the other of said grounds was true, but appellees did not know which ground was true. The appellees took the deposition of the appellant, and the exceptions were sustained by the court below. From the judgment sustaining the exceptions this appeal is prosecuted.

It appears that the money was lost in the Union Club, of which appellant was a member, on two different occasions, and in games in which he took no part as player. The sole testimony introduced is that of the appellant himself taken by the appellee, and, as was to be expected, he was a most reluctant witness upon many points.

He states that he paid out the money for which the note was given less than three years before, and also the money claimed in the account at the request of Wilson, to different parties to whom Wilson had lost it at cards at the Union Club; that he waited on the gentlemen engaged in the games at various times, but did not manage the game more than other members of the club; that there was a "take-out" in the game played at the club in proportion to the value of the hands held—that is to say so much for "jackpots," so much for "two pairs," so much for "fours," etc., the amount of the "take-out" being taken as the game progressed from the amount won on any hand above a certain value, and out of this "take-out" was defrayed the expense of the meals, drinks and cigars; that it all went into a fund, and went to the credit of the club if there was any surplus; that this taking out was done by any member of the club who happened to be convenient; that sometimes if there was any money left there appellant took charge of it, and sometimes the colored boy, Dave Evans, who waited on the club members and visitors for what they might choose to give him; that he could not say from recollection who were the parties to whom he paid the money at Wilson's request, and did not know that he could name *one* man to whom he paid money for Wilson.

According to appellant's statement the game was running continuously at that time. There was a dining room for the exclusive use of members and friends invited there by members, and the meals were furnished from the hotel below, charged to the club and paid out of the take-out. Appellant on a number of occasions paid Mr. Seelbach his accounts for room rent, eatables, etc., but declines to give the name of any other member who did so. He states that Dave Evans did so at times, but it is obvious that the payments by the colored steward must have been made under direction. Books were kept at the club showing the indebtedness of those who obtained checks or counters on credit. The book from which the account was taken was kept there but is not produced, and appellant professes ignorance of its whereabouts. When asked if he had any interest whatever in the take-out he says not personally "any more than any other members of the club; I suppose I got my part in eating, drinking and smoking."

The only evidence as to the time of the request by Wilson to pay, and the time the payments were made, is that of appellant, who states that it was in both instances after the losses had been incurred. Appellant takes occasion to state once or twice that the club was incorporated.

We are bound from the evidence to conclude that all the payments were made at Wilson's request and for his benefit after the losses were incurred.

Numerous cases have been cited for appellant to the effect that in cases in which money has been advanced to pay losses at cards after the losses had been incurred the money is recoverable. But we think there is a marked distinction between those cases and the case at bar.

Whether the Union Club was a corporation or not (and there is no *competent* evidence in this case that it was) the fact remains that

appellant was to some extent at least managing it, and for his own profit, which was to came out of the "take-out." This he received either as a partner or as a stockholder, and for the purposes of this opinion it makes no difference, for the law does not permit corporations to be formed to carry on gaming, and as soon as the corporation, if any there was, was used for that purpose, the stockholders so using it ceased to act as stockholders, and acted individually and for themselves. In this view there can be no doubt of appellant's interest in the take-out.

As was well said by Judge Bowden, in Triplett v. Seelbach, 11 KY. LAW REP., 283, "As each winning hand is played the manager is there claiming and taking his share of what is won by that hand. The nominal winner—he who actually plays the hand—has no right to take *as his own* all that his hand won; there, *as it lies*, it belongs jointly to him and to the manager; the latter has as much right to his share, called a 'take-out,' as the player has to the residue. Thus he who plays the winning hand wins for himself and the manager. It is the most effective of all joint enterprises; the manager is always the partner of the winner. * * * What is the difference in principle between such a scheme and one in which the manager arranges with one player only for a percentage of his winnings? His right in either case is to the winnings as such; it is in *them* that he has an interest. Neither in the one case nor in the other can it be material to inquire what induces the player to agree to such a participation in the amount won. If the manager should furnish the money to be used in the game that would be the inducing fact. Why it is not so, if he furnishes gilded parlors, sumptuous meals and sparkling wines? The question is not as to what moves the player to consent that the manager shall be a participant with him in what he wins; the fact of participation is alone important."

In our judgment appellant was a joint wrongdoer with the winners from Wilson, in that he had an interest in the winnings, no matter how small.

Under the principles laid down in the case cited above, and in the same case when decided in this court, if Wilson had paid his losses at the time they were incurred to the various winners, he might have recovered them from White.

Said Judge Bennett in the same case in this court, 91 Ky., 33: "It is not the extent but the community of interest that makes wrongdoers responsible for the whole wrong. If each is to receive a certain amount of the result of the unlawful enterprise this gives them such a community of interest as to render each responsible for the whole amount received."

The judgment of the lower court is, therefore, affirmed.

LOUGHRIDGE, PRESIDENT, &C. V. ALLEN.

(Filed January 19, 1897—Not to be reported.)

1. Sales of personal property—Right to return given by contract—Where a contract for the sale of fifty mules provided that if at the time the buyers "are ready to ship said mules to market, as contemplated by them, they so elect, they shall have the right to return any ten of said mules," the buyers had the right to make their election to return the ten mules at any time before they had shipped all the mules, and were not obliged to tender them before they had "commenced" shipping the mules.

2. *Measure of damages*—In this action upon a note executed for the purchase price of the mules, in which the defendants pleaded as a set-off the damages sustained by them by reason of the plaintiff's refusal to accept ten of the mules offered to be returned by them, the court practically excluded from the jury, although it refused to do so in terms, the evidence of the value of the mules in the southern market by directing the jury to fix the damages upon the set-off at the difference between the market value at Lexington, Ky., and the stipulated credit agreed upon per head in the contract. Therefore, the plaintiff was not prejudiced by the admission of the testimony as to the value in the southern market, even if it was incompetent, which it does not seem to have been, as the measure of damages was to be fixed by the value in the southern market if the mules were purchased for that market, and this fact was understood by both parties to the contract.

3. *Instructions—Interest upon unliquidated claim*—The court properly instructed the jury that if they found for defendant on his set-off "they should allow him amount so found as of the date when the ten mules were offered to be tendered, if they were so offered to be tendered," the instruction not being liable to the objection that it allows interest upon a claim for unliquidated damages.. If defendant was entitled to the credit at the stipulated price at the time the mules were tendered, that tender should stop interest upon plaintiff's claim.

4. *The finding by the jury as a part of their verdict* "that the ten mules in question were tendered within the spirit of the contract," although not responsive to the instructions, was immaterial, and may be rejected as surplusage.

Bronston & Allen and John T. Shelby for appellants.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge DuRelle.

This action was brought by the appellant to recover the balance due on a note for $641.32, which had been executed to him by the appellee. The defendant did not controvert the plaintiff's right of recovery, but pleaded an equitable set-off in his answer and amended answer, which is, in effect, that in October, 1890, the plaintiff, as president of the Lexington Street Railway Company, and on its behalf, contracted with the defendant and his partner, who subsequently assigned his interest in the claim to appellee, for the sale of fifty mules. Upon this contract the main question in the case arises.

The contract, after reciting the money consideration to be paid by appellee and his partner, and that the title to all the mules sold by appellee and his partner should be unincumbered by any claim of the appellant, further provides: "And it is agreed and understood by the parties hereto that if, at the time second parties are ready to ship said mules to market as contemplated by them, they so elect, they shall have the right to return any ten of said mules, provided same have received no damage at hands of second parties to first party, and first party will allow for them the sum of $70 per head, which sum shall be deducted from the amount of the note mentioned herein; but second parties shall receive nothing for the keeping of said mules during the time they may so have them."

The first question made by appellant turns upon the proper construction of this clause of the contract. It appears, from the evidence of appellee himself that he began shipping mules to the southern market on December 31, 1890; that on or about January 25, 1891, when somewhat over half of the mules had been already shipped, and when he was preparing to ship the last carload of the mules bought from the railway company, he brought in ten of them,

tendered them to the company, and demanded that he should be allowed the stipulated credit of $70 per head, and that appellant refused to receive them.

Appellant moved for a peremptory instruction to the jury to disallow the set-off, on the ground that the proper construction of the contract should be that the tender provided for must be made when the parties were ready to ship *any* of the mules purchased to market as contemplated by them.

We are unable to concur in this contention. The contract provided that when the parties were "ready to ship *said mules* to market, as contemplated by them," they should have the right to return any ten of the lot.

It is conceded in the argument of counsel that the shipment contemplated was to the southern market, and the provision of the contract was not that the tender should be made when the appellee and his partner were ready to *commence* the shipment of said mules, but when they were "ready to ship said mules." "Said mules," in our opinion, must refer to either forty or fifty of the lot, at the option of the vendees; and we are of the opinion that until the appellee and his partner were ready to ship all the said mules, or all of them with the exception of those which he had the right to tender to appellant in part payment of the note, his option so to do had not expired.

This contract may have been an unfair one, but it appears to us that it was the contract which the parties made. The trial court might, therefore, have instructed the jury, as matter of law, under the evidence produced, that appellee and his partner had made the tender in due time, and there was no error to the prejudice of the substantial rights of the appellant in leaving that question to the jury.

The second objection of appellant is as to the measure of damages to be recovered upon appellee's set-off. It is claimed for him that the measure is the difference between the value of the ten mules, estimated at $70 per head according to the contract, and their value as fixed by the market price at Lexington at the date of the tender if that market price was less, and the third instruction gives this view of the law to the jury.

The jury were instructed, if they found for the defendant on his set-off, to allow such sum, not exceeding $400, as was the difference between $700, the price stipulated in the contract, and the market value at the time in Lexington, Ky., of the ten mules offered to be tendered to the president of the Lexington Street Railway Company. If, however, the mules were purchased for the southern market, and this fact was understood by both parties to the contract, the rule is quite well settled that the measure of damages is fixed by the value in the market for which the property was intended.

Moreover, the court, by instruction No. 3, the substance of which is given above, practically excluded from the jury, although it refused to do so in terms, the evidence of the value of the mules in the southern market by directing them to fix the damages at the difference between the market value at Lexington and the stipulated credit agreed upon per head in the contract. There was, therefore, no error to the prejudice of appellant on this point.

It is further claimed that the claim for damages, being unliquidated, ought not to bear interest, and that the court, in effect, instructed the jury to allow interest in the instruction in which they were told that, if they found for the defendant on his set-off, "they should allow him amount so found as of the date when the

ten mules were offered to be tendered, if they were so offered to be tendered."

If appellee and his partner were entitled to the credit at the stipulated price at the time the mules were tendered, that tender should stop interest upon appellant's claim against them, and we see no error in this instruction.

Under the court's instructions the jury rendered a verdict as follows: "We, the jury, whose names are signed below, find that the ten mules in question were tendered within the spirit of the contract, and that the defendant was damaged in the amount of $350 by the refusal of the plaintiff to receive the same, and that the defendant is entitled to a credit of this amount from the 25th day of January, 1891." This verdict was signed by ten of the jury. It is complained that the words "the tender was made in the spirit of the contract" was in the nature of a special finding, and not authorized by the instruction; that, if appellee and his partner "did promptly, after they became so ready to ship said lot of mules, bring said ten mules to some convenient place near to the place of business of said company, and then and there offered to tender them to said company," etc.

It may be true that this finding was not responsive to the instruction, but this court, having reached the conclusion that, as matter of law, the tender was made in due season, the language used by the jury in their verdict as to the spirit of the contract becomes immaterial and may be rejected as surplusage, the inquiry before the jury being as to the amount of damage suffered by appellee and his partner.

Wherefore, the judgment is affirmed.

MOON V. POTTER.

(Filed January 23, 1897—Not to be reported.)

Appellate jurisdiction—This court has no jurisdiction of this appeal from a judgment enjoining appellant from collecting a judgment for an amount less than $100.

Thomas H. Hines and J. B. Fitzpatrick for appellant.

Appeal from Letcher Circuit Court.

Opinion of the court by Judge White.

The appellee sued the appellant in the Letcher Circuit Court to rescind and set aside a contract he had executed to appellant to convey to the appellant the mineral and coal on his land in Letcher county, and averring that appellant had failed to comply with his contract of purchase. Appellant answered and claimed he had paid on said contract the sum of $75, and, on the hearing of the cause, the court rendered judgment rescinding the contract and giving appellant judgment for $75, and interest from date of payment, to appellee, and adjudging that appellant have a lien on the land described in the bond. Sometime after this judgment, and before the sale of the land to pay this judgment, appellee filed an amended petition, pleading that he had fully paid said judgment to appellant's assignee, and asking the court to so adjudge. The appellant filed answer, and denied that said judgment had been paid off, or that he had assigned said judgment to anyone; that he was still the owner of the same.

On the hearing the court adjudged that said judgment had been paid, and made orders preventing appellant from proceeding to collect the same, and from this judgment this appeal is prosecuted by appellant.

We are of opinion that this court has no jurisdiction to hear and determine this appeal, as the amount in controvery is less than $100.

Wherefore, this appeal is dismissed.

HEAD V. AUBERRY, &C.

(Filed January 23, 1897—Not to be reported.)

Mortgage—Waiver of exemptions—Under a mortgage of land executed by husband and wife waiving "all rights to said land under the exemption laws of this State," the mortgagors are not entitled to the exemption of a homestead.

W. E. Selecman for appellant.

Appeal from Washington Circuit Court.

Opinion of the Court by Judge Guffy.

The plaintiff below, appellant here, instituted this action in the Washington Circuit Court seeking to recover a judgment on two notes, one executed to him by appellee Auberry for $50 and the other executed to Malby and by Malby assigned to him. He also asserted a lien on one of the tracts of land for the payment of the assigned note, it being for purchase money for the 40 acre tract of land described in the petition, and also claimed a mortgage lien on both tracts by reason of the execution of a mortgage thereon to him by said Auberry and wife.

Defense was made and credits claimed and an offset pleaded. The court rendered judgment for the debt claimed, subject to a credit. The correctness of that judgment is not questioned, hence need not be further noticed. Upon the submission of the cause the appellees, Auberry and wife, were allowed to add the following to their answer on the margin thereof: "The defendants, Ralph Auberry and Francis Auberry say that they have a homestead right and exemption in the 7½ acres of land named and described in the petition, which homestead right and exemption is not waived or relinquished in the mortgage sued on. They ask the protection of the court to said homestead right."

The court below adjudged in appellees' favor as to their homestead right, and to reverse that judgment this appeal is prosecuted. The only question presented for decision is as to whether the mortgage was in law a relinquishment or waiver of the homestead right in said land.

We quote from the mortgage as follows: "This deed of mortgage between Ralph Auberry and Francis Auberry, his wife, of the first part, of Washington county, Ky., and Robert A. Head, of the county of Marion and State aforesaid, of the second, witnesseth, that the said Auberry is justly indebted to the said Head in the sum of fifty dollars borrowed money, evidenced by note of even date herewith. Now, to secure the said Head harmless from all losses, we do by these presents grant mortgage and convey unto the said Head, his heirs and assigns, two certain tracts or parcels, lying and being

in the county of Washington, * * * one piece containing 7½ acres, * * * the other containing 40 acres, * * * to which said Auberry warrants unto the said Head, his heirs and assigns forever; but to be void on condition the said Auberry shall pay off said debt, interest and cost; otherwise to remain in full force and effect. The said Auberry and wife waive all rights to said land under the exemption laws of this State."

The mortgage was signed, acknowledged and recorded. We have not been furnished by the judgment nor otherwise any reason for the judgment appealed from. The mortgage expressly waives all right to said land under the exemption laws of this State. The only exemption the appellees had was the homestead exemption, and it seems to us that the language used as clearly and certainly waived the homestead claim as if the word "homestead" had been used.

In Withers, &c. v. Pugh, 91 Ky., 522, the expression in the mortgage was as follows: "And said grantors hereby especially waive and release all right or claim which arises out of or is given by the exemption laws of Kentucky."

The court in that case held that the homestead was waived. The case at bar is quite as clear and explicit as the case *supra*.

For the reasons given the judgment of the court below appealed from is reversed and cause remanded, with directions to disallow the exemption claimed, and for further proceedings consistent with this opinion.

HIGGINS' ADM'R V. LOUISVILLE & NASHVILLE R. R. CO.

(Filed January 23, 1897—Not to be reported.)

1. *Bill of exceptions—Instructions*—What purport to be copies of instructions referred to in the bill of exceptions as given to the jury, and which are offered as an additional transcript, can not be considered by this court, not being embodied in the bill.

2. *Same*—Where the bill of exceptions does not contain all the instructions given the court can not reverse for an error in instructing the jury, unless the instructions contained in the record could not, under any circumstances and with any modification or explanation, be the law applicable to the case.

Oscar Turner, jr., E. E. McKay and Thomas F. Hargis for appellant.

John S. Kelley for appellee.

Appeal from Nelson Circuit Court.

Opinion of the court by Judge DuRelle.

Appellant brought suit against appellee for damages for the death of his intestate, which occurred on October 5, 1893, after the act of July 3, 1893, passed in pursuance of section 241 of the new Constitution, went into effect. It appears that the deceased was the engineman of the second section of a north-bound freight train on appellee's railroad. The two sections were between two and three hours apart when they left Rowland, but the first section had two disabled engines from a wreck which had occurred a few days before at Hazel Patch, some twenty-eight cars, a number of which were loaded with debris from the wreck, making it a very heavy train, and, on account of the disabled engines, was compelled to run more slowly than the average freight train. Between Chicago and Pottinger's Creek, a

little north of New Hope, by reason of the heavy down grade, the first section of the train at that point broke into three parts. The first cut, with the locomotive, was obliged to go ahead to keep out of the way of the middle cut, which consisted of the two dead engines and eighteen cars. There was one brakeman on the middle cut, which, of course, was the most unwieldy part of the train, and he was unable to stop until his cars had run across the bridge at Pottinger's Creek, where he signaled to the engine to return. The rear brakeman, who is called the flagman, stopped his cars just south of the bridge, and went back to flag the second section.

There is conflict of testimony as to what point he reached before meeting the second section, and where he gave the danger signal. There is also some conflict as to the rate of speed at which the second section was going when the signal was given, and appellee introduced evidence upon that point to show contributory negligence on the part of the deceased in running his train at a high and forbidden rate of speed. The deceased did not stop his train until it had run into the rear cut of the first section, and by the collision the bridge was broken and the engine and a number of cars went into the creek, and the deceased was buried beneath the wreckage and killed.

Under the instructions of the trial court the jury returned a verdict in favor of appellant for one cent and costs, upon which a judgment was entered, to reverse which this appeal is prosecuted.

Appellant's first complaint is that there was error in the trial court giving instructions marked "A" and "B." Neither of these instructions is made a part of the record by any order of court, by the bill of exceptions, or shown in the record before this court; nor are the instructions asked by appellee and refused by the court made part of the bill of exceptions or included in the record.

Instructions 1, 2, 3, 4 and 5, offered by appellant and given by the court, are set out in the bill of exceptions, but the recital of the bill as to appellee's instructions is that it offered instructions marked "A," "B," "C," "D," "E" "F" and "G," to the giving of each and all of which the appellant objected, but the court overruled his objections to "A" and "B" and gave same to the jury, to which the appellant at the time excepted, etc., but sustained the objection to "C," "D," "E," "F," "G" and "H."

A motion was made in this court and overruled to file, as an additional transcript, what purported to be copies of instructions "A" and "B" used upon the trial. These instructions we can not, of course, consider in the decision of this case.

In the case of Forest v. Crenshaw, 4 Ky. Law Rep., 596, it was said: "We have made no examination of the testimony in this case, as the instructions are not properly a part of the record. The refusal of the court to give a peremptory instruction is not assigned for error, and, as to the other instructions complained of, they are not embraced by or included in the bill of exceptions signed by the judge. The clerk has copied certain instructions, but whether they were the instructions given or refused we can not know. They were not made part of the record in the court below by any order of court, nor are they identified by being in the bill of evidence. They form no part of it. * * * Instructions should be identified by making them part of the record by an order of court, or they should be embodied in the bill of exceptions signed by the judge. The proper mode is to include them in the bill of exceptions."

In the case of Meaux v. Meaux, 81 Ky., 478, this court, referring to the case of Forest v. Crenshaw, said: "The bill of evidence signed by the judge was not complete, and what instructions

were given or refused this court could not know, except from the statement of the clerk. The usual mode of making up bills of exceptions is by the direction, *here insert* instructions 1, 2, h, or instructions a, b, h, or instructions in the handwriting of the court or counsel, so as the clerk can identify them; and when copied into the bill of evidence, in the usual form, the bill is complete and the instructions a part of the record; or when the court directs the insertion of the instructions without identifying them, and the clerk inserts the instructions, thereby making the bill complete, this court will not grant the writ of *subpœna duces tecum* that the original bill may be inspected, unless there is an affidavit that the instructions embodied in the bill were not those offered, given or refused by the court on the trial, and so with reference to any *exhibit* made part of the bill of evidence."

In Davis v. Commonwealth, 4 KY. LAW REP., 719, it was held that "*where the bill of exceptions does not contain all the instructions given*, the court can not reverse for an error in instructing the jury, unless the instructions contained in the record could not, under any circumstances, and with any modification or explanation, be the law applicable to the case."

Under this state of case, the only instructions in the record being those given on appellant's own motion, it is scarcely necessary to refer to the other errors assigned. It may be stated, however, that one of the errors complained of is that the court permitted appellee to read in evidence what purported to be a bulletin of date December —, 1891, and in allowing oral proof that the same was in force at the date of the accident, without showing that deceased knew of said order, or had reasonable opportunity of knowing of it, etc. The record, however, shows, on page 21, that the witness (Roller) "here produced bulletin issued by the Louisville & Nashville Railroad, of date December —, 1891, and offered to read the same, to which the plaintiff objected; but the court sustained said objection, and refused said paper to be read to the court, to which the defendant excepted and still excepts."

After a careful examination of the testimony in this case, we find that the verdict is not so flagrantly, if at all, contrary to the evidence in the case as to warrant this court in reversing the judgment upon that ground.

Wherefore, the judgment is affirmed.

TOWNSEND V. RHEA, &C.

(Filed January 26, 1897—Not to be reported.)

1. Continuance—The trial judge did not abuse his discretion in refusing a continuance asked, upon the ground that defendant was not in a physical condition to attend court, as it was not stated in the affidavit for a continuance that defendant expected to testify in the case, or that his presence was necessary to the attainment of justice. Besides, there was no exception to the ruling upon the motion.

2. Attorney's fee—The action being to recover an attorney's fee fixed by contract, the fact that defendant at plaintiff's instance employed counsel to assist plaintiff in the Court of Appeals does not deprive plaintiff of the right to the full amount of the stipulated fee in the absence of an agreement to that effect.

3. New trial—There was no error in refusing a new trial, asked upon the ground of "accident," which consisted in the fact that defendant by reason of

sickness was prevented from attending the trial and testifying as a witness in his own behalf, the facts connected with his physical condition having been presented to the court before trial, and the motion for a continuance on that account overruled and no exception taken. Moreover, as the action was pending in equity from its inception until a few days before the trial, a period of almost two years, and defendant had not taken the deposition of himself or other witnesses, he had not used due diligence in preparing for trial.

Little & Little for appellant.

Ben. T. Perkins, jr., for appellees.

Appeal from Logan Circuit Court.

Opinion of the court by Judge Hazelrigg.

The principal ground urged for reversal in this case is that the court erred in refusing a continuance.

The only ground for a continuance, suggested in the affidavits filed in support of the motion therefor, was that the defendant was not in a physical condition to attend court. It was not stated that defendant expected to testify in the case, or that his presence was necessary to the attainment of justice. There had been several postponements of the trial at defendant's instance, and this court can not say that the trial judge abused his discretion in overruling the motion. Besides, there was no exception to the ruling of the court upon the motion.

The action being to recover an attorney's fee fixed by contract, the fact that defendant at plaintiff's instance employed counsel to assist plaintiff in the Court of Appeals does not deprive plaintiff of the right to the full amount of the stipulated fee in the absence of an agreement to that effect. And while the facts might be such as to authorize the court or jury to infer that there was such an understanding, it is manifest in this case that it was not contemplated that there should be any reduction of plaintiff's fee on that account. And especially is this true in the absence of either allegation or proof that plaintiff was to follow the case to any court to which it might be carried.

The instructions conform to these views, and embody the law of the case. On his motion for a new trial the appellant complained of "accident, which ordinary prudence could not have guarded against," and for the first time disclosed by his affidavit that he was a material witness, and his presence at the trial necessary. This "accident," however, was his physical condition, and the facts connected therewith were presented to the court before trial, and the motion for a continuance on that account was overruled and no exception taken. Moreover, it is to be remembered that the case was pending in equity from its inception in July, 1892, until a few days before the trial in February, 1894, and appellant did not prepare his case by taking the depositions of himself or other witnesses. It does not appear that he has used due diligence in preparing for trial.

Judgment affirmed.

ROBINSON V. MORGAN, &C.

(Filed January 27, 1897.)

1. *Malicious prosecution—Allegation of petition*—If it was the intention of plaintiff to sue for malicious prosecution his petition is defective, because there is no statement contained therein that the charge upon which he was arrested, if upon any, was false and unfounded, or that the arrest was even without probable cause.

2. *False imprisonment*—If the plaintiff intended to sue for false imprisonment it was necessary for him, after admitting that defendants were respectively marshal and police judge *de facto*, to further allege, in order to make it appear that they acted unlawfully, that neither of them was duly elected and qualified as such officer, and that they were, therefore, without legal right, and as usurpers holding and exercising functions of the two offices. It was not sufficient to aver that "neither of them was such officer."

A. M. Baker for appellant.

Appeal from Clay Circuit Court.

Opinion of the court by Chief Justice Lewis.

Appellant's cause of action, as stated in his petition, is that appellees, A. L. Morgan, pretending to be and acting as police judge, John G. White and others, pretending to be and acting as trustees, and Joseph Hacker, pretending to be and acting as marshal of the town of Manchester, when in fact neither of them was such officer, concerted and agreed with each other to do so, and did unlawfully, willfully, without right and maliciously cause appellant to be arrested and brought by said Hacker before said Morgan, who was pretending unlawfully to act as a court, and who unlawfully, wrongfully, maliciously and without right or authority caused him by his order to be taken by Hacker and put in jail, where he was confined four days.

Though not in terms so stated, there is no other meaning to be given to the language of appellant's petition than that he was arrested by Hacker acting as marshal, and was taken to and confined in the jail under an order or judgment of the police court, of which A. L. Morgan was *de facto judge*, and nothing to the contrary being stated after an examination or trial in due form of law.

If it was intention of appellant to sue for malicious prosecution his petition is defective, because there is no statement contained therein that the charge upon which he was arrested, if upon any, was false or unfounded, or that the arrest was even without probable cause.

If he intended to sue for false imprisonment there was something necessary to be stated besides the general allegation the arrest and order of imprisonment were made unlawfully, maliciously and without right. After admitting, as appellant in his petition does do, that Hacker and Morgan were respectively marshal and police judge *de facto*, it was necessary for him, in order to make it appear they acted unlawfully, to farther allege they were neither duly elected and qualified as such officers, and were, therefore, without legal right, and as usurpers holding and exercising functions of the two offices. As the petition does not contain a statement of facts sufficient to constitute a cause of action, the general demurrer was properly sustained.

Judgment affirmed.

TAYLOR V. WILSON.

(Filed January 28, 1897—Not to be reported.)

Limitation—New promise—In this action upon a new promise to pay a debt barred by limitation, as the proof is conflicting as to the promise, and the finding of the lower court for defendant is not flagrantly against the evidence, the judgment will not be disturbed.

W. E. Selecman for appellant.

Clements & Thurman for appellee.

Appeal from Washington Circuit Court.

Opinion of the court by Judge Hazelrigg.

The note out of which this controversy grew was executed in 1857. The plaintiff, now appellant, alleges in his petition that he recovered judgment against appellee, the maker of the note, in the Washington Quarterly Court in 1858, and an execution was issued thereon and returned in substance "no property found" in November, 1859; that within the last five years before the bringing of this suit appellee had promised to pay the debt, and had in fact paid thereon $5 in 1885, and $2.75 in 1890.

The appellee admits that he paid $5 to the plaintiff's agent some twelve years ago, but testifies that he did so upon an express agreement that such payment was to be in full satisfaction of the alleged debt, and further says that the note was in fact surrendered to him at that time. He denies that he ever made any promise to pay any balance.

The proof is conflicting as to the promise, but the appellee's statement that he had possession of the note is corroborated by other proof.

The court found for the defendant, and we can not say that its finding is flagrantly against the evidence.

Judgment affirmed.

ALLEN V. NEVIN.

(Filed January 30, 1897—Not to be reported.)

Practice in civil cases—Upon the return of this case to the lower court after it was decided by this court, as reported in 15 KY. LAW REP., 836, although it may not have been incumbent on the court to ascertain the amount due or to fix a time in which to pay it, yet the court having entered an order reciting that the case was passed one week in order to ascertain the amount and fix the time in which plaintiff was to pay the same, it was then error to dismiss her petition without ascertaining the amount and fixing a time in which it was to be paid.

Wm. Halbourn and Chas. G. Hulsewede for appellant.

Lane & Burnett for appellee.

Appeal from Jefferson Circuit Court, Law and Equity division.

Opinion of the court by Judge Hazelrigg.

Upon the return of this case from this court, where the appellant, then appellee, was denied a homestead as against the claim of Nevin

for street improvement (see Nevin v. Allen, 15 KY. LAW. REP., 836), the chancellor, to the end that Mrs. Allen might pay off the assessment for which the property had been sold, entered this order: "And this case is passed one week in order to ascertain amount to be paid, and to fix the time in which plaintiff Allen is to pay the same."

Thereafter, without fixing that amount or fixing the time within which it was to be paid, the court dismissed her petition. We think this was error. It may have been the duty of the appellant to have supported the amounts of her petition by testimony, and to have tendered the amount supposed by her to be due, and it may not have been incumbent on the court to have undertaken to ascertain the amount or to fix a time in which the plaintiff was to be allowed to pay it, but although she failed to take her proof or make such tender the court, in pursuance of the order, should have fixed the sum to be due on the pleadings, and fixed a time within which the plaintiff might pay off the debt and save her homestead. Not to have done so after the order looking to that end must have been misleading. She had the right to rely on the court making such an order, and may have failed on that account to have procured the necessary money.

The original assessment was $64, and that and the costs amounted at the time of sale to $122. For this sum property valued at $1,000 is about to be taken from the owners. On the return of the case appellant ought to be given a reasonable time, after the amount due is fixed by the court, in which to satisfy the appellee's debt, and this whether her husband is alive or not.

The judgment dismissing the petition is reversed for proceedings consistent with this opinion.

YOUNG, &C. V. CONRAD.

(Filed January 14, 1897—Not to be reported.)

Passway—Adverse user—In this action in which the plaintiff claims by adverse user for more than fifteen years the right to a passway through defendant's stable lot, defendant being an infant when the use of the way in question was begun, limitation did not begin to run against him until he reached his majority; and, as fifteen years have not elapsed since that time, the plaintiff has failed to make out her claim.

Dickerson & Willis for appellants.

A. G. DeJarnett for appellee.

Appeal from Grant Circuit Court.

Opinion of the court by Judge Burnam.

Appellant is a daughter of Isaac Conrad, and inherited the lands owned by her from him. He died in 1889.

Appellee is the son of W. G. Conrad, who died in 1873. Isaac and W. G. Conrad were brothers, and owned two adjacent tracts of land in Grant county, Ky., of about 250 acres each. The lands of W. G. Conrad fronted on one county road and the lands of Isaac Conrad on another parallel county road. For many years a passway existed across these tracts of land from one county road to the other, which was used by the brothers and by the public generally without objection.

There is no evidence that this passway was ever dedicated to the county as a public road, and no evidence that same was ever used under any express agreement by the owners of the lands over which it ran, but as a matter of mutual convenience the brothers had allowed each other and the public generally to pass through each other's lands over said passway.

Before the death of W. G. Conrad he divided his lands between his three sons, T. J., J. C. B. and W. W. Conrad, by metes and bounds.

The passway passed over the lands of appellee until it reached a point about 75 yards from the Mt. Zion pike, at which place it passed off the land of appellee, and from that point on ran over the land of his brother, J. C. B. Conrad, to the public road.

W. G. Conrad made a will, in which he named Isaac Conrad, the father of appellant, as executor. This will required the executor to take possession of the lands devised to his sons, to manage and keep them in repair, and to rent them out, giving his sons the preference as renters until his youngest son became of age on the 20th of September, 1884.

Isaac Conrad took possession of all these lands under this will and managed and controlled them until September, 1884. In 1878 or 1879, at a time when appellee was an infant, the said Isaac Conrad allowed J. C. B. Conrad to fence that part of the passway which passed over his land and to move same over upon the land of this appellee and through the barn lot in question. He also built and put in gates in appellee's fences surrounding his barn lot, so that he could reach the public road without going upon the land of J. C. B. Conrad at all.

After appellee became of age he moved to Kansas and continued a resident of that State until a short time before the institution of this suit. He testifies that he never knew of this change in the passway from the land of his brother to his until a short time before this suit was instituted.

The evidence of Thomas Conrad shows that Isaac Conrad got him to write a letter to his brother, W. W. Conrad, proposing to buy a passway out over this land, upon the idea that if W. W. Conrad should sell said land he might have trouble about his passway with the purchaser. This was refused by appellee.

There is no evidence in this case to show that the ancestor of plaintiff in this action ever claimed any legal right to pass through this barn-lot over the lands of appellee. There is not a particle of evidence to show that appellant or her vendors ever had the permission of appellee to pass through said barn-lot; and whether the change was made in 1878 or 1879 is wholly immaterial, as the statute of limitation would certainly not run against the appellee until he arrived at age in 1884.

It seems to us that appellant has failed to make out any legal claim to the passway through the stable and barn-lot of appellee.

Therefore, the opinion of the lower court in this action is affirmed.

The court delivered the following response to a petition for rehearing February 25, 1897:

The very learned and able counsel for appellant in this case seems to have misconstrued the effect of the opinion rendered herein. We think there can be no reasonable doubt that the passway through the lands of appellant and that of the heirs of W. G. Conrad connecting the two county roads, the Mount Zion Turnpike Road and the road

that runs in front of the house of the witness, Osborn, was a right of way to which the appellant and the public generally had a prescriptive right, and there is no intimation in the opinion, as counsel for appellant seems to believe, that this was not a legal and vested right. All that the opinion undertakes to say is that Isaac Conrad, who was the guardian of W. W. Conrad, had no authority in law to change this passway in 1878 or 1879, at a time when appellee was an infant, from the lands of J. C. B. Conrad to the lands of this appellee and through his barn-lot.

The evidence shows that he held a prescriptive right of way on the lands of J. C. B. Conrad, and we do not at all take issue with counsel for appellant in his vigorous contention that "where the owner of lands across which others have a prescriptive right of way for his own convenience closes such way and opens another across other parts of his lands for the use of those having the right, and they assent to the change and use the new way for a period less than twenty years, the owner can not close such new way and prevent its use without first restoring the old one to its former condition." But that is not the question presented by this record. Here a guardian without right changes a passway from the land of one ward, where it has been for many years, and where it was established by the ancestor, to the lands of another. The change was material and necessarily injurious, and we can not conceive that such authority existed in a person who had only temporary possession of the land.

It does not seem to us that the appellant in this case is estopped from requiring the owner of the land across which the old passway ran, and over which she had a prescriptive right of travel, to reopen same, as he does not seem to have held the adverse possession of same for the statutory period of limitation.

Counsel is right in his contention that the opinion rendered in this case erroneously stated that the land of appellant fronted upon the public road. The allegations of the petition and the evidence both clearly show that the land owned by appellant is about 250 yards from the road which runs in front of the house of the witness, Osborne. But this error in the opinion can have no effect upon the legal rights of appellant to pass through the barn-lot of appellee; and, whilst the court sympathizes with the appellant in the annoyance and inconvenience which has resulted to her from the unauthorized act of her ancestor in making this change, we can not, on this account, change the law as we see it.

Wherefore, the petition of appellant for rehearing is overruled.

RIDDELL, &C. V. PARK.

(Filed January 15, 1897—Not to be reported.)

Attachment—As it satisfactorily appears that the debtor's undivided interest in his deceased father's land, which is sought to be subjected by attachment in this case, was sold by him by title bond, even before the debt sued on was created, it was not subject to the attachment.

V. P. Smith for appellant.

Appeal from Estill Circuit Court.

Opinion of the court by Chief Justice Lewis.

The evidence in this case is entirely satisfactory that R. C. Riddell, for a valuable consideration, purchased, paid for and took the title bond of John W. Riddell for his undivided interest in the land left by their deceased father before even the debt sued on by plaintiff Park was created. Consequently it was not subject to attachment or sale for satisfaction of the latter's claim, and the judgment for sale of it was erroneous and is reversed and cause remanded for further proceedings consistent with this opinion.

CROW, &C. V. SHACKLETT, AGENT, &C.

(Filed January 16, 1897—Not to be reported.)

1. *Married women—Contract for "necessaries"*—Under a statute providing for the sale of the wife's real estate to pay debts created on account of "necessaries," a sum which she has agreed by contract in writing to pay as rent for a hotel kept by her as a business of profit, and not as a mere means of support, can not be regarded as a debt created for "necessaries," the wife already having sufficient means of support from her rents and the profits from her farm.

2. *Appellate jurisdiction*—As the judgment appealed from directs the sale of the wife's land to satisfy a judgment rendered in a previous action for the debt and costs, the costs included in that judgment are to be regarded as a part of the amount in controversy upon this appeal, and as that judgment, including the costs of the action in which it was rendered, amounts to more than $100, this court has jurisdiction of the appeal.

R. L. Stith and J. D. Irwin for appellants.

S. H. Bush for appellees.

Appeal from Hardin Circuit Court.

Opinion of the court by Judge Hazelrigg.

The appellant, Drew Crow, wife of her co-appellant, was the owner of two houses and lots in Elizabethtown; and of a residence and small farm in Hardin county, and an interest in some lands in Bullitt county.

Conceiving that she might make some money by renting and managing a hotel, she rented of the appellees the Arbor Hotel in Elizabethtown, and after running a few months discovered that instead of making she was losing money, and quit the business. When she began, she, with her husband, had signed a written contract to pay a certain sum for the rent of the hotel, and, failing to pay this, this suit was brought to subject the wife's real estate to its payment. The proof is clear that she went into the hotel business as a means to make money and accumulate a profit and not as a necessity or means of support for herself and family. She already had sufficient means of support from her rents and the profits from her farm.

In the case of Harris v. Dale & Co., 5 Bush, 61, this court held that supplies used in keeping a hotel as a business of profit and not as a mere means of support could not be regarded as necessaries furnished for the use of a family within the meaning of the statute on that subject.

The statute in force when the rental contract under consideration was made is like the statute construed in the case cited, and provided for a sale of the wife's real estate to pay debts created "on

account of necessaries for herself or any member of her family, her husband included, as shall be evidenced by writing, etc."

If supplies for the hotel were not "necessaries" we can not well say that the hotel itself, when run as a means of profit, comes within the meaning of that term.

The judgment below is for the sum of $110.45, and adjudges a sale of the wife's land to satisfy it. This court, therefore, has jurisdiction of the appeal, although a part of the judgment is for costs in another action on the same debt in justices' courts against the husband.

The amount in controversy as to the wife is the sum total of the judgment.

The judgment is reversed, with directions to dismiss the petition.

CITY OF MAYFIELD V. ELMORE.

(Filed January 19, 1897.)

Constitutional law—Amendment of city charters—Between the time of the adoption of the present Constitution and the enactment of general laws for the government of towns and cities, the Legislature had the power to amend existing charters of towns and cities.

An amendment of March 31, 1892, to the charter of Mayfield is valid.

Barbour & Carroll and Robertson & Lee for appellant.

Robbins & Thomas for appellee.

Appeal from Graves Circuit Court.

Opinion of the court by Chief Justice Lewis.

By section 2 of an act to amend an act to amend and revise the charter of the city of Mayfield, approved April 2, 1890, it was provided the city judge should be allowed by the board of councilmen a reasonable salary; also fees and fee costs as then allowed by the city charter.

But by an act approved March 31, 1892, it was provided that so much of the above recited act as authorized and provided for the payment of salaries to the city judge, city marshal and city attorney should be repealed, provided the right of said officers to receive fees and fee costs, authorized by the act of April 2, 1892, should not be affected but continue.

Appellee, Stephen Elmore, brought this action to recover of appellant, city of Mayfield, the sum of $500 claimed as his salary as city judge for the term of one year, beginning the last Monday in May, 1892, said amount having been fixed by the city council as the annual salary of the city judge in pursuance of the act of April 2, 1890; but as he was not elected city judge until April, 1892, he has no right to the salary sued for or any other compensation besides fees and fee costs if the act of March 31, 1892, was valid, and whether it was depends upon the proper meaning of section 166 of the Constitution as follows: "All acts of incorporation of cities and towns heretofore granted, and all amendments thereto except as provided in section 167, shall continue in force under this Constitution, and all city and police courts established in any city or town shall remain with their present powers and jurisdiction until such time as the general assembly shall provide by general laws for the

government of towns and cities, and the officers and courts thereof, but not longer than four years from and after the 1st day of January, 1891, within which time the general assembly shall provide by general laws for the government of towns and cities and the officers and court thereof as provided by the Constitution."

It is not at all certain that according to even the strict letter of that section the Legislature was inhibited from amending existing acts of incorporation of cities and towns during the period of four years from January 1, 1890, or at least during the period from that date up to the enactment of a general law governing cities, and towns as required by section 156 of the Constitution. But looking to the real purpose and reason of section 166 we are satisfied it was not intended to prohibit the enactment during that period of proper and necessary, or what the legislature in its wisdom might deem proper and necessary, amendments to existing acts of incorporation; for such restriction was not necessary to the accomplishment of the purpose in view, which was ultimate substitution of the plan of governing cities and towns by a general and consistent system of laws in place of a series of special and local acts, but on the contrary would have probably embarrassed and done injury to particular cities and towns without any reason or necessity for thus preventing needed legislation.

In our opinion the act of March 31, 1892, was valid and effectual to repeal the act of 1890, and under nugatory ordinance of the city council fixing the salaries of the city judge and other officers of the city of Mayfield, and as a consequence appellee is not entitled to the salary sued for.

Wherefore, the judgment is reversed and cause remanded for the dismissal of his action.

MACKEY, &C. V. GLEASON.

(Filed January 19, 1897—Not to be reported.)

Assessment for street improvements—Correction of estimates—Interest—In this action by certain lot owners to set aside as void the proceedings of the city council, by which their property was assessed to pay the cost of improving an alley, the other lot owners whose property was assessed to pay for the same improvement, and also the contractor, being made defendants, the chancellor upon a cross petition filed by the contractor against his co-defendants and the plaintiff seeking upon the ground of mistake to correct the estimates made by the city engineer fixing the amounts due by the property holders, properly granted the relief sought as against the appellant, one of the defendants, it appearing from the evidence that she had by mistake been required to pay only $41.39, when the amount which should have been assessed against her was $153.76. But as she had promptly paid off the warrant for the smaller amount the additional amount charged against her by the judgment should have been made to bear interest only from the date of the judgment and not from the date of the original estimate.

D. M. Rodman for appellants.

Lane & Burnett for appellee.

Appeal from Jefferson Law and Equity Court.

Opinion of the court by Judge White.

John A. Michelhauser and others brought this action in the law and equity division of the Jefferson Circuit Court against Michael Gleason, Bridget Mackey, S. M. Bernoid and the city of Louisville seeking to set aside proceedings and estimate made against their property for the improvement of an alley in a square or block in which their lots were situated in the city of Louisville, and claiming that said proceeding by the city council and said estimates were void. The steps taken by the city counsel are fully set out in this record. By these proceedings in the city counsel the property of Bridget Mackey was assessed for her part of said improvements at $41.39, and warrants for this amount were issued to Gleason by the proper authorities, which warrant the appellee, Bridget Mackey, paid off and fully discharged before the institution of this action. This action progressed until the 18th day of January, 1892, when defendant Gleason filed an amended answer and cross petition against all the plaintiffs and his codefendants in this suit, and making all the property holders in said block or square defendants thereto, asking process on said cross petition to bring them before the court on his cross petition, and by said cross petition he sought to correct the estimates as made by the city engineer fixing the amount due from the property holders in said block, averring that the city engineer had made a mistake in his estimates, and charging that there should be assessed against the property of appellant, Bridget Mackey, $153.76 instead of the sum of $41.39 in his assessment, appellee being the owner of a lot abutting on said alley so improved of twenty-five feet, and this was the proper amount that should have been charged against her lot; that appellee was chargeable with the cost of the curbing of said alley abutting her lot, but which had been aportioned against all the property holders when the same was only chargeable against her; but he filed a corrected estimate apportioning the expense of said improvement according to the city charter, and by this corrected estimate Mrs. Mackey should be made to pay $153.76, of which sum she had paid $41.39, leaving due $112.38, and for this sum he asked judgment, and the court on having rendered judgment fixing the amount against the property of appellant, adjudging a lien on appellant's lot for $112.38, with interest from the 12th day of November, 1889, and from this judgment appellant has prosecuted this appeal and asks a reversal.

Appellant contends that the entire proceeding by the city counsel to have said alley improved by the lot owners was void. We see no error in the proceeding by the city council in reference to the improvement of the alley. The proceedings were regular and in accordance to the provision of the city charter, and by the proceeding and improvement of said alley appellant's property was made liable for her proportion of the cost of said improvement, and created a lien on her lot in said block.

We are satisfied that the engineer of the city, whose duty it was to make the estimate and proportion the amount against the lots chargeable with the cost of the improvement of the alley, made a mistake in his estimate of the amount that should be charged as against appellant, and that the chancellor had, on the state of pleading in this case, the jurisdiction to make said correction and ascertain the true amount that should be paid by appellants and rightfully chargeable against her property, and we find no error in the judgment fixing the amount as against appellant at $153.76, and appellant has no cause to complain on the ground that her lot had been assessed too much. It was assessed much less than was its due proportion of the cost of said improvements, but her co-defendants do

not complain of this action of the court. On the cross petition of appellants process was issued and duly executed on appellant on the — day of September, 18—, and by which summons she had notice of the proceeding, but we are of the opinion that the court erred to the prejudice of appellant in adjudging that she was liable to the payment of interest from November 12, 1889, the date of the original estimate, for which warrant had been issued and paid off.

The city council had undertaken by and through its proceeding to improve the alley on which appellant abutted, and there was nothing due from appellant until the same was ascertained and amount fixed and certified for payment to appellant, and when the city council fixed the amount she promptly paid it off. Then appellee commenced his proceedings in the circuit court against appellants to correct the estimate made by the city engineer against her property. She did not resist the proceeding to correct the assessment and permitted judgment against her by default. She had no legal notice that any additional demand was being made until she was served with process, which was done on the 18th day of September, 1892. We do not think there was any demand that she was required to pay until the rendition of the judgment correcting said estimates, and we are of opinion that the judgment rendered in this case should only bear interest from the date of its rendition, and for this error alone this cause is reversed and remanded for further proceedings in accordance with this opinion.

WESTERN DISTRICT WAREHOUSE CO. v. ROBERTSON, &C.

(Filed January 19, 1897—Not to be reported.)

Attachment—In this action the proof failed to sustain the defense that a settlement of the judgment against R. was made with appellant by B. & Co., under an agreement that appellant was not to proceed against the tobacco of R., which had been attached. The proof sustained the grounds of the attachment, and the action of the court dismissing the attachment was erroneous.

Greer & Reed for appellant.

Appeal from Calloway Circuit Court.

Opinion of the court by Judge Guffy.

The appellant instituted this action in the Calloway Circuit Court seeking a judgment against the appellee, Robertson, for more than $500, and obtained a general attachment, which was levied upon two hogsheads of tobacco and —— pounds of loose tobacco. Appellees, Burnett & Co., executed bond and obtained possession of the tobacco, and were on their motion made parties to the suit. All of the appellees made defense.

The substance of the defense consisted in a denial of the indebtedness and the grounds of the attachment, and further alleged that a settlement was made with plaintiff, in which it was agreed that Burnett & Co. would and did pay plaintiff's claims, and that plaintiff undertook and promised to not molest Robertson's tobacco, purchased in 1892, and that the same was to be shipped to Burnett & Co., Robertson having prior to that time been buying tobacco to be shipped to appellant, and money furnished by appellant to him constituted the debt sued on.

The allegations of the appellees were denied by reply, and upon final hearing the court rendered judgment against Robertson for the debt claimed but dismissed the attachment, and adjudged that Burnett & Co. account to Robertson for the tobacco, and from that judgment this appeal is taken.

It seems to us that the appellees totally failed to prove the agreement alleged, and failed to show a settlement or payment to plaintiff. In fact Robertson finally admitted the justice of the demand sued for. We also think that the proof sustained the grounds of the attachment, and that it should have been sustained.

The judgment appealed from is, therefore, reversed and cause remanded, with directions to sustain the attachment and for further proceedings consistent with this opinion.

FREY V. MATHIAS, BY, &C.

(Filed January 20, 1897—Not to be reported.)

1. *Assault and battery*—The facts in this action to recover damages for assault and battery are not such as would authorize the court to disturb the verdict of the jury on the ground that the verdict was against the weight of evidence; and the instructions given by the court to the jury state fairly the law of the case, and are not prejudicial to the legal rights of the appellant.

2. *Burden of proof*—The appellant, upon whom the burden of proof rested, having acquiesced in the ruling of the court that the burden was upon appellee and permitted the appellee, without objection, to first introduce his testimony, appellant waived his right to the concluding argument to the jury.

Jno. P. Norvell and Benj. H. Robinson for appellant.

Hanson Kennedy for appellees.

Appeal from Nicholas Circuit Court.

Opinion of the court by Judge Burnam.

This action was instituted in the Nicholas Circuit Court by the appellee to recover damages in the sum of $1,000 from the appellant, John H. Frey, for having unlawfully assaulted, beat and bruised by striking him with his fist, choking him with his hand, and kicking him with his feet. A special and general demurrer was filed to the petition of the appellant and overruled, and the appellant filed his answer, in which he denied that he had unlawfully assaulted, beat or bruised appellee as charged in the petition, or that he had damaged him in the sum of $1,000, or any other sum, claiming that at the time and place mentioned in the petition the appellee had assaulted him with his hands, feet and fist, and that in necessary defense he struck the appellee with his open hand, and kicked and barely touched him with his foot, and doing no more damage and using no more force than was necessary in his self-defense to repel the assault made upon him by the appellee. By agreement the allegations of the answer were traversed of record, and a jury was empaneled who heard the evidence deduced by both sides, and returned a verdict in favor of the appellee in the sum of $100. Thereupon the appellant, John H. Frey, moved the court to set aside the verdict of the jury and the judgment of the court and grant him a new trial:

1st. Because the verdict is not sustained by the evidence and contrary to law.

2d. Because the court erred in instructing the jury.

3d. Because the court refused to grant the appellant, upon his motion, his right to conclude the argument to the jury, but permitted the attorney for the appellee to conclude the argument against the objections of appellant.

The facts in this case are not such as would authorize the court to disturb the verdict of the jury on the ground that same was against the weight of evidence.

The instructions given by the court to the jury are as follows: "If the jury believe, from all the evidence, that the defendant unlawfully assaulted, beat and bruised the plaintiff by striking him with his fist, choking him with his hand and kicking him with his feet, or either, if they believe from the evidence that he did strike or choke or kick plaintiff, then they will find for the plaintiff as indicated in instruction No. 2, unless they should find for the defendant as indicated in instruction No. 3."

The second instruction was as follows: "If the jury find for the plaintiff, as indicated in instruction No. 1, the criterion of recovery is such a one as will compensate the plaintiff for his physical and mental sufferings, or either, endured by plaintiff and caused by the assault of the defendant; and the jury may, in addition to this, give exemplary damages, not in all to exceed the sum of $1,000."

To the giving of these instructions the defendant objected, which objections were overruled. The defendant then moved the court to give to the jury this instruction: "The court instructs the jury, if they should believe from all the evidence and circumstances proven in the case that the plaintiff, Joseph Mathias, at the time of the assault complained of in the petition, had first assaulted the defendant with his hands, fist and feet, or either of them, and that in repelling said assault the defendant used such force and only such force as was necessary, or to him reasonably appeared to him to be necessary to be used, he had such right, and the jury should find for the defendant;" to which instruction the plaintiff excepted, which was overruled.

It seems to us that the instructions given by the court to the jury state fairly the law as it is, and are not prejudicial to the legal rights of appellant.

The main ground upon which appellant relies is that under the pleadings the burden of proof was upon him, as his answer was practically a plea of confession and avoidance, and that the court should have sustained his motion to allow him the concluding argument to the jury. The bill of exceptions shows that after a statement of the case by the parties hereto and an examination of the pleadings that the court held that the burden of proof was upon appellee, and to this ruling of the court appellee at the time objected and excepted, but the appellant offered no objection to said ruling, and by his silence presumably acquiesced in same.

In accordance with the ruling of the court the appellee introduced his proof, and the case proceeded in accordance with such ruling. It was held by the Superior Court, in the case of Cooper v. Toebe, 15 KY. LAW REP., 844, that where the party upon whom the burden of proof rests permits the other party, without objection, to first introduce his evidence, he waives his right to the concluding argument to the jury; and it seems to us that this rule of procedure is a salutary one, as it would be very unjust for a court to decide that the burden of proof was upon a litigant and require him to make out

his case, and then, after the proof was all in, to change the ruling and give the concluding argument to the other party.

The appellant, by his silence, acquiesced in the justness of the ruling adopted by the court, and he should not thereafter be allowed to take advantage of an error by which he had prospered.

From a careful consideration of all the questions presented in this case, we conclude that the judgment should be affirmed.

BRECKINRIDGE & PINEVILLE SYNDICATE, LIMITED v. MURPHY.

(Filed January 20, 1897—Not to be reported.)

Master and servant—The appellee in this case, who was an experienced miner himself, having, after calling the attention of the foreman of the mine to a dangerous place in the roof, continued to work under the dangerous part, he is not entitled to recover damages for an injury received by the falling of slate from the roof in the absence of an allegation that the foreman promised to make the roof safe, the appellee being as capable of ascertaining the danger as the foreman.

D. B. Logan for appellant.

S. F. Johnson for appellee.

Appeal from Bell Circuit Court.

Opinion of the Court by Judge Hazelrigg.

The appellee was seriously and permanently injured by the fall of slate from the roof of an entry where he was digging coal when in the employ of the appellant, and, in his suit for damages by reason of the alleged negligence of the appellant in failing to inspect and keep the roof in a reasonably safe condition, recovered the sum of $2,000.

The proof conduced to show that the appellee—himself an experienced miner and former "boss" in several coal mines—dug away the coal from under the roof which afterwards fell on him, and discovering the dangerous condition thereof called the attention of the foreman, Hall, thereto, and applied to him to let him (appellee) "shoot down" the roof, and thus make it secure by knocking down the dangerous slate.

Hall thereupon sounded the roof with a pick, and according to the testimony of appellee assured him that it was safe and directed him to go on with his work. Appellee further stated that after so sounding the roof, which he saw and heard Hall do, neither of them could tell whether there was danger or not.

Hall denied these statements, and testified that he told appellee the roof in that mine was a bad one, with "bell tops" in places which he would have to watch. There was other testimony more or less affecting the issues, but this is sufficient to test the correctness of the instructions complained of.

In No. 1 the question of whether or not the duty devolved on appellant to keep the roof in repair was submitted to the jury, and we think properly so, because the appellant had pleaded that under the contract with appellee this duty devolved on him.

In No. 2 the jury were told that they might find for the plaintiff, although he knew the roof was unsafe and dangerous, if the foreman

also knew it or had been so notified and had assured plaintiff that the roof was safe and directed him to proceed with the work.

This instruction permits a recovery upon the assurance of the foreman that the roof was safe, when the plaintiff, with the same opportunity and means of information, knew better and knew it was unsafe and dangerous.

This was followed up by instruction No. 4, which told the jury that if under the plaintiff's contract of employment to drive the entry the defendant company was to inspect the roof and keep it reasonably safe, "then it was no part of plaintiff's employment to look after the safety of said roof, and that if he was injured while so employed and at his post of duty by reason of defendant's neglect to inspect and keep same in a reasonably safe condition" they were to find for the plaintiff.

These instructions permit the plaintiff to shut his eyes to the danger about him because not employed to keep them open, and though he knew of the danger he is permitted to rely entirely on the inspection of the foreman and the assurance of one who could know and did know no more than the appellee.

There are cases where the employe is entitled to rely entirely on the assurances of his employer. A workman is not required to test the safety and soundness of the materials or appliances furnished him, but if he knows of their weakness or unfitness and that their use is dangerous, and nevertheless uses them, he does so at his own risk, unless he is induced to continue work upon the promise of the employer to remedy the evil, and then he may continue his work only for a reasonable time pending the repairs.

It is possible that under the proof in this case a promise may be inferred to make the roof safe, but it is not so averred in the pleadings, or relied on as inducing a continuation of the appellant's work in his dangerous position.

Upon the state of the pleadings the request for a peremptory instruction should have prevailed, and the judgment is reversed for proceedings consistent therewith.

RHODES V. RHODES, &C.

(Filed January 20, 1897—Not to be reported.)

1. Division of lands between children by father—Where the father divided the bulk of his real estate between his four children, intending to make an equal division, and a tract of land belonging to his wife was included in the division although she did not join in the deed, each child received one-fourth of the estimated value of the land of the wife in the division and settlement, and after the death of the parents the child to which the particular tract was conveyed will not be compelled by the court to divide it with the other children.

2. Moreover by a voluntary division by the children of the residue of the lands of their father after the death of their parents the former adjustment was ratified and all chance of re-imbursing him, to whom the tract belonging to the grantor's wife had been conveyed, in the event that tract should be taken from him, was destroyed. Hence, the original distribution will not be disturbed.

3. One of the children, who inherited from the father one-fourth of the land undisposed of by the old deed, can not evict his brother from the tract belonging to the wife of the grantor, and which was included in the division without offering to make good out of the estate which he received the father's warranty of title.

Robt. Crenshaw and W. G. Bullitt for appellant.

Appeal from Trigg Circuit Court.

Opinion of the court by Judge Hazelrigg.

In March, 1871, which was a short time before his death, Ephraim Rhodes made deeds of gift to his four children of several hundred acres of land each. In that to his son, T. W. Rhodes, however, was a tract of eighty acres, which the grantor's wife had inherited from her father in 1867, and of which the husband had taken possession, and had used as he did his own adjoining lands. The wife did not unite in any of these deeds. The children took possession of their several tracts, though, on the home tract, which included the eighty acres named, the grantor and wife reserved the right to reside during their lives. The grantee, T. W. Rhodes, built a small house in the yard, however, and the proceeds of the farm appear to have been divided about equally with his mother. The father died shortly after making the deeds, leaving some seven hundred acres of land not embraced in the deeds to his children. This land was presumably used for the widow's benefit until her death in 1877, when the children divided it into four equal shares, and made to each other deeds of partition. In July, 1893, this suit was brought by two of the children against their brother and the child of a deceased brother for a division of the eighty-acre tract among the four.

The defense is that by the deeds of 1871, by which the father conveyed the bulk of his real estate to his children, the grantor intended to make, and did make, an equal gift or advancement to each, and as the eighty acres went into the whole to be divided, and was treated as part of the lands of the father, the mother consenting, each of the four got more land than he or she would otherwise have gotten, the effect being that each child got its share of the eighty acres, though it was in fact laid off to but one of them; and that, in pursuance of this arrangement and common understanding, each child entered upon his land, and has been in the continuous, adverse possession of it ever since.

Upon the proof the chancellor upheld this defense and dismissed the petition. One of the plaintiffs only appeals.

Manifestly the deed of the father did not invest the son, T. W., with title to the eighty acres, and on the death of the mother, in 1877, it passed to the four children. Upon this state of case a sale of his interest to a *bona fide* purchaser, by any of the heirs would have passed the title. But this contest is among the heirs, and, all being before the court, the chancellor was authorized to settle the issues upon equitable principles; and this, we think, he has done. It is wellnigh conclusive that the father intended an equal division by the deeds of 1871. If so, no proof was needed of the equal value of the respective parcels conveyed. The father's estimate is conclusive; but the proof, while somewhat conflicting in this particular, conduces to show substantial equality. It is conceded or clearly shown that the eighty acres was taken into the estimate and treated as part of the father's lands, and entered into the division, though no agreement is shown with the mother. It follows that in this division and advancement of lands each child got one-fourth of the estimated value of this eighty acres, and entered upon and has since enjoyed his or her respective share. But, some of them, including appellant, were minors at the time of these deeds, and we will suppose the appellant was not concluded by the acceptance of the lands and participation in the family settlement. Still, when he became of

age in about 1878, he can not be allowed to claim the benefit of the division, which gave him in effect a share in the eighty acres, and also the land itself. Moreover, it would seem of the greatest importance to all that when the remaining lands of the father came to be divided and deeds of partition to be made, if the eighty acres were to be taken away from T. W. the fact should have been disclosed while there were lands out of which the equality could still have been preserved. An equal division was voluntarily made, however, and the former adjustment thereby ratified, thus destroying the last chance for re-imbursing T. W. in the event of his losing the eighty acres conveyed to him by the old deed. Appellant, at least, seems to have none of the land of the estate now in his possession.

Moreover, there would seem to be another insuperable obstruction in the way of appellant's recovery. He inherited from his father one-fourth of the 700 acres remaining undisposed of by the old deeds. Can he now evict his father's grantee under the deed of 1871 without at least offering to make good, out of the estate he received, his father's warranty of title? We think not.

The appellee has filed no brief, and we do not know upon which of these grounds the chancellor denied the relief sought. Either we have mentioned is sufficient.

Judgment affirmed.

TRIGG, &C. v BALL, &C.

(Filed January 21, 1897—Not to be reported.)

Preference of creditors—In this action to enforce a mortgage lien, in which various creditors of the mortgagor filed their petition seeking to have the mortgage declared to operate as an assignment under the statute upon the ground that it was executed with the design to prefer the mortgagee to the exclusion of other creditors, the evidence was sufficient to authorize the chancellor's judgment declaring the mortgage to operate as an assignment for the benefit of all creditors whose debts existed prior to its execution.

Harry Kennedy for appellants.

John P. Norvell and Hanson Kennedy for appellees.

Appeal from Nicholas Circuit Court.

Opinion of the court by Judge Guffy.

It appears from this record that on October 11, 1892, C. S. Ball executed to the appellants his note for $823, due in one day, and to secure the same mortgaged to appellants a stock of goods, and on November 1, 1892, appellants brought suit on the note and for the enforcement of their mortgage lien in the Nicholas Circuit Court.

At the February term, 1893, of the said court various creditors of said C. S. Ball filed their petitions in said action seeking to have said mortgage adjudged to operate as an assignment of all said Ball's property for the benefit of his creditors. The allegations of the petition showing such to be the fact were denied by appellants. Afterwards the appellee, C. S. Smart, administrator of Gertrude Smart, also filed his petition asking the same relief and claiming that the suit or proceedings instituted by the other creditors enured to his benefit, he having a judgment against said C. S. Ball for

$5,000, rendered on a suit instituted about eleven days after the execution of the mortgage, but the cause of action had accrued before the mortgage was executed. This pleading was also controverted, at least his right to the benefits of the pleadings of the other creditors.

It further appeared that appellants, prior to the execution of the mortgage, were bound as sureties of C. S. Ball for the amount of the note, and had taken up the notes signed by them as surety for Ball, and given their own note in lieu thereof, and that the note and mortgage in contest was executed to secure them.

The court below adjudged that the said mortgage was made with the design to prefer appellants to the exclusion of other creditors of said Ball, and that it operated as an assignment of his property for the benefit of all his creditors, whose debts existed prior to the execution of the mortgage, and that the claim of G. K. Smart as administrator of Gertrude Smart, was a valid, subsisting claim, and in existence when the mortgage was made. Proper orders were also made for the settlement of the estate, and from that judgment appellants have appealed and superseded the same. We deem it unnecessary to recite the evidence introduced.

Suffice it to say that the testimony abundantly sustains the judgment of the court below, and the judgment appealed from is, therefore, affirmed.

HAMILTON V. WILLIAMS.

PARK V. HAMILTON.

(Filed January 22, 1897—Not to be reported.)

1. *Note—Principal and surety*—Where upon the renewal of a note the name of a surety thereon, who was unlearned and could neither read nor write, was signed so as to make him a principal instead of a surety, he had the right in an action on the note to show that the understanding was that he was to be bound only as surety. And if his name was placed on the note by the payee with the fraudulent intention of making him a principal when he only agreed to become a surety, there can be no recovery against him on the note.

2. *Appeal*—There being no judgment in favor of the appellant surety against his co-surety P., nor any relief asked as against each other in their pleadings, the appeal of the surety P. must be dismissed.

Grant E. Lilly for appellant and appellee Hamilton.

White & Smith for Williams.

Riddell & Riddell for Park.

Appeal from Estill Circuit Court.

Opinion of the court by Judge Paynter.

This suit was on a writing as follows, to wit: "One day after date we, Clint Hamilton and Granville Hamilton, promise to pay to W. T. B. Williams two hundred and fifty dollars, borrowed money, bearing eight per cent from date until paid. This, the 18th day of December, 1893.

CLINT HAMILTON,
his
"GRANVILLE X HAMILTON,
mark
"W. W. PARK, *Security.*"

Clint Hamilton, Granville Hamilton and W. W. Park were made defendants. Granville Hamilton filed an answer, and among other things he alleged that the plaintiff, Williams, had a note to which his name was signed as surety by another without any written authority, etc., on which he was not bound, and that the defendant, W. W. Park's, name also appeared as surety thereon; that he agreed to renew this note and sign his name as surety; that Williams and Park, with the fraudulent understanding, intent and purpose to make him responsible for the entire amount of the note prepared—the note in suit—and had it signed in its present form, thus making him appear as a principal instead of a surety thereto; that he is unlearned —can neither read nor write—and that the note was to be signed as surety, together with Park, for Clint Hamilton.

To this answer a demurrer was overruled. Subsequently the court sustained a notice to render judgment on the pleadings and gave judgment against the defendants for the amount of the note and interest.

The court must have reached the conclusion that the answer did not present a good defense. If the facts be as appear in the answer there could be no recovery on the note against Granville Hamilton. In a renewal of the first note he had the right to maintain his status as surety for Clint Hamilton, together with Park. While the note imports that he was principal he had a right to show that the understanding was that he was only to be bound as surety.

If the facts are as alleged in the answer there can be no recovery on the note aganst Granville Hamilton. Park filed an answer in which he alleged he signed the note as surety for both of the Hamiltons, and that if Hamilton was released he was not bound thereon. Clint Hamilton is insolvent. As Hamilton did not recover a judgment against Park, nor did the respective pleadings of Park and Granville Hamilton ask any relief against each other, and, as there is no judgment in favor of Granville Hamilton against Park, the motion to dismiss the appeal of Park against Granville Hamilton must be sustained.

The judgment on the appeal of Granville Hamilton is reversed, and also it is reversed on the appeal of W. W. Park as to Williams.

Further proceeding must conform to this opinion.

The Kentucky Law Reporter.

EDITOR:
WALTER G. CHAPMAN, ... Frankfort, Ky.

VOL. 18. MAY 15, 1897. No. 22

KENTUCKY COURT OF APPEALS.

SOUTH COVINGTON & CINCINNATI STREET RY. CO. v. ENSLEN.

(Filed January 22, 1897—Not to be reported.)

Contributory negligence—When the driver of a horse and wagon, with knowledge of the approach of a car, attempted to cross the track of a street railway, believing he could do so in safety, he can not complain of the want of a signal; and, as his contributory negligence is to be imputed to the owner of the horse and wagon, the court in this action by the owner to recover of the street railway company for the injury to his property should have been given a peremptory instruction to find for defendant.

Simrall & Galvin for appellant.

E. H. Kilpatrick and E. W. Hawkins, sr., for appellee.

Appeal from Campbell Circuit Court.

Opinion of the court by Judge Hazelrigg.

Appellee's meat shop is situated on the north side of Eleventh street, in Newport, between Patterson and Isabella, Eleventh running east and west, and the others north and south. Eleventh is traversed by two tracks of the appellant's electric railway.

On the morning of November 1, 1893, the horse and wagon of the appellee were standing in front of his shop with the head of the horse turned toward the west or Patterson street, that street being 95 feet away.

The regular driver of the team came out of the shop, and, as he took his seat on the wagon, saw coming rapidly from the east and on the track next to him the electric cars of the appellant, but, as he testifies, believing he had time to reach Patterson street and turn south out that street and across the railway track, he started his horse in a trot for that purpose, driving, however, on the right and entirely clear of the track.

From the time he started he did not look back or make any effort as he turned his horse upon the track and drove on it to see the approaching car, though his view was unobstructed, and though by

looking, as he admits, he would have seen the car. He had gotten nearly across when the hind wheels of the wagon were struck by the car, the collision damaging both the wagon and the horse. Upon the trial of this action, brought by the owner of the property, for its damage, the verdict was for the plaintiff.

The distance at which the car followed the team from its starting point at the shop to the crossing is estimated by the different witnesses to have been from 30 to 100 feet, according, as we suppose, to the time when the particular witness testifying observed the two moving objects.

As is common in such cases, the proof is conflicting as to whether those operating the car sounded the usual alarm for the crossing, though after the driver turned to the crossing and showed an intention to go on the track there is no proof conducing to show any negligence on the part of the motorman or want of effort to stop the car and avert the collision.

In support of the finding of the jury we shall assume that no signals were given for the crossing. So that, conceding the negligence of those managing the car in this particular, the sole question is, was there such contributory negligence on the part of the driver of the team, which is to be imputed, of course, to the owner, as that but for it the accident would not have happened, and should, on that account, the peremptory instruction asked for by the company, have been given? We are clearly of the opinion that the request ought to have been granted.

The only need for signals in the operation of the railway is to give warning of the approach of the car, and if the driver of a vehicle already knows this he can not complain of the want of a signal; it could tell him nothing of which he was ignorant. Here the driver testifies that knowing of the rapid approach of the car behind him he yet trusted to the belief he started out with that he could make the crossing safely and, therefore, did not use any precaution whatever in driving on to the track. He did not look but drove blindly in front of the moving and dangerous car. Had he from the start been driving on the track it would have been the duty of the motorman to have seen him, and, if necessary in order to avoid the collision, to have checked or even stopped his car. As it was the operator was not required to anticipate that the driver would suddenly quit his place of safety and take up one of danger, nor would a prudent driver have done so. This one, impressed with his original belief, miscalculated the chances, and the speculation miscarried by a few seconds.

Judgment reversed for proceedings consistent with this opinion.

LONG V. BANK OF COMMERCE.

(Filed January 23, 1897—Not to be reported.)

Banks—Credit of collection to wrong person -Where the assignee of a draft inclosed it to a bank with direction to "collect and credit," the bank was guilty of negligence in crediting the proceeds of the draft to the assignors instead of to the assignee, and the assignee is entitled to recover of the bank the amount of the draft. And it was error in this action brought by him, therefore, to credit the bank with the amount of a check drawn by the assignors in plaintiff's favor, and which was paid by the bank.

Grubbs & Moraney for appellant.

Dodd & Dodd for appellee.

Appeal from Jefferson Circuit Court, Common Pleas division.

Opinion of the court by Judge White.

Long sued the Bank of Commerce in the Jefferson Circuit Court, Common Pleas division, to recover of said bank the amount of a draft of $309.81, which had been drawn by J. L. Cochran & Co. in their own favor on Rodgers & Co. of Peoria, Illinois, at thirty days, which was endorsed by J. L. Cochran & Co. to John S. Long, appellant, who placed the same in said bank for collection. Said bank collected said draft, but failed and refused to pay the same to appellant or place it to his credit in said bank, and for which sum he asks a judgment.

The bank answered the petition and admitted it had collected the draft, but alleged that it had by mistake placed the proceeds of said draft to the credit of J. L. Cochran & Co., and averring that Long was a partner of J. L. Cochran & Co. in the lumber business in the city of Louisville, and had been engaged as such partner for some time, and that said J. L. Cochran & Co. had a deposit account, and had had with said Bank of Commerce for considerable time before the collection of said draft, and that plaintiff Long also had a deposit account with said bank, opened a short time before the collection of said draft, and the bookkeeper of said bank, supposing the draft was that of Cockran & Co., on the collection of said draft placed the same to the credit of J. L. Cochran & Co. After the deposit of the proceeds of said draft to the credit of J. L. Cochran & Co. they drew their check on said bank for $275 in favor of said Long, which the bank paid to Long before the discovery of said mistake, the bank claiming the said draft was the proceeds of lumber sold by said firm, and that the partnership had not been settled, and that the said partners yet owned lumber and effects, and he had received the partnership effects and could not complain. Plaintiff replied to this answer and denied that he was a partner of said Cochran & Co. or that he had any interest in the firm of J. L. Cochran & Co., or that he had ever been a partner of said J. L. Cochran & Co. in said firm.

Upon the issues being formed the parties waived a trial by jury and submitted the law and facts to the court, and the court rendered judgment for defendant as to the claim of $275 and for plaintiff for $34, and adjudged that plaintiff Long should pay the entire cost of the action, and plaintiff's motion for a new trial having been overruled he has appealed to this court and asks a reversal of the judgment.

The facts as shown by the testimony in the case are as follows: J. L. Cochran, desirous to purchase two certain lots of lumber, in the Paul Lumber Yard, and on board of Louisville & Nashville cars for shipment, and not having the money to make the purchase, he applied to plaintiff to borrow it, whereupon Long furnished Cochran the money with which to make the purchase of said lumber, amounting to about $2,300, for which sum Cochran executed to Long his receipt, agreeing that Long should share in the profits made by the sale of the lumber. This contract is in writing and filed in the records in this case. A part of this lumber was sold and a draft was drawn in payment of the same, which draft was endorsed by Cochran & Co. to plaintiff Long and forwarded to him at Chicago, Illinois, who by letter sent the same to the Bank of Commerce for collection, enclosed in the following letter:

"CHICAGO, July 24, 1893.

"*Bank of Commerce, Louisville:*

"Please find John L. Cochran & Co. check on your bank for $500, which please place to my credit; also J. L. Cochran & Co. draft, 30 days after date, July 5th, on Rodgers & Co., Peoria, Illinois, for $309.81, which please collect and credit.

"Very truly yours,

"JOHN S. LONG."

The court below in its findings seems to put stress on the wording of the letter of Long to the bank in which he sent the draft to the bank for collection as being indefinite, and for that reason says that it can hardly be said that the bank was guilty of negligence in crediting the account of Cochran & Co. with the collection. If the draft had not been assigned to Long by Cochran & Co. then there might be some doubt about the instructions given in Long's letter, the draft having been assigned to Long. When he says *please collect and credit* clearly meant to credit Long, the assignee of said draft. In reference to Long's letter there is no complaint made by the pleading or evidence that the mistake was caused by the misunderstanding of the bank as to the instructions of Long. The court further says, in his finding, in view of the want of certainty in Long's instructions to the bank as to how the collections should be credited, it is not clear that he can complain at all, and especially is this true when there has been no settlement of the partnership venture between himself and Cochran & Co.; but giving him the benefit of any doubt that may exist in this respect he will be awarded judgment for the difference between $275 which he has received and $309.81, the amount of the draft, viz, $34.81, and it is so ordered.

We can not concur with this reasoning of the judge of the lower court, and upon carefully examining the evidence in the whole case we fail to find sufficient evidence to support the judgment, and are of opinion the court erred in refusing appellant a new trial.

Wherefore, the judgment of the lower court is reversed and remanded, with direction to grant appellant a new trial in conformity with this opinion.

CITY OF LEBANON V. BEVILL.

(Filed January 23, 1897—Not to be reported.)

Municipal taxation—A lot of four acres brought into the limits of a town by an extension of the boundary, and which receives at least a portion of the benefits of the municipal government and is essentially town and not farm property, is subject to taxation for municipal purposes.

H. W. Rives for appellant.

W. J. Lisle for appellee.

Appeal from Marion Circuit Court.

Opinion of the court by Judge DuRelle.

By act of the Legislature, approved March 20, 1890 (Acts 1889-90, volume 1, page 738), the limits of the city of Lebanon were extended in every direction from the courthouse from half to three-quarters of a mile. Prior to this legislative extension of the city limits in

May, 1888, the town of Lebanon had voted a subscription of $60,000 in aid of a corporation called the Lebanon Water Works Company, the city to take stock of that par value in the company, and pay for it in town bonds as authorized by act of March 6, 1884 (Acts 1885, volume 6, page 54).

The house and land now owned by appellee were not included in the former limits of Lebanon, but were included in the limits as extended in 1890. The appellee did not live within the city limits at the time of the vote for the waterworks bonds, nor at the time the city boundary was extended, and had nothing to do with the voting of the bonds or the extension of the city limits, but purchased the property now owned by him, subsequently to that extension, from one Boldrick, who owned a tract of land adjoining the city limits, and had divided it into town lots for sale as city lots, and had dedicated a street known as Market street (extending from a street called High street within the then city limits), upon which appellee's lot abuts; and, according to appellee's own testimony, this street was referred to in the deed to him from Boldrick, had been extended at the time of his purchase as far as the line of his lot, and has since been extended along the front thereof.

Appellee brought this suit enjoining the collection of municipal taxes by the city of Lebanon assessed against his real estate in said city and the personalty thereon. The trial court perpetuated the injunction, and the city has appealed to this court.

The grounds alleged for the injunction were, in effect, that his lot was used for farming and grazing purposes, and derived no advantage whatever from the remote and inaccessible city government; that it had never been divided into town lots, or in any way devoted to town purposes; that the tax levy upon his property was void; that the greater part of said taxes was to pay interest on the bonds issued in aid of the waterworks, and that the city tax collector was threatening to levy on and sell appellee's property to enforce the collection of the tax.

It appears, from the deposition of appellee himself, that his lot included a little over four acres; that it was part of a lot of some seven acres bought by Boldrick, who divided it into three lots, building houses on the other lots, and selling the four-acre lot to appellee; that there are six houses on the extension of Market street from High street, the nearest being about fifty feet from appellee's house, and that his principal business has been that of a tailor, which he has carried on on Market street, in the city of Lebanon, since his purchase from Boldrick.

Appellee has a garden on his property for family purposes, but the remainder of the four acres of land is not in a condition to be used profitably as a market garden or farm, owing to the poorness of the land.

This case seems to us to come within the rule laid down in Elkton v. Gill, 94 Ky., 138; Cheany v. Hooser, 9 B. M., 330; Matthus v. Shields, 2 Met., 553. In the first-named case this court held: "The general power of the Legislature to extend the limits of a city or town, whereby municipal taxation is imposed upon property hitherto free of it, can not, in view of repeated decisions of this court, be now disputed. And it is only when that power is so exercised as to involve violation of the clause of the Constitution prohibiting taking of private property for public use without just compensation courts will interpose. But the protection afforded to, and advantages received by, the citizens from a municipal government are, in the meaning of the Constitution, just compensation for taxation im-

posed in order to maintain it. And local taxation authorized by law can not be deemed taking private property without just compensation, unless it is palpable that persons or their property are subjected to such burthen for benefit of others for purposes in which they have no interest, and to which they are, therefore, not justly bound to contribute. Cheany v. Hooser, 9 B. M., 330; Matthus v. Shields, 2 Met., 553. Whether the benefit and advantages derived from a municipal government are, in a given case, adequate compensation for local taxation imposed is not the province of courts to decide, legislative determination of that matter being conclusive. Cheany v. Hooser; Swift v. City of Newport, 9 Bush, 39. For, as said in the first named case, the limit of legislative discretion in regard thereto 'can only consist in the discrimination to be made between what may, with reasonable plausibility, be called a tax, and for which it may be assumed that the objects of the taxation are regarded by the legislature as forming a just compensation, and that which is palpably not a tax, but is under the form of a tax, or in some other form, the taking of private property without just compensation.'"

We think it perfectly apparent that appellee used his property as a town lot; that it received, at least, a portion of the benefits of the municipal government, and that it was essentially town and not farm property, and was so situated as to afford ground for municipal control.

No case has been made out by appellee which can authorize the courts to overrule the legislative discretion in extending the boundary. "Courts are authorized to interfere in such cases only when the burden, though called so, is palpably not a tax, but is under the form of a tax, the taking of private property for use of others, or for the public, without compensation." (Henderson Bridge Co. v. City of Henderson, *ante*, 417–421.)

And in Briggs v. Town of Russellville (*ante*, 389), it was held that agricultural and similar lands brought within the corporate limits of a town by the extension of such limits, and receiving the benefits coincident with municipal government, are subject to taxation for municipal purposes, although not strictly urban property, in that the lands are not divided into blocks and lots.

We think it unnecessary to refer to other authorities.

The judgment is reversed, with directions to dismiss the plaintiff's petition.

WATKINS' ADM'R V. AHRENS & OTT MFG. CO.

(Filed January 27, 1897—Not to be reported.)

Continuance—The court erred in refusing a continuance or postponement asked by plaintiff, it appearing that one of her two attorneys was then engaged in the trial of a case in another court, and that it was necessary for the other on that day to argue in the Federal Court a case involving large interests.

R. C. Davis and Matt O'Doherty for appellant.

Randolph H. Blain for appellee.

Appeal from Jefferson Circuit Court, Common Pleas division.

Opinion of the court by Judge Guffy.

This appeal is prosecuted to reverse a judgment of nonsuit rendered against the appellant in her suit against the appellee.

After there had been several continuances or postponements of the case it was set down for trial for April 17, 1894, but not called until the 18th, at which time it appears that Mr. Davis, one of appellant's attorneys, was engaged in the trial of a cause in the county court, which trial had been commenced some days before that time.

It was also claimed that Mr. O'Doherty, appellant's other attorney, then in court, had to go and attend the trial of a cause in the Federal Court, in which a very large sum of money was involved, and a number of parties in interest litigating, it being an equity suit pending on exceptions to report of commissioner, and to be argued that day. Appellant asked for a continuance of her suit, and the motion was overruled and the judgment aforesaid entered and cause dismissed without prejudice. Several affidavits were filed in support of the motion for a new trial and some in opposition thereto, which motion was overruled.

It is claimed by appellee that O'Doherty first said he would try after the motion for continuance had been overruled, and after reflection refused to try.

It is also claimed by appellee that all the former continuances had been at the instance of appellant, but several of the orders of court do not show that the continuances were at appellant's instance. It is also claimed that O'Doherty did not argue the case in the Federal Court until the 19th.

Appellant's claim that she was ready to try the case on the 17th, but at the request of appellee's attorney she had agreed to let the case go over if it was called the 17th, but that in fact it was not reached for trial.

It seems that the judgment was in effect a final determination of appellant's cause of action, as it was, after dismissal, barred by the statute of limitation. The trial court should be allowed a reasonable if not wide discretion in granting or refusing continuances. But in this case it seems that appellant was not in fault, and the fact that her attorneys could not be present and conduct her case seems to have been a casualty or misfortune that she could not with reasonable diligence have foreseen or guarded against. The cause might have been set down for another day not far distant, and the appellant ruled to the utmost diligence. Taking the record before us it seems to us that the court erred in dismissing the action.

The judgment is, therefore, reversed and cause remanded, with directions to award appellant a new trial and for proceedings consistent with this opinion.

WILSON V. SMITH.

(Filed January 27, 1897—Not to be reported.)

1. *Wrongful suing out of attachment*—In this action to recover damages for the wrongful suing out of an attachment, the petition may have been defective in so far as it was sought to recover an attorney's fee in that it was not alleged specifically what attorneys's fee had been paid or agreed to be paid for defending the attachment; but the defect, if any, was cured by the answer and verdict.

2. *The court should have confined plaintiff to proof* of the attorney's fees paid or agreed to be paid "for the defense of the attachment," and should have so instructed the jury.

3. While the proof may have been hardly sufficient to authorize the amount allowed as an attorney's fee, yet, as it would have authorized a much larger verdict for the attached property, defendant was not prejudiced.

4. The defendant having appealed from the judgment in the attachment suit, which was affirmed, he can not now question the jurisdiction of the special judge who rendered that judgment.

Wilson & Rawlings for appellant.

John T. Hays and J. H. Tinsley for appellee.

Appeal from Knox Circuit Court.

Opinion of the court by Judge Guffy.

The appellee, Smith, recovered a judgment in the Knox Circuit Court against the appellant for $180, with interest and cost, and, appellant's motion for a new trial having been overruled, he prosecutes this appeal. The suit was to recover damages for the wrongful suing out of an attachment by the appellant.

It is insisted by appellant that the petition was insufficient, and did not authorize the evidence to be admitted that was admitted, nor authorize the court to give the instruction which was given, it being nowhere specifically alleged in the petition what attorney fee had been paid or agreed to be paid for defending the attachment. It may be that the petition as to that claim was defective, but the defect, if any, was cured by the answer, verdict and judgment. The court should have confined the plaintiff to proof of the attorney fees paid or promised for the defense of the attachment, and should have so instructed the jury. It is, however, by no means certain that the instruction given was not intended to restrict appellee's recovery for attorney fees to the amount paid or to be paid for defending the attachment. The evidence conduced to show that the attached property was worth $200, or near that amount. The jury allowed $120, with interest, from August, 1884, and $60 attorney fee.

It may be that the proof was hardly sufficient to authorize the $60 for attorney fee, but it would have authorized a much larger verdict for the attached property. It seems to us that no error to the prejudice of the substantial rights of the appellant occurred on the trial.

The court properly refused to allow the amended answer to be filed. It did not show that any objection was made at the time to the special judge, and appellant prosecuted an appeal from the judgment and the same was affirmed; hence, he could not be heard in this case to impeach or attack the judgment rendered by the special judge in the suit of Wilson v. Smith, etc.

The judgment appealed from is affirmed with damages.

EILKE, &C. v. MCGRATH.

(Filed January 28, 1897.)

Sale of liquor to inebriate—Under the act of March 6, 1878 (General Statutes, page 462), a right of action in favor of the wife of an inebriate, on account of a sale of liquor to her husband, existed only against a "licensed" liquor dealer, and only on account of a sale made after written notice served upon him not to make such sale. Notice served upon his employe was not sufficient to give a right of action against either him or the employe on account of a sale made by the latter.

O'Neal, Phelps, Pryor & Silligman and Phelps & Thum for appellants.

Pirtle & Trabue and A. C. Rucker for appellee.

Appeal from Jefferson Circuit Court, Common Pleas division.

Opinion of the court by Judge Paynter.

Section 2, act March 6, 1878 (General Statutes, page 462), provides that it shall not be lawful for any person having a *license* to sell spirituous, vinous or malt liquors by the drink or otherwise to sell, give or loan any of such liquors or the mixture of either knowingly to any person who is an inebriate or in the habit of becoming intoxicated or drunk by the use of any of such liquors, or to suffer or permit any such person to drink any of such liquors or the mixture of either in his barroom, saloon, or in or upon any tenement or premises in his possession or under his control. The one guilty of such offense is subject to a fine of $50.

Section 3 of same act (General Statutes, page 462), provides that in addition to such fine the person who shall violate any of the provisions of the second section of the act shall, together with his sureties on his bond, be liable to a civil action for damages by the wife, etc., of such inebriate; "*provided, however*, that the person so selling shall not be liable in civil actions to the wife, father or other relation unless written notice forbidding such sale has been given the person so selling prior to the offense complained of."

This action was brought by the appellee, wife of Thomas McGrath, under section 3 *supra*, against Wm. C. Eilke, sr., and Wm. C. Eilke, jr. The appellant, Wm. C. Eilke, jr., had a license to retail liquors in South Louisville, and Wm. C. Eilke, sr., father of Wm. C. Eilke, jr., assisted in the sale of the liquors, and some of the testimony tending to prove that he devoted a considerable portion of his time to the business. The testimony offered by the defendants tended to prove that the father only attended to the business during the temporary absence of the son.

There was no evidence tending to show, nor is it claimed that a notice was served by Mrs. McGrath on Wm. C. Eilke, jr., forbidding him to sell or give liquors to Thomas McGrath. The proof establishes the fact that a written notice was served on Wm. C. Eilke, sr., by Mrs. McGrath, forbidding him to sell or give spirituous, vinous or malt liquors to her husband, who was an inebriate, and that after receiving the notice he sold and gave such liquors to the husband of appellee, and that her husband was frequently permitted to drink such liquors at the place in question.

The statute under consideration provides a penalty against a *licensed* liquor dealer for its violation and a civil remedy in addition thereto for certain relatives of the inebriate.

There is no evidence whatever tending to prove that William C. Eilke, sr., had a license to sell liquors. As there was no written notice served upon William C. Eilke, jr., the question is, was the service of the notice on Eilke, sr., equivolent to serving it on him? We are of the opinion that it is not. Before the cause of action could arise for selling the liquor it was necessary that the person "so selling"—the one *licensed*—should have received written notice for bidding such sale.

It means that the notice must be served on the one who is authorized to carry on the business; not his agents or employes who may assist in conducting it.

An entirely different question would be presented had the notice been served on William C. Eilke, jr., and afterwards he permitted his father to conduct his business and while doing so sold the liquors in disregard of the notice to McGrath.

The statute is highly penal in nature, and to enable one to maintain an action under it its requirements should be strictly pursued. In so far as the instructions which the court gave the jury are not in accord with the views herein expressed, they are erroneous.

The judgment is reversed, with directions that further proceedings conform to this opinion.

WRAY'S EX'TX, &C. V. CRAIG'S EX'OR.

(Filed January 29, 1897—Not to be reported.)

Interest—Judgment A note executed April 4, 1876, payable twelve months after date, and "bearing interest at 8 per cent.," bore that rate until maturity, and after that 6 per cent. And while it was error to make a judgment upon the note bearing 8 per cent. interest until October 1, 1890, the defendant was not prejudiced, as the judgment, in accordance with the endorsements on the note, was credited by "interest paid" to October 1, 1890. And as the several credits upon the note were merely of "interest paid" to a certain date it can not be inferred, in the absence of the pleading and proof to that effect, that the interest thus paid was at the rate of 8 per cent. Nor does the fact that an endorsement was made October 1, 1890, to the effect that thereafter the note should bear only 6 per cent., authorize the inference that interest had theretofore been paid at the rate of 8 per cent.

J. W. Alcorn and J. B. Paxton for appellants.

H. Helm for appellee.

Appeal from Lincoln Circuit Court.

Opinion of the court by Judge Guffy.

The appellee instituted this action in the Lincoln Circuit Court against the appellants to recover judgment upon a note executed by appellee Barnes, and to enforce an alleged mortgage lien upon a tract of land. The other appellants were alleged to have some claims or interest in the land which was alleged to be inferior to that of appellee. The note sued on reads as follows:

"Twelve months after date we promise to pay R. G. Craig or order fifteen hundred dollars, bearing eight per cent. interest from date hereof, and this note is secured by a mortgage bearing even date herewith on one dwelling house and lot.

"Signed: GEO. O. BARNES;
"G. O. BARNES,
"*Trustee for Jane S. Barnes;*
"April 4, 1876. JANE S. BARNES."

The petition sets out the mortgage and says it is filed herewith, but it seems not to have been filed.

It is alleged in the petition that the obligors promised to pay said sum of $1,500 with 8 per cent. interest from date until paid, but it will be seen that the words "until paid" are not in the note. No answer was filed or defense made by any of the appellants. At the June term, 1894, the court below adjudged that appellee recover of

appellant Barnes $1,500 with interest at the rate of 8 per cent. per annum from the 4th of April, 1876, until October 1, 1890, and after that date 6 per cent. per annum until paid, subject to numerous credits, which will be noticed hereafter, and also adjudged a sale of the land, it being alleged that it could not be divided without great detriment to its value, and adjudged that appellee's lien was superior to that of all the appellants. The land was sold and sale confirmed. In December, 1894, appellants took an appeal to this court.

The contention of appellants is that the judgment is erroneous because it allows 8 per cent. interest per annum from date of the note until October 1, 1890, when the endorsement was made that thereafter the note should only bear 6 per cent. interest. There is no question as to law governing such contracts. The note would bear 8 per cent. until maturity and after that 6 per cent. But it will be seen from the judgment and credits on the note that all the interest was credited up to October, 1890, besides sundry other credits, and by the terms of the judgment no interest could be counted on the note prior to October 1, 1890, and in addition thereto the various other credits allowed in the judgment prior or at the date of October, 1890, should be and we presume were deducted from the amount of the principal of the note, hence so far as this record shows no 8 per cent. interest nor any interest was in fact collected and could not be legally collected under the judgment.

It may be that 8 per cent. was in fact paid at each payment where the simple endorsement is made: Interest paid to such and such times. If such was the fact appellants should have pleaded that fact in the court below. The endorsement of October, 1890, that 6 per cent. only was to be paid after that date does not show that a greater rate had been paid therefor.

It may be conceded that it was error to render a judgment for 8 per cent. interest, but it is a well-settled rule of law that an erroneous judgment will not be reversed at the instance of a party not injured thereby or whose rights have not been prejudiced thereby.

Judgment affirmed.

DAVIDSON, &C. V. HAYDEN, &C.

(Filed January 30, 1897—Not to be reported.)

1. Indemnifying bond—The sureties in an indemnifying bond executed by the plaintiff in an execution can not escape liability to the officer to whom the bond was executed upon the ground that the claimants of the property did not claim an exclusive interest therein, but only a joint interest with the defendants in the execution, and that the officer should have returned the execution with the levy endorsed and not have sold the property.

2. The marshal of the town of Salem had the right to levy an execution issued by a justice of the peace upon personal property outside the corporate limits of the town. (Acts 1889-90, page 589.)

James & James and Bush & Worten for appellants.

Jno. K. Hendrick for appellees.

Appeal from Livingston Circuit Court.

Opinion of the court by Judge Paynter.

This action is on an indemnifying bond, executed by the appellants as the sureties of Ben. Shoecraft. An execution was issued by

a justice of the peace of Livingston county on a judgment in favor of Ben. Shoecraft against J. H. Greenlee and J. A. Brasher. It was placed in the hands of the appellee, Hayden, marshal of the town of Salem, in Livingston county, for collection. He proceeded to levy it on property outside of the corporate limits of Salem, but in Livingston county. The plaintiff in the execution required that the marshal should sell the property under execution, and to indemnify him executed the indemnifying bond in suit. It turned out that the property sold under the execution was not subject to levy and sale under it, and those owning it brought suit against the appellee, and recovered damages for the wrongful seizure and sale of the property.

The return on the execution shows that the marshal levied it, not upon a joint interest or partnership property, but upon 4,000 pounds of tobacco belonging to John Brasher and Henry Greenlee, the defendants in the execution.

The plaintiff demanded a sale of the property, and, the marshal having a doubt whether it was subject to the execution, he required the indemnifying bond in suit. The conclusive presumption in this case is that the plaintiff in the execution denied that any one was the owner of or had any interest in the property levied on except the defendants in the execution; therefore, he gave the indemnifying bond, and required the marshal to sell the property levied upon. While the owners may have claimed a joint interest in it with the defendants in the execution, still the plaintiff denied such claim, and compelled the marshal to sell it by giving the indemnifying bond.

It can not now be said by the sureties on the bond that some one had or claimed a joint interest in the tobacco with the defendants in the execution, and that, therefore, the officer should have returned the execution with the levy indorsed and not have sold the tobacco. The officer could not have done this because the plaintiff in the execution required him to sell it all as the property of his debtors. The appellants enabled the plaintiff in the execution to enforce his demand on the officer by the execution of the bond, and thereby agreeing to "indemnify him against the damages which he may sustain in consequence of the seizure or sale of the property."

This action was brought to compel the appellants to perform their undertaking. The officer was damaged in consequence of the seizure and sale of the property, and the appellants should be required to pay it.

Upon the examination of section 7 of the new charter of the town of Salem (Acts 1889-90, page 589), we are of the opinon that the marshal had the right to collect the execution under which the sale was made and the consequent authority to take the indemnifying bond.

The judgment is affirmed.

WILSON v. DONALDSON.

(Filed January 30, 1897—Not to be reported.)

1. Surrender of note for forged renewal—Pleading—In an action upon a note which had been surrendered for a renewal note, which turned out to be a forgery as to defendant, the plaintiff having alleged, as it was necessary for him to do, that he believed in good faith when he accepted the new note that defendant had signed it, the defendant having, by a denial, put in issue this allegation,

it was not improper to strike from the answer an affirmative allegation to the effect that plaintiff knew, at the time he accepted the new note, that defendant had not signed it.

2. *Usury*—The fact that the renewal note embraced usurious interest did not affect defendant's liability on the original note.

B. H. Robinson, John P. Norvell and Norvell & Clark for appellant.

Hanson Kennedy for appellee.

Appeal from Nicholas Circuit Court.

Opinion of the court by Judge Paynter.

This action was instituted against the appellant, G. W. Wilson, and W. A. Wilson on a note dated August 15, 1893, for $3,558.40, which purported to have been executed by them to appellee. The appellant pleaded *non est factum*. W. A. Wilson did not answer. Thereupon appellee filed an amended petition, in which he alleged that appellant, G. W. Wilson, and W. A. Wilson, in November, 1891, executed to him their promissory note for $2,726.74, payable twelve months from date, with 10 per cent. interest; that on the 15th day of August, 1893, the note remained unpaid; that on that day he had prepared the note for $3,558.40, except the two signatures thereto; that he sent it to W. A. Wilson with instructions for him and the appellant, G. W. Wilson, to sign and return it to him in renewal of the note for $2,726.74; that in a few days thereafter it was returned by W. A. Wilson by mail to him with the names of G. W. and W. A. Wilson signed thereto; that he accepted the note in renewal of the other note mentioned in ignorance of the fact that G. W. Wilson had not signed his name to it, and that when he so accepted the note he in good faith believed that G. W. Wilson had signed it and, therefore, surrendered the other note. The appellee asked to recover on the note so surrendered.

The appellant filed an answer in which he put in issue the facts alleged as to the manner and circumstances of the preparation, the sending and return of the note. It also denies that the appellee "accepted said note in ignorance of the fact that this defendant had not signed his name thereto or that plaintiff believed in good faith at the time he accepted it that this defendant had signed said alleged note or that the signature of G. W. Wilson to said alleged renewal note was his genuine signature."

These denials put in issue clearly and distinctly the question as to whether the appellee had accepted the note in ignorance of the fact that appellant had not signed his name to it, and also as to whether he had accepted it in good faith, believing that the appellant had signed it.

It was essential that the plaintiff should show these facts to enable him to recover on the original note. (Stratton v. McMakin, 84 Ky., 641; First National Bank of Covington v. Gains, 87 Ky., 597.)

After the appellant, G. W. Wilson, had made the denials in his answer, to which we have just alluded, he proceeded to allege that the appellee knew at the time he accepted the so-called renewal note that he (G. W. Wilson) had not signed it and that his signature thereto was not genuine, etc., and with this knowledge accepted it and surrendered the original note, and that the note contained usurious interest. The court sustained a motion to strike out this part of the answer. These allegations that appellee had knowledge at

the time he accepted the renewal note and surrendered the original one were unnecessary, as the facts alleged, except as to the usurious interest, had already been put in issue by the answer.

The fact that the renewal note embraced usurious interest did not affect appellant's liability on the original note nor operate to prevent the appellee from maintaining his action thereon because he had been induced to surrender it by the misconduct of the co-obligor.

The court did not err in sustaining the motion to strike out the parts of the answer indicated. The jury found a verdict for the amount of the original note and legal interest and the court entered a judgment thereon.

There is no bill of exceptions in the record, therefore we can not consider anything except the question of the sufficiency of the pleadings. There is no suggestion made that the pleading are not sufficient to sustain the verdict, except counsel for appellant contend that the court erred in sustaining the motion to strike out the parts of the answer as heretofore stated.

It may well be doubted, where there is no bill of exceptions, in reviewing the question as to whether the pleadings will sustain the judgment, it is proper to review the action of the court on a motion to strike out part of a pleading of the unsuccessful party, but we have done so in this case, as it was the only error suggested, and being of the opinion that the court did not err in sustaining the motion the judgment is affirmed.

ASHCRAFT V. ELLIOTT.

(Filed January 30, 1897—Not to be reported.)

1. *Officers—Liability for trespass*—One who assumed to act as town marshal under a void appointment is liable to the owner for the seizure of personal property under an attachment; but, as he sold the property in obedience to a valid judgment of the court, he is liable only for his acts prior to the judgment.

2. *Same*—It was competent for defendant to show, in mitigation of damages, that plaintiff received the benefit of the sale of his property.

C. T. Atkinson for appellant.

John D. Wickliffe for appellee.

Appeal from Nelson Circuit Court.

Opinion of the court by Judge Hazelrigg.

One Gentry sued Elliott, the appellee, and caused an attachment to be levied on his mules. Appellant Ashcraft, as marshal of the town of New Hope, levied the attachment and took the mules in possession. At the trial of the cause judgment was rendered for Gentry for his debt, the attachment was sustained and the mules adjudged to be sold. The court in its judgment directed the marshal to execute the judgment of sale after the usual advertisement and on the usual credit. The marshal did so and Gentry became the purchaser. Subsequently the appellee prosecuted an appeal from the judgment, and on that trial judgment was rendered for Gentry's debt, but the attachment was discharged. Gentry then offered to surrender the mules, but an execution on his last judgment having

come to the hands of the sheriff they were levied on and sold at public outcry to an outsider for the sum of $75.

This suit was then brought by appellee, the defendant in the attachment, against the marshal for the seizure and sale of his mules. He defended on the ground that he was authorized to make the seizure of the mules in virtue of the process coming to his hands as marshal, and that he made the sale at the direction of the court and in pursuance of its judgment. On the trial of the case it developed that the marshal had in fact no valid claim to that office, having been appointed by the trustees of the town in whom there was vested no sort of authority to make such appointment. The court thereupon confirmed the proof to the value of the mules and judgment resulted in plaintiff's favor for $125, which seems to have been their full value.

The proof offered by the defendant showing that the plaintiff had received the benefit of the sale of the mules under the execution against him was rejected. This was error, as it is well settled under such circumstances that "if the property has been sold and the proceeds applied to the payment of the plaintiff's debt, or otherwise to his use, these facts may be shown in mitigation of damages." (15 Am. & Eng. Ency., 688, and cases cited.)

But there is a more radical error in the rulings of the trial court. The appellant had pleaded that he had sold the mules in obedience to the judgment of the court and as appointed and directed to do, and offered to so prove by the judgment itself. This was refused him. It seems clear to us that as the court's commissioner in making the sale he was fully protected by the judgment, which was confessedly regular in all respects, and at that time unreversed or even appealed from.

This ruling of the court on the evidence—and the same view was carried into the instructions to the jury—held the appellant liable, not only for the original seizure, but for the sale in pursuance of a perfectly valid judgment. His liability in any event is limited to the damages, if any, caused the owner by being deprived of the use of his mules from the time they were first taken until they were placed in the hands of the appellant to be sold under the judgment of the court. After the rendition of the judgment the appellant is protected under it in all he did in pursuance of its mandate, and can not be treated as a trespasser, though the plaintiff in such cases may be held liable if it be finally determined that the attachment was wrongfully obtained.

The judgment is reversed for proceedings consistent herewith.

WALLACE V. MASON, &C.

(Filed January 30, 1897.)

1. Husband and wife—Fraudulent conveyance—To the extent that real estate conveyed to the wife of a debtor was paid for by her in work for the vendor, it can not be subjected by the husband's creditors upon the ground that the conveyance was fraudulent as to them.

2. Homestead—To the extent that a homestead was paid for with exempt wages of the debtor, it is exempt even as to debts created prior to its purchase.

Wm. H. Holt and Grant E. Lilly for appellant.

Hathaway & Cardwell for appellees.

Appeal from Clark Circuit Court.

Opinion of the court by Judge Paynter.

The appellant is seeking to subject to the payment of a judgment debt against Chas. Mason a house and lot in Winchester. The debt appears to have been contracted before the purchase of the property. It was purchased in 1886, and on the 7th day of March 1887, it was conveyed to Ellen Mason, wife of Chas. Mason, by the vendor, Major Cardwell. While the note for the purchase money, amounting to $250, was executed by Chas. Mason, yet the agreement between the vendor and Ellen Mason was that if she would do certain work for him the property was to be conveyed to her. This arrangement was made with the consent of the husband. The interest and principal when paid amounted to something over $320. Except $50, which was paid by the husband in work for the vendor, the wife washed, cleaned house and did other work for the vendor until she had paid for the property.

She did this work for several years without other compensation than being credited on the purchase money of the place. It is insisted that the husband was entitled to her earnings and, therefore, the property was paid for by him. The cases of Uhrig v. Horstman, 8 Bush, 177, and Penn v. Young, 10 Bush, 628, are cited to sustain that contention.

There has been legislation on the subject of the right of a married woman to her earnings since the opinion in the 8 Bush case and since the transaction out of which the 10 Bush case arose.

Section 1 of an act approved April 11, 1873 (General Statutes, 720), is as follows: "That the wages and compensation of married women for services and labor done and performed by them shall be free from the debts and control of their husbands."

Under the provisions of this act the wife was entitled to her earnings and could use them in the payment of the purchase money of the little home which, by her industry and toil, she was endeavoring to secure to her family.

She paid all the purchase money with her labor except $50, which the husband paid with his labor. He was entitled to this $50 free from the payment of his debts. He was a laborer with a family, and when he appropriated it to aid in paying for the house it did not prejudice the rights of the appellant because he could not subject it to the payment of his debt.

It was held in Thompson v. Hiffner, 11 Bush, 353, that where an exchange of real estate is made, if either of the parties thereto is at the time entitled to a homestead right in the property he parted with, he takes the same right in the property he receives in exchange.

It was said in Lear v. Totten, 14 Bush, 105, "that if the owner sells his homestead and converts it into money, with no purpose of reinvesting the proceeds in property not exempt from execution, the protection of the law afforded him against the claims of creditors is gone."

One can sell his homestead after he has contracted a debt and reinvest its proceeds in another homestead and hold it free from the payment of such debt. This technically is a *purchase* of a homestead, although with the proceeds of another homestead. If a debtor owns just such personal property as the law exempts from the payment of his debts why should he not be permitted to sell it and invest it in land, occupy it with family and hold it as a home-

stead exempt from the payment of his debts? Where is the difference in principle between the case where the proceeds of exempt realty and those of exempt personalty are invested in a homestead? The creditor is injured no more in the one than in the other case.

We do not think the fact that the husband paid $50 of wages exempt from the payment of the debt renders the property liable for appellant's debt, or that any part of its proceeds should be subjected to the payment of it. Had the statute of limitation been pleaded it would have been an available defense to the alleged fraudulent act in having the property conveyed to the wife.

The judgment is affirmed.

KIMBALL, &C. V. DOHONEY.

(Filed December 9, 1896—Not to be reported.)

1. Negligence in caring for horse—In this action to recover damages for the negligence of defendant in failing to take proper care of a horse of plaintiff placed in defendant's possession to train, the court properly instructed the jury that defendant was required to take such care of the animal as an ordinarily prudent man would take of his own property.

2. Reversible error—There can be no reversal because of the admission of incompetent testimony, as the error, if any, was not made a ground for new trial.

J. W. Lewis for appellants.

J. W. S. Clements for appellee.

Appeal from Washington Circuit Court.

Opinion of the court by Chief Justice Pryor.

This action was instituted by the plaintiff to recover damages for the negligence of the defendant in failing to take proper care of a horse of the plaintiff, placed in possession of the defendant to train, etc.

The issue was properly made, and a verdict and judgment for the plaintiff. The testimony for the plaintiff conduced to show that the horse was so badly injured as resulted in its death, and we perceive no reason for disturbing the verdict. The instructions were to the effect that no recovery could be had unless the loss complained of was caused by the neglect of the defendant, and that the latter was required to take such care of the animal as an ordinarily prudent man would take of his own property. The admission, if any, of incompetent testimony was not made a ground for a new trial.

Judgment affirmed.

MT. STERLING & HOWARD MILL TURNPIKE CO. V. BARRY, &C.

(Filed January 19, 1897—Not to be reported.)

1. Damages for breach of contract to grant passway—Where the owner of land over which there was a public highway agreed with a turnpike road company and certain individuals to close the highway in consideration of their granting to him a passway over the lands of one of them, there was no breach of the agreement to grant the passway until it was demanded, and as the land-

owner to whom the passway was promised died without having made the demand, and his widow and heirs have since demanded the passway, which was refused, they, and not the administrator, were the proper persons to sue for a breach of the contract.

2. *Same.* The court properly sustained a demurrer to a paragraph of the answer of defendants setting up an agreement with the decedent and one of his sons to convey to the son the tract of land over which the passway was to be granted, by which agreement the son was to allow the father to have the passway, there being no written memorandum of the agreement. And while defendants amended their answer by alleging the actual conveyance of the land as agreed, the evidence fails to show that it was a part of the contract with the son that the father was to have the passway or that the conveyance to the son was in satisfaction of the original agreement to grant the passway.

3. *A judgment for $110 as damages* for breach of the contract to grant the passway is not excessive.

B. F. Day and Tyler & Apperson for appellant.

H. B. Kinsolving for appellees.

Appeal from Montgomery Circuit Court.

Opinion of the court by Judge White.

The appellees, Sarah J. Barry, John F. Barry, J. P. Barry and George Barry, sued the appellants, Mt. Sterling & Howard Mill Turnpike Co., W. T. Fitzpatrick, E. C. Owings, R. Q. Drake, N. C. Baily and Wm. Durham. The appellees sued as the widow and children and heirs of J. P. Barry, deceased, and Sarah J. Barry also sued as the administratrix of her husband, J. P. Barry. Appellees state that J. P. Barry, at the time of his death, was the owner of a tract of land in Montgomery county containing one hundred and thirty acres; that he had owned and possessed this land for many years before his death; that defendants had instituted proceedings in the Montgomery County Court to annul a public highway that was on said land, and had been established as such highway by the Montgomery County Court; that their ancestor filed objections to the discontinuance of said public highway because it would deprive said decedent of any way of ingress and egress to and from his land; that on the 17th day of June, 1889, the defendants, now appellants, being anxious to close up said dirt road, and have the same annulled by the orders of said county court, made, executed and agreed to and with said Barry, deceased, by written contract, which is in substance as follows:

"Whereas, as this agreement, made and entered into this 17th day of June, 1889, by and between the Mt. Sterling & Howard's Mill Turnpike Road Co. and Taylor Fitzpatrick, N. G. Baily, Ed. Owings, R. Q. Drake and Wm. A. Durham, individually, parties of the first part, and J. P. Barry, of the second part, all of Montgomery county, Ky.

"Whereas said parties of the first part, are desirous of closing that part of the old dirt road known as the Howard's Mill & Mt. Sterling dirt road, commencing at the point on the turnpike road where the said dirt road intersects it * * * (describing the portion of road they desired to close), and J. P. Barry is opposing the closing of said road, and in order to compromise said controversy, it is agreed that Wallace Dehaven as surveyor shall go on the lands of said Barry at a point where they connect and adjoin the lands of said Baily, near the turnpike road, and survey and ascertain by said survey whether or not it is practicable to construct a passway

that can be hauled over, leading from said turnpike road through the lands of said Baily, and then through the lands of said Barry to a point on the hill in said Barry's land, and said survey shall include a road or passway twenty feet wide, giving metes and bounds, courses and distances, and probable cost thereof, and all facts connected therewith that he may deem necessary to report, said Dehaven to go on land and make report as soon as practicable; * * * and if said Dehaven shall make report that the passway as indicated herein is practicable, and can be built at a reasonable cost, then, in that event, said parties of the first part hereby agree and bind themselves to convey to said J. P. Barry said land, twenty feet wide, where it passes through said Baily, in fee, but said Barry will have to, * * * and in consideration thereof said Barry agrees to withdraw all objection to the closing of said road aforesaid, and permit the same to be closed by the county court so far as he is concerned."

This contract was signed by all the parties thereto, and dated June 17, 1889. Appellees aver that said Dehaven did make said survey, and reported the same, giving metes and bounds and courses and distances, and that said report was approved and agreed to, and the same was filed on the 25th of June, 1889, in the Montgomery County Court, and thereupon the said J. P. Barry withdrew his exception to the discontinuance of said dirt road; that defendants have failed to make to said Barry during his life a deed to said roadway or to appellees, his widow and children and only heirs-at-law, though they have been requested to convey and carry out said contract by appellees. The appellees say that, by reason of the closing of said dirt road, the land was deprived of any outlet unless they passed over land of private individuals, their neighbors. By reason of the failure to have passway, the land was greatly damaged in value. They ask that defendants be required to make said conveyance, and carry out their contract; and if this can not be done, they ask judgment for $2,000 damages, etc.

To this petition defendants demurred, and the court overruled the demurrer, and appellants excepted.

We are of opinion that the petition stated a cause of action, and the demurrer was properly overruled.

Appellants then moved the court to compel plaintiffs to elect whether they will prosecute this action in the name of Sarah J. Barry as administratrix of J. P. Barry, or in the name of the widow and heirs of J. P. Barry. To this plaintiffs objected, and the court overruled the objection and compelled plaintiffs to elect in whose name they would prosecute this action, and plaintiff, under protest, elected to prosecute the same in the name of the widow and heirs of J. P. Barry. In view of the opinion in this case, it will not be necessary to decide this objection. Plaintiffs then filed an amended petition, making more specific in some of their statements.

Defendants answered, denied that they had broken the contract set up in the petition of June 17, 1889, by failing to convey to J. P. Barry said land or otherwise; deny any breach of said contract; denies that said farm has been damaged in the sum of $2,000 or any other sum.

Appellants charge that, after the 17th day of June, 1889, and during the life of J. P. Barry, and after the said Wallace Dehaven had filed his report named in the petition, about the 26th of June, 1889, it was expressly agreed, understood and contracted between J. P. Barry and J. F. Barry, and defendants Fitzpatrick and N. G. Baily, that for and in consideration of full settlement and in satisfaction and compromise of the contract of June 17, 1889, and other consid-

erations since paid by plaintiff, John F. Barry, if the said Fitzpatrick and Baily would convey to John F. Barry, a son of J. P. Barry, two certain tracts of land in Montgomery county, adjoining J. P. Barry's farm, and including the land and road contemplated on June 17, 1889, and located by Dehaven, as in the petition named, and by which last contract and agreement said Barry was to have a road and passway for himself and family and servants or employes in the land conveyed to plaintiff, J. F. Barry; that, in pursuance of said settlement and compromise of said agreement of June 17, 1889, and before this suit was brought, did convey said land as they agreed to do to plaintiff, J. F. Barry.

A demurrer was sustained to the second paragraph of the answer that set up this contract with J. F. Barry as a defense, and we think properly so, as there was no written memorandum of this contract signed by Barry.

Defendants amended their answer, and say that, by the contract of June 26, 1889, J. P. Barry was to have a road and passway over the land conveyed to J. F. Barry for himself and family, etc.; and, for amendment to the second paragraph of their answer, that they conveyed the two tracts of land to J. F. Barry at the instance and request of J. P. Barry, and at the time J. P. Barry and J. F. Barry contracted between themselves, etc., and it was expressly understood that, in the purchase of the land by J. F. Barry, at a reduced price, was to take the land, and that J. P. Barry was to use the road as contemplated by the contract of June 17, 1889; and it was expressly agreed that the sale was in full satisfaction and settlement of contract of June 17, 1889; that they carried out said contract by putting said J. F. Barry in possession, etc.

Plaintiffs demurred to this answer, and their demur was overruled, and exceptions taken. Plaintiffs filed reply, putting in issue all the statements of defendants, and, the issues having been formed, a trial was had and resulted in a judgment against appellants for $110 damages, and from this judgment they have appealed, and appellees have prayed a cross appeal, and each asks a reversal of the judgment.

Appellants insist that appellees can not maintain this action as the widow and heirs of the decedent, J. P. Barry; that, if there was a breach of said contract of June 17, 1889, it must have occurred before the death of J. P. Barry, and, if it did so occur, his administrator alone had the right to sue for the breach of the contract. This position is correct if the breach of the contract was during the lifetime of J. P. Barry. The proof shows that J. P. Barry died in April, 1890, and there is no proof that he ever demanded a compliance by appellants with the contract; and we hold that there could not be a breach of contract until a demand was made of appellants to convey. The appellees, as proven, made demand of appellants after the death of J. P. Barry, and they refused to make conveyance of this road and actually conveyed the same to J. F. Barry in fee, thus putting it out of their power to comply with the contract of the 17th of June, 1889, and that appellees, as the widow and heirs of J. P. Barry, were the proper parties to sue in this action.

Appellants failed to establish their defense, unless we consider their own testimony, which was excepted to as incompetent under what is known as the testimony bill. This testimony was incompetent, and we suppose that the circuit judge did not consider it in making up his judgment.

A considerable amount of proof was taken as to the damages resulting to the land of appellees by reason of the closing of the old

dirt road, and the failure to convey the passway over the Baily land; and, from the evidence, it is shown that appellees' farm was entirely cut off from any passway to or from it to the county seat or any public place, many of the witnesses fixing the damages at $2,000, and many of appellants witnesses proving it was but little damaged, and that other passways of equal convenience could be had for a trifling sum.

From all the evidence, facts and circumstances proven in this case as to damages sustained by appellees on account of the breach of said contract to convey, we are of opinion that the amount fixed by the judgment of the circuit court is a fair estimate of the damages to appellee's land, and that it is not excessive, as claimed by appellants.

Wherefore, the judgment of the circuit court on the original appeal is affirmed with damages, and also affirmed on the cross appeal.

EVANS V. STEWART, &C.

(Filed January 19, 1897—Not to be reported.)

Divorce—Liability of husband for wife's attorney's fees—To exempt the husband from liability for the wife's attorney's fees in a suit brought by her for divorce it must not only appear that the wife has ample estate to pay her costs, but also that she was in fault. And in this case, in which the wife's suit for divorce and alimony was dismissed upon a compromise, the court, upon motion of the wife's attorneys, properly rendered judgment in their favor against the husband for a reasonable fee, which was fixed at $100. And the husband can not complain that execution was awarded therefor, for as the chancellor could have compelled the payment by rule and attachment, but instead selected the milder means of making the collection, the defendant was not prejudiced.

Alexander Lackey for appellant.

Stewart & Stewart for appellees.

Appeal from Lawrence Circuit Court.

Opinion of the court by Judge White.

Elizabeth Evans sued her husband, Wm. F. Evans, in the Lawrence Circuit Court for a divorce and alimony, in which she charged her husband with cruelty and many outrageous perpetrations on her that are unnecessary to mention in this opinion. She also sued out an attachment and had the same levied on $10,000 or $12,000 worth of real estate, consisting of houses and lots and two farms in Lawrence county.

To bring and prosecute this suit she employed Sullivan, an attorney at law, and the law firm of Stewart & Stewart, who brought her suit and attended to it as her attorneys, but before the appearance term of the court the husband and wife concluded to settle their differences and did so, and by agreement said litigation was compromised and suit to be dismissed. The appellees gave the appellant, who was husband and defendant in said action, a written notice that appellees would move the court to make to them an allowance in said case a reasonable attorney's fee for their services as attorney for appellant's wife, and on said motion appellant appeared and resisted the motion, and after hearing the evidence offered by the par-

ties the court adjudged that appellees, Stewart & Stewart, were entitled to a reasonable fee for their services as attorneys in said case for Mrs. Evans, and fixed the amount at $100, and awarded an execution on said allowance in their favor, and said sum to be taxed as cost against the appellant.

The court refusing to allow a fee to but one attorney, appellant has appealed to this court and contends that this judgment is erroneous because his wife, who was the plaintiff in the divorce proceedings, had ample property out of which the appellees could make their fees, and, therefore, he was not liable, and they should look to her for the payment of their fees.

By the statute, section 900, it is provided that the husband shall pay the cost of each party unless it shall be made to appear in the action that the wife is in fault and has ample estate to pay the same.

There is no evidence in this case that shows the wife was in fault. It is shown that she owns some property in her own right in the State of Ohio, consisting of a farm that appellant had given her, and that she owned some small amount of personal property of small value, but before the husband can avoid the payment of the expense of the litigation instituted by his wife for divorce he must show she was in fault and owned ample estate to pay the same.

Having failed, as we think, to show that she was in fault, the judgment of the court making the allowance to appellees is proper and reasonable. But appellant complains that it was error in the court to award an execution on said judgment of allowance. We have no doubt but what the chancellor had the authority to award an execution in favor of appellees and cause the collection to be made by that means, as he could compel the payment by rule and attachment, and, having selected the milder mode of making the collection, appellant can not complain.

The judgment is affirmed with damages.

WHITTINGTON V. PENCE, &C.

(Filed January 22, 1897—Not to be reported.)

Levy upon exempt personal property -In this action against a sheriff to recover damages for the levy and sale of plaintiff's horse under execution, plaintiff claiming the horse as exempt from levy and sale, a verdict for defendant was flagrantly against the evidence, the plaintiff having the right, as he did, to select the horse in question as the one exempt from execution; and it was a clear violation of his legal rights for the sheriff, after such selection, to levy upon and sell the horse.

Geo. S. Fulton and C. T. Atkinson for appellant.

Jno. S. Kelley and J. D. Wickliffe for appellees.

Appeal from Nelson Circuit Court.

Opinion of the court by Judge Burnam.

This action was instituted by the appellant, Whittington, in the Nelson Circuit Court against appellee, Pence, sheriff of Nelson county, to recover damages for the levy and sale of a horse under execution, which appellant claims was exempt from such levy and sale.

The facts show that appellant was a physician at the time of the levy and sale complained of, and was a housekeeper with a family of six persons residing with him, consisting of his wife and five children. The execution was levied upon a bay horse, five years old, named "Bonnie," which was chiefly used by appellant in his practice as a physician, being a combined horse, and was necessary for his use.

Appellant claims that this horse was specifically exempt, and he also claims that as he had no provisions or breadstuff or animal food to sustain his family for one year; nor did he have sufficient property of any kind to make up the deficiency in said provision; that all the property which he had was exempt from execution, claiming same in lieu of the aforesaid deficiency in breadstuff and provisions.

The answer filed by appellees in this case admits the levy and sale of the horse, but denies specifically all the affirmative allegations of plaintiff's petition.

The issues being made up, the case came on for trial. Upon the trial appellant testified and proved all the material allegations of his petition; that he owned the combined horse seized by the sheriff; that he used him in his practice; that he had one old horse about sixteen years old worth about $20, a filly worth not over $30, a cow and heifer worth $40, a cart worth $8, a buggy worth $10, a wagon, and certain household furniture that was specially exempt. He proves that this was all the personal property he owned; that he had no provisions on hand that would have furnished supplies for his family for longer than one week; that he had no provender for his live stock except a half load of hay, a part of a two-bushel sack of oats and a few shocks of fodder, that would not have lasted his live stock for more than a week. He proves that his entire accounts were not worth over $125, and that he had no money. His testimony shows that on the 8th day of January, 1895, Bishop, the deputy sheriff, came to his house, notified him that he had come to levy the execution in his hands, asked him to go to the stable and notified appellant that he had come to levy the execution on the horse "Bonnie." Appellant told him that the horse was exempt, and that he claimed him as exempt property. The deputy sheriff, in response, said that the horse was the best thing appellant had for producing money, and that he intended to levy upon him. Appellant then told him that he did not think he had any property subject to execution, but that if he was determined to levy he asked him to levy on the old horse, wagon and cart, as he could not do without this horse "Bonnie." The deputy sheriff, in response, said that they would not bring the debt, and refused to do so, but proceeded to levy on the horse "Bonnie."

Appellant proves that several times after the levy, and before the sale, he forbade the sheriff to sell the horse, claiming him as exempt under the law. This horse sold for $70, $19.75 in excess of the execution. He also gave to the sheriff a written notice not to sell said horse, claiming him and the other property as exempt to him under the law.

The testimony of the appellant in this case is strongly supported by the testimony of Ernest Whittington; and William Grant testifies that he heard appellant tell Bishop, the deputy sheriff, that he claimed the horse as exempt, and notified him that if he sold him he would sue him.

At the close of the plaintiff's testimony the defendant placed the deputy sheriff, Bishop, on the stand. He proved that he went to

the house of Whittington on the 8th day of January, 1895, and out to the stable; that appellant claimed both horses as exempt; that Bishop told appellant that he was only entitled to one, and that he intended to levy on the horse "Bonnie," which was the first one he came to; that appellant objected and told him (Bishop) to levy on the wagon, buggy and cart, but that Bishop responded that they would not pay the debt. He says that appellant then asked him to levy on the old horse and leave "Bonnie," and demanded a written statement of his levy. He also files the notice served on him by Whittington, notifying him that he claimed the horse, wagon and buggy under the exemption laws of the State, in lieu of other property, etc.

At the close of the testimony the appellant offered a number of instructions, all of which were refused by the court, one of which was in substance a peremptory instruction to find for the plaintiff the value of the horse in controversy. The court then, upon its own motion, gave to the jury several instructions. The first told the jury the articles which were exempt to a practicing physician who was a *bona fide* housekeeper with a family. The second was as follows: "Although the jury may believe that the horse sold by the defendant was subject to execution; that the plaintiff had the right, before the levy, to elect which of his horses he would retain; and if the jury believe, from the preponderance of the evidence, that he did elect to keep the horse sold, and so informed the deputy sheriff, who made the levy before the levy was made, that the law was for the plaintiff, and the jury will find for him the value of said horse; and if they further believe, from the preponderance of the evidence, that the levy and sale were made in an oppressive, reckless, vexatious and high-handed manner, they may find for the plaintiff further damages, not exceeding the amount claimed in the petition." By the third instruction the jury were told that if they believed from the evidence that the plaintiff's property was all exempt from execution, as set out in instruction No. 2, they should find for plaintiff as set out in instruction No. 1.

The court then, at the instance of the appellee, gave to the jury this instruction: "Plaintiff is entitled under the exemption laws to one horse, but not to a wagon, cart, dray or buggy specifically; nor is he entitled to other property in lieu of property not on hand; that he is entitled to a year's provision and provender, and if not on hand, then to other property or money, not to exceed $40 for each member of his family, and not to exceed $70 for provender; and if the jury believe from the evidence that the plaintiff had other property not exempt, including notes and accounts, sufficient to supply the deficiency in provision and provender, they will find for the defendant, unless they believe from the evidence that before the levy plaintiff elected to claim the horse in controversy as specifically exempt, or afterwards surrendered in writing other property in lieu of said horse."

On the law and facts in this case the jury found for the defendant, and judgment was entered accordingly. At the same term of the court appellant made a motion for a new trial, and filed numerous grounds in support thereof; among others, that the court erred to the prejudice of the appellant in refusing and failing to give to the jury certain instructions asked by him referred to; that the court erred to his prejudice in giving instruction No. 4 at the instance of the defendant, and that the verdict was not sustained by sufficient evidence, and was contrary to law.

It seems to us, from the consideration of this case, that the verdict

of the jury was flagrantly against the weight of the evidence. The testimony, both of the appellant and the deputy sheriff, Bishop, leave no room for doubt that appellant claimed the horse levied upon and sold as property exempt to him as a housekeeper with a family, both before the levy and repeatedly thereafter and before the day of sale. He had the right under the law to select the said horse as the one exempt from execution, and it was a clear violation of his legal rights for the sheriff, after such selection, to have levied upon and sold said horse. The sheriff seems to have grossly disregarded his duty as an officer to have entirely ignored the legal rights of this appellant in this matter, and it is difficult to see upon what evidence the jury based the verdict returned in this action. It seems to us that the evidence in the case would have justified a peremptory instruction to find in favor of the appellant, so far as the value of the horse was concerned; and the weight of the evidence tends to establish the contention of the appellant herein that he was entitled to the other property levied on in lieu of the exempted provisions and provender which he did not have on hand. The defendant in an execution about to be levied is entitled to select any work beast owned by him which does not exceed in value $150.

It is not necessary to discuss the proposition that if the appellant had failed to make his election before the levy, that he cannot do so afterward, unless he tendered to the sheriff other property of equal value or sufficient to produce the debt in lieu thereof, if he desired to have such release, and upon which the fourth instruction was based.

There is no evidence in this case which justified the giving of such instruction, as before stated, the evidence being positive and clear, both from the deputy sheriff and appellant, that he claimed this horse before it was levied on at all.

For the reasons indicated in this opinion this cause is reversed, and same is remanded for proceedings consistent with the same.

WOODRAM, BY., &C. V. CINCINNATI & KENTUCKY SOUTHERN R. R. CO.

(Filed January 22, 1897—Not to be reported.)

Suit in name of next friend Amendment of petition—In this action in the name of a next friend for the benefit of an infant the court, after properly sustaining a demurrer to the petition because the suit was brought in the name of the next friend for the infant and not in the name of the infant by the next friend, should have permitted the plaintiff to file an amended petition offered by him, which, in effect, so changed the caption of the petition as to make it appear that the suit was instituted by the infant by his next friend.

J. D. Belden for appellants.

Stone & Stone for appellee.

Appeal from Casey Circuit Court.

Opinion of the Court by Judge Burnam.

This action was instituted in the Casey Circuit Court in the name of Milton Woodram, as next friend of Samuel Woodram, against the Cincinnati & Kentucky Southern Railroad Co. for damages for mental and physical suffering, caused by an injury inflicted by

the willful negligence of the agents and employes of the defendant by running one of its cars against said Samuel Woodram, by which he was seriously injured internally and by injuring one of his legs, it being further alleged that said Samuel Woodram is an infant under twenty-one years of age, and without statutory guardian, curator or committee, and other necessary allegations.

The defendant filed a demurrer to this petition upon the ground that it was a suit in the name of Milton Woodram and not in the name of Samuel Woodram. This demurrer was properly sustained by the court below. Thereupon the plaintiff produced an amended petition in open court and asked leave of the court to have same filed, which amendment in effect changed the caption of the petition so as to make it appear that the suit was instituted by Samuel Woodram, by Milton Woodram as his next friend, and the court, being advised, overruled the motion of the plaintiff to file said amended petition, to which ruling of the court plaintiff objected at the time, and plaintiff failing to plead further his petition was dismissed, with a judgment for defendant's costs, to which ruling of the court the plaintiff excepted at the time and now excepts and prays an appeal to this court and asks a reversal.

The allegations of this petition clearly show that it was a suit instituted for the benefit of the infant, Samuel Woodram, for an injury done to him, and the facts as recited set out a cause of action in his favor. The prayer of the petition asks judgment for $5,000 for the benefit and in favor of the said Samuel Woodram.

It seems to us that this amendment did not change substantially the claim of the petition, and was an amendment in furtherance of justice and of the substantial rights of the plaintiff, and one in nowise to the prejudice of the defendant, and in our opinion the judge of the lawer court erred to plaintiff's prejudice in its refusal to allow said amendment to be filed.

Wherefore, said judgment is reversed, with instructions to allow the plaintiff to file said amendment, and with directions that this cause proceed in accordance with the rights of the parties.

STAHL V. LOWE, &C.

(Filed January 23, 1897—Not to be reported.

Verbal agreement to mortgage exempt property—The buyer of tobacco which was exempt from execution in the seller's hands, acquired a perfect title thereto as against one to whom the seller had verbally agreed before the crop was planted to execute a mortgage thereon to secure the payment of an existing debt, although he had full notice of the agreement, as a verbal agreement to mortgage personal property exempt from execution, unaccompanied by delivery of possession, does not deprive the debtor of his right to hold or dispose of the property, whether it be or not in existence at time of such agreement.

Robbins & Thomas for appellant.

Moorman & Hesper for appellees.

Appeal from Graves Circuit Court.

Opinion of the court by Chief Justice Lewis.

This is an action by appellees, J. R. Lowe & Son, a firm of merchants, to enforce an equitable lien, based upon a verbal promise

made by J. R. Lowe, before a crop of tobacco was planted, to execute a mortgage thereon to secure the payment of an existing debt, and another for goods, groceries, etc., created while the crop was cultivated.

In an amended pleading it was stated and not denied that appellant Stahl had purchased the crop of tobacco with notice of the alleged lien of appellees and during the pendency of this action.

Whatever lien appellees acquired was purely equitable, and the agreement to execute the mortgage was not in writing, but verbal. It is, therefore, manifest J. R. Lowe did not pass legal title or waive the right to claim or use the tobacco as property exempt from execution or other process of his creditors to subject to the payment of their demands; for no verbal agreement to mortgage or otherwise convey personal property exempt from execution, unaccompanied by delivery of possession, can have the effect to deprive the debtor of his right to hold, use or dispose of such property, whether it be or not in existence at the time of such agreement.

Lowe in his answer stated that he was a housekeeper with a family, consisting of a wife and five children, and that it would have required the proceeds of the tobacco sold at its full value to supply provisions necessary to sustain his family and provender suitable for his live stock.

That allegation not being controverted, it must be taken as true, and being so the tobacco in question was not subject to either an execution or enforced lien of appellee or any other creditor, but Lowe, the debtor, had the right to dispose of it to whomever or in whatever manner he might choose, and appellant Stahl, having purchased it, acquired title thereto, although such purchase was made with full notice of appellee's alleged lien.

It was, therefore, error of the lower court to render judgment for the value of the tobacco against appellant Stahl, and it is, therefore, reversed for further proceedings consistent with this opinion.

ARNOLD V. HUBBLE, CITY ATTORNEY, &C.

(Filed January 26, 1897.—Not to be reported.)

Damages for wrongful prosecution by city attorney. In this action against a city attorney to recover damages for the wrongful prosecution and conviction of plaintiff for an alleged violation of the city laws, the petition is not good, for the reason that it fails to state facts which show that the police judge before whom the trial was had was not acting within the scope of his authority, or that defendant, who advised the course pursued by the judge, was actuated by malice or corrupt motives.

H. Mort Rothwell for appellant.

Wm. Herndon and L. T. Hubble for appellees.

Appeal from Garrard Circuit Court.

Opinion of the court by Judge Paynter.

The petition failed to state facts which show that the police judge of Lancaster was not acting within the scope of his authority in the trial of the case against appellant.

It is alleged that the appellee, as city attorney, advised the course pursued by the judge, but there is a failure to allege that he was acting by malicious or corrupt motives. (Revel, &c. v. Pettit, 3 Met., 315.)

The judgment is affirmed.

UNITED STATES SCHOOL FURNITURE CO. v. BOARD OF EDUCATION OF CITY OF OWENSBORO.

(Filed January 26, 1897—Not to be reported.)

Sales of personal property—Limitations upon agent's authority as to prices—When the prices at which the agent of a corporation bound his principal to sell and deliver goods were not so low as to indicate that there was collusion or deception, or that the agent had violated the orders of his employer, the other can not excuse its violation of the contract, upon the ground that the agent sold the goods at lower prices than he was authorized to do, unless the buyer had notice of the limit on the agent's authority. And a printed notice in the contract that agents had no authority to bind the corporation in anything except to sell goods at "proper prices" was not sufficient to put the buyer on inquiry.

Weir & Weir and Little & Little for appellant.

Sweeney, Ellis & Sweeney for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Chief Justice Lewis.

This action was brought by appellee, Board of Education of the City of Owensboro, made by statute a corporation, to recover of appellant, United States School Furniture Co. of Chicago, Illinois, also a corporation, $217.50 damages for failure to furnish certain school furniture in compliance with a written contract entered into between the parties. Defense to the action is based upon the alleged fact that the agent of appellant, who sold and agreed to deliver the various articles at prices stipulated, exceeded his authority and violated, with knowledge of appellee, the following reservation or condition printed and made part of the contract signed by the parties:

"N. B.—Agents have no authority to bind us in anything, except sell our goods at proper prices."

We can conceive of the case of an agent by collusion with the purchaser selling and agreeing to deliver goods at prices so far below the real value as to plainly show fraud, whereby the contract would be rendered unenforcible.

There might also be the case of an unenforcible contract when an agent sold goods below the price which his principal had in the warrant of authority, or on the face of the written contract signed had expressly and certainly prescribed and fixed, and of which the purchaser had notice.

But it seems to us the phrase "proper prices," printed in a blank contract to be thereafter made and entered into between the general agent of the seller and a chance purchaser, is too flexible and indefinite to bind or even put upon inquiry the latter.

There is no collusion between agent of the seller and the purchaser in this case alleged or proved; nor are the prices at which the agent bound his principal to sell and deliver the goods so low as to indicate to the court or jury there was collusion or deception, or that the agent had betrayed or violated orders of his employer. The hypothesis upon which the jury was authorized to find for appellant is stated in the following instruction of the lower court: "If the jury believe from the evidence that defendants had instructed Slavens as to the lowest price he might sell the furniture in question, and plaintiff at the time of the contract had knowledge or notice of the limit on the said agent's authority, and knew that said agent

was exceeding his authority in selling said goods at lower prices than he was authorized to do, then such contract is not binding on defendant, and the jury should find for defendant." And certainly that instruction was quite as favorable, if not more so, than appellant was entitled to, for there is no evidence directly showing, or from which a fair inference can be drawn, that either Slavens, the agent, had been instructed as to the lowest price he might sell the furniture, or that appellee had notice of any such instruction, except as indicated by the meaningless words, "proper prices." As appellee sued for damages, amount of which was difference between what appellant had contracted to sell and deliver the furniture at and amount appellee was compelled, by reason of violation of that contract, to pay for same kind and quantity purchased elsewhere; and the jury, under proper instructions, and upon the evidence before them, found appellant liable, and fixed the sum of recovery, this court has no right to do otherwise than affirm the judgment, which is now done.

MAST, CROWELL & KIRKPATRICK v. LEHMAN.

(Filed January 26, 1897.)

1. *Pleading*—A petition to recover the price of goods sold upon the faith of a letter of credit executed by defendant was fatally defective in failing to allege any notice by plaintiffs to defendant of their acceptance of or reliance upon his letter of credit, or any promise or agreement by defendant to pay for the goods sold, or any breach of such agreement.

2. *Judgment notwithstanding the verdict*—While defendant, because of these defects, was entitled to judgment upon the pleadings, yet, having made a motion for a peremptory instruction, which was improperly overruled, he was thereby precluded, upon the return of a verdict for plaintiff, from moving for judgment notwithstanding the verdict, as plaintiff's attention would have been called to the defects in his pleading, and he would have had an opportunity to amend if the court had sustained the motion for a peremptory instruction, as it should have done.

3. *Reversible error- Practice*—Even if defendant's motion was properly sustained, it was error to give judgment for all the costs of defendant against plaintiffs, there being no demurrer to the petition.

L. L. Parks for appellants.

Samuel S. Blitz and J. M. Chatterson for appellee.

Appeal from Jefferson Circuit Court, Law and Equity division.

Opinion of the court by Judge Burnam.

This suit was instituted by the plaintiffs against defendant upon a letter of credit executed by defendant to the plaintiffs in favor of one Francis Holloway, which is, in words, as follows: "I request that if Mr. Francis Holloway order books or merchandise from you at any time within twelve months from the date of this letter of credit, you ship same to his order, and I hereby obligate myself to see that same are paid for within thirty days from date of shipment, provided he should fail to make settlement in that time, and the amount should not exceed $1,000. I further waive notice to me of shipment made to the said Francis Holloway on the faith of this letter of credit, or failures to meet payments when due by him.

"Signed: SIMON LEHMAN."

Plaintiffs alleging that upon the faith of said letter of credit they sold and delivered to the said Holloway books and merchandise to the amount of $735.43, on which he had paid the sum of $140, leaving a balance of $595.43, which balance was due and unpaid, and had remained due and unpaid for more than thirty days from the date of shipment of said books and merchandise.

Plaintiffs further alleged that by reason of said letter of credit their sale and shipment to said Holloway of said books and merchandise, and said Holloway's failure to pay said balance of $595.43 when due, that defendant had become indebted to plaintiffs in the aforesaid sum, and that said debt was due and unpaid, and that although requested he had failed to pay any part of it, and they prayed for a judgment.

The defendant filed a demurrer to the petition. On the 10th day of February, 1894, notified plaintiffs' counsel that he would move the court to permit him to withdraw from the records his demurrer to the petition, which motion was sustained by the court, and said demurrer was withdrawn. On the 16th day of February defendant filed his answer, which was substantially a traverse of all the affirmative allegations of plaintiffs' petition. Afterwards, on the 11th day of May, 1894, the issues being made, a jury was selected and sworn to try the case. All the evidence being heard, the defendant *moved* the court to *peremptorily* instruct the jury to find for the defendant, to which motion the plaintiffs objected, and the court, being advised, *overruled* said motion, to which defendant objected.

The court instructed the jury in behalf of plaintiffs, and the cause was given to the jury, who returned a verdict in favor of plaintiffs for $595.43, with interest from the 23d day of December, 1893; and a judgment was thereupon entered in favor of plaintiffs against defendant for said sum, and their costs expended. The defendant then moved the court to enter a judgment for the defendant, notwithstanding the verdict for the plaintiffs, and the court sustained said motion and dismissed plaintiffs' petition, with judgment for defendant's cost.

The motion of defendant was under section 386, Civil Code, which says: "Judgment shall be given for the party whom the pleadings entitle thereto, though there may have been a verdict against him." The grounds upon which said motion were based were:

1st. That plaintiffs had wholly failed to allege or prove any notice by the plaintiffs to the defendant of their acceptance of or reliance upon his letter of credit, upon which this case was based.

2d. That said petition wholly failed to allege any promise or agreement of defendant to pay for the goods sold Holloway under such letter of credit, or any breach of such agreement.

These objections were well taken, and are supported by frequent adjudications of this court. The petition was fatally defective upon demurrer.

As the petition is certainly wanting in all these usual and necessary allegations, and evinces great carelessness or lack of skill on the part of the pleader, which probably suggested to defendant the *cul de sac* into which plaintiffs finally landed. The defendant, with admirable skill, concealed both from the court and the plaintiffs the real defense upon which he relied; but, in our judgment, the defendant at the close of the case committed an error which was fatal to his defense, and lost him all the advantage which he had gained by his finesse.

At the conclusion of the trial the defendant moved the court to peremptorily instruct the jury to find for the defendant. This mo-

tion of defendant should have been sustained by the court, and would have been sustained if the court had been aware of the true condition of the pleadings. It is true the plaintiffs objected to the instruction; but, in our opinion, such objection did not relieve the court of its obligation to properly instruct the jury as to the law of the case, based upon the pleadings and the proof. If the court had sustained this motion, as it was clearly his duty to do, it would necessarily have brought to the attention of the plaintiffs the defense which had been so carefully concealed from the very beginning of the case; and, before the submission of the case to the jury, he would have had an opportunity to have offered an amendment curing the defects in his petition, which, in furtherance of justice, it would have been the duty of the court to have allowed to be filed.

The objects of courts are primarily to enforce rights and to prevent wrongs. These ends were defeated in this case; a claim apparently just is defeated, and the defendant released from liability without any trial, upon the real merits of the case, by an error of the court in refusing to give a proper instruction when asked to do so.

We also think it was error to give judgment for all the costs of the defendant against plaintiffs, even if his motion had been properly sustained, as paragraph 2 of section 93, Civil Code, requires a party to demur before he files other pleadings than demurrer, or to be liable for all costs which would result from such failure.

For the reasons indicated the judgment is reversed and the cause is remanded, with instructions to allow plaintiffs to file the amended petition offered by him, and other proceedings consistent with this opinion.

LEE V. RUSSELL, &C.

(Filed January 28, 1897—Not to be reported.)

1. *Set-off*—While a demand due by a plaintiff in his individual capacity can not be set off by a defendant against a demand due to the plaintiff in a representative character, yet if the plaintiff has become the real owner of the debt sued on, and that fact is alleged in the answer and proved, a defendant may set-off against it a debt due to him from the plaintiff individually.

2. *Same. Practice*—While a debt due to the defendant and another jointly can not be set off against a demand due by the defendant alone, yet such a ground of objection shown to exist by a pleading is waived unless distinctly specified by a demurrer thereto. And the right of plaintiff to demur to such items of set-off in this case was waived by filing a reply, which joined issue on the merits. While plaintiff could have filed a general demurrer at any time, this objection could be reached only by special demurrer.

J. P. Thompson for appellant.

Wm. H. Holt for appellees.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Burnam.

This suit was instituted in the Marion Circuit Court by the plaintiff as executor of J. S. Caldwell against the defendants, Russell & Avritt, upon a promissory note dated November 7, 1885, due three years after date, and bearing interest from date, which was executed to the plaintiff by the defendants. Said note was for $1,169.92, and

was the last payment upon a tract of land sold defendants. Russell & Avritt were the security on same. The petition sought a personal judgment against the defendant, and for an enforcement of the lien retained in the deed to secure the payment of said note.

The defendant filed an answer, set-off and counterclaim, resisting judgment on said note, alleging that same was the individual property of the executor; that he had settled his accounts as executor, paid the devisees under the will, and all the debts of the deceased; that he had been charged with the note, and that neither the heirs nor the creditors of said Caldwell had any interest whatever in same. He further alleges that plaintiff was largely indebted to him by way of accounts, and that said plaintiff had agreed that said indebtedness should be credited on the note sued on, and plead, by way of set-off and counterclaim, a great many items of indebtedness due to him (S. A. Russell) by the said Lee, amounting to $———. He also claimed to be the owner of a number of debts due by the plaintiff to the firm of Avritt & Russell, which was composed of the defendant, Russell, and Avritt, amounting to $———. He also claimed to be the owner of a debt due by plaintiff to W. E. and S. A. Russell for rent of office, amounting to $———, which he claimed belonged to him, and which he had a right to set-off.

This answer, set-off and cross petition was filed on the 25th of November, 1891. In March, 1892, the plaintiff filed a reply, in which he substantially denied his indebtedness to Russell individually, or to the firm of Avritt & Russell. He also denied that he was indebted to the defendants, W. E. and S. A. Russell, or either of them, for office rent, claiming that he had occupied the office of said W. E. and S. A. Russell during his term as sheriff of Marion county for the years 1881, 1882, 1883 and 1884 under an express agreement with W. E. Russell, who owned same, that no charges were to be made against him for said occupancy. He denied that the charges for services by S. A. Russell or by Avritt & Russell were reasonable or customary; and he further plead that most of said claims had accrued more than five years before the filing of the answer, and that same were barred by the lapse of time and the statute of limitation, which he plead and relied on.

The defendant in his rejoinder controverted nearly all the allegations of plaintiff's reply, and alleged that plaintiff had, within one year before the filing of the petition, and frequently theretofore within five years, agreed and promised to pay to the defendant the said items of indebtedness set out in the answer. This was filed in November, 1892. In February, 1893, the plaintiff, for the first time, filed a general demurrer to the answer and counterclaim of the defendant, which the court properly overruled, and he at the same time filed a special demurrer to so much of the defendant's answer, set-off and counterclaim as plead the accounts of Avritt & Russell and the office rent, because same were not properly a defense to the claim of the plaintiff. This special demurrer was overruled by the court, presumably because same had come too late.

At the April term, 1893, the defendant, by leave of court, filed an amended answer, set-off and counterclaim, in which he alleged specifically that the claims of Avritt & Russell, and the rent due Russell & Russell belonged to him, and were to be used as credits, and making some other allegations. No demurrer was filed to this amended answer and cross petition, but at the same term of the court the plaintiff filed his reply thereto.

Upon the issues so made up, both parties took proof, mainly as to the value of the services of the defendant, Russell, and the value of

the services of Avritt & Russell, and as to the contract for the rent of office.

At the May term, 1893, the case being submitted to the chancellor upon the pleadings and proof, the court adjudged that the plaintiff was the owner individually of the note sued on, gave judgment for same, and directed a sale of the land to pay said note subject to credits allowed defendant, viz: The sum of $———, to be credited on said note at the date thereof; the sum of $150, to be credited September 27, 1886; the further sum of $——— being the fees due the firm of Avritt & Russell, and the further credit of $424, the rent of office, of which $400 was directed to be set off against the claim of plaintiff for items of indebtedness due to him by the defendant outside of the obligation sued on.

From this judgment plaintiff appeals and asks a reversal.

The first ground relied on is the overruling of the general demurrer, based upon the idea that the defendant could not plead an individual liability as a set-off to the note due plaintiff as executor. It is a well-recognized rule of pleading that a demand due by a plaintiff in his individual capacity can not be set off by a defendant against a demand due to the plaintiff in a representative character; but if the plaintiff has become the real owner of the debt sued on, and that fact is alleged in the answer and proved, a defendant may set off against it a debt due to him from the plaintiff individually. (Stone v. McConnell, 1 Duvall, 54; Smith's ex'or v. Field, 6 Dana, 363; Morrison v. Page, 9 Dana, 428.)

The reply does not really controvert this allegation of plaintiff's answer on this point, and the evidence of the plaintiff shows conclusively that he is the real owner of the note. We, therefore, conclude that this contention of plaintiff is not well taken, and that the defendant had a right to set off his debts against the obligation sued on.

The second ground relied on for a reversal is that the debts due to the firm of Avritt & Russell, and the rent due to W. E. and S. A. Russell, can not be relied on by the defendant as a set-off, as they are not mutual demands, and that there is no allegation of a written assignment of same, and that said Avritt and W. E. Russell were necessary parties. As a question of pleading, "the original cause of action sued on and a set-off must be mutual demands between the same persons and in the same right. A joint debt can not be set off against a separate demand, nor a separate demand against a joint one." Stone v. McConnell, 1 Duvall, 54.)

But the Code of Practice (section 92, subsection 4), provides that "such a ground of objection, shown to exist by a pleading, is waived unless distinctly specified by a demurrer thereto."

In this case no demurrer was filed until long after the reply had joined issue on the merits of defendant's answer. This waived the right of plaintiff to demur to these items or set-off. Of course the plaintiff could at any time have filed a general demurrer, but this only goes to the jurisdiction of a court, and the cause of action stated; and certainly a general demurrer could never have been sustained to this answer.

The defendant very earnestly insists that his plea of limitation in this case should have been sustained, but the answer of defendant pleads and relies upon a recognition and promise to pay their demands by the plaintiff within five years before the institution of the suit, and this plea is supported, not only by the sworn testimony of the defendant, but it is also corroborated by the fact that there had been mutual outstanding claims between these parties for many

years, and by the further fact that the appellant in his reply admits some of defendant's claims. We think that under the pleadings and proof that it was a question of fact to be determined by the court, and that the evidence supports the conclusion reached by the trial judge.

The fourth ground upon which he relies for a reversal was error in allowing defendant anything on the set-off, because the weight of evidence showed that he was not entitled to as much as defendant admitted plaintiff paid for him or held against him, viz, the sum of $424. Upon these questions of fact a large amount of proof was taken by both parties, and same was very conflicting, it being largely made up of opinion as to the value of services. The lower court, who knew the witnesses and understood the surroundings of the case, has fixed the amount of these set-offs from all the evidence in the case, and has largely abated the amount claimed by defendant in his pleadings.

Under the circumstauces, we do not think that we would be justified in reversing this case on these questions of fact.

Wherefore, the judgment is affirmed.

McQUEEN, &C. v. McDANIEL, &C.

(Filed January 28, 1897—Not to be reported.)

Purchase of decedent's land by widow at decretal sale—Collusion—Where a part of a tract of land, which had been purchased by a decedent by executory contract, was sold to satisfy the unpaid purchase money, and was purchased by the widow at the commissioner's sale, she afterwards induced the vendor to convey to her the whole tract, claiming that part not sold under decree, upon the ground that the money paid by her husband upon the purchase price belonged to her. In this action by the heirs to set aside that deed, the chancellor properly granted the relief sought, as the widow fails to establish her claim as to that part of the land not sold under decree; and, as to that part purchased by her at the decretal sale, the evidence shows that she, the administrator and the vendor, acted collusively to enable her to buy it for less than its salable value.

Thomas H. Hines for appellants.

Jas. M. Sebastian and W. H. & M. J. Holt for appellees.

Appeal from Jackson Circuit Court.

Opinion of the court by Judge Burnam.

Elijah McDaniel died a citizen of Jackson county, Ky., in November, 1882. He left a small personal estate amounting to about $400, which came to the hands of his administrator, W. G. Johnson. At the time of his death he was in the possession of a boundary of about sixty-eight acres of land on the waters of Pond creek, in Jackson county, purchased of one John R. Hurst, and which the said Hurst and his father, James M. Hurst, purchased from F. P. Powell. At the date of the purchase Hurst owed Powell a balance on said land of about $180, which was in contest. McDaniel paid to Powell on the purchase about $520, and held up the residue of the purchase money to await the determination of the suit of Powell against Hurst. During this delay McDaniel died, leaving a widow, Mahala McDaniel (who subsequently to his death married the de-

fendant, McQueen), a mother and four half brothers. George W. Johnson, a brother-in-law of the widow, qualified as administrator.

At the September term of the Jackson Circuit Court, 1883, Powell recovered a judgment against J. M. and John R. Hurst for $180, balance due on the purchase price by them of the tract of land sold to McDaniel, and the commissioner was directed to sell said land to pay said debt of unpaid purchase money; and said land was so sold by the commissioner on the 3d day of December, 1883, and at this sale the widow became the purchaser of thirty-three acres of said land, in discharge of the aforesaid debt, laid off on the southern side of the tract.

Subsequent to this sale the widow induced James M. Hurst to convey to her the title to the whole of said tract of land. The evidence in the case does not disclose any consideration whatever for this conveyance from the said Hurst to Mahala, but it is contended by her that the $520 paid on said land by her husband in his lifetime arose from the proceeds of a tract of land owned by the said Mahala in Breathitt county, which she had inherited from her father.

This suit was instituted in the Jackson Circuit Court to vacate the deed made to Mahala by Hurst, and to set aside the commissioner's deed for the thirty-three acres, upon the ground that the administrator and the widow had fraudulently conspired together to let said land be sold in order to divert the title from the heirs at law to the widow, and further alleging that the administrator had ample assets in his hands to pay off the judgment for the unpaid purchase money, and also seeking a settlement of the accounts of the administrator.

These allegations of plaintiffs' petition were denied in toto by the defendants, Johnson and the widow, she claiming that no written contract was ever entered into between James M. Hurst and her husband, and that Hurst himself had no title to the land until after the sale, under the judgment of the court to pay purchase money due by him to Powell, and alleging that she bought same at public outcry to the highest bidder with her own money, and also claiming the residue of the sixty-eight acres of land under the deed made from Hurst on the ground that same had been paid for by her out of the proceeds of her land in Breathitt county, and in equity belonged to her.

The case dragged along for several years, a good deal of proof being taken upon the issues raised by the pleadings until finally, at the November term, 1887, it was submitted to R. L. Ewell, a special judge, who held that said case was not ready for final hearing, and referred same to the commissioner, first, to state and settle the accounts of the administrator, and then to ascertain certain other facts which he deemed essential to the proper adjudication of said cause, chief of which was to ascertain whether said thirty-three acres of land had actually been paid for with money which had been derived from the estate of Elijah McDaniel, deceased. No report was ever made by the master commissioner under this judgment, and the facts which the judgment directed him to ascertain were never officially ascertained; but at the March term, 1891, the parties to this record filed an agreed order (see page 128 of record), in which, in consideration of the payment to plaintiffs of $86 in the hands of J. M. Sebastian, which had been collected from W. H. Blanton in favor of Johnson as administrator of McDaniel, and the agreement by said Johnson to pay off the outstanding claims against the said McDaniel's estate, that the said Johnson was to be relieved from any

further claim by the heirs at law for personalty which came into his hands as such administrator.

At the October term, 1891, B. H. Dalton and M. F. Goodwin were made parties to this action, alleging that they had purchased of the widow of McDaniel all of the aforesaid tract of land, and that they were the real owners of it, and were necessary parties to the suit, which facts were controverted by the plaintiffs, and the case was continued on the docket, no further steps being taken until the May term, 1894, when the case was submitted by agreement of all parties to H. C. Eversole, special judge, for judgment, who adjudged that the plaintiffs recover of the defendant, Mahala McQueen (late McDaniel), all of the aforesaid tract of land, and directing a cancellation of the deed from James M. Hurst to Mahala McDaniel, holding that the said Mahala held said property in trust for the heirs of Elijah McDaniel, subject to her rights of dower and homestead, and also subject to a lien for the $190.57 which had been advanced by her to pay off and discharge the judgment in favor of Powell against Hurst, the vendor of Elijah McDaniel. The court also gave Elizabeth McDaniel the right to discharge the $190.57, with accumulated interest, at any time within six months, and if she did not pay said debt, then directing a sale of the land by the commissioner of the Jackson Circuit Court at public outcry to pay said purchase money and the cost. The court also adjudged that A. P. Settle, the attorney of Mahala McDaniel (now McQueen), be allowed $50 as his fee, and that same be a lien upon the judgment for $190; and also allowed Clark, Culdom & Sebastian a fee of $75 for their services in behalf of the plaintiff, Elizabeth McDaniel, and giving them a lien upon the land, subject to the lien, however, of the defendant, Mahala, for the $190.57 advanced by her to pay off the lien for purchase money and her homestead rights.

From this judgment the said defendant has appealed to this court, and asks for a reversal.

It seems to us that the evidence entirely fails to establish the claim of defendant, Mahala, that the $520 paid on this land by her husband in his lifetime was paid with her money and as the proceeds of the property inherited from her father. The evidence shows that the title to the land in Breathitt county was in her husband and not in her at all, and that he had paid all the money to Hurst from his own means, and we, therefore, conclude that she had no right in law or equity to have had the title to that portion of the sixty-eight acres of land which was not sold under the decree of the Jackson Circuit Court to pay the purchase money due Powell conveyed to her, as said property belonged at the death of intestate to his heirs at law.

The evidence in this case also, we think, conduces to show that the defendant, Mahala McQueen, the administrator, and the vendor, Powell, all acted collusively to enable the defendant to buy this tract of land at the commissioner's sale for less than its salable value. That the administrator and the widow had such an agreement is expressly proven by the testimony of the administrator's brother, and the administrator, in order to have the sale made and to prevent a payment of the balance of such purchase money by the appellee, Arthur McDaniel, agreed to pay all the costs of such sale; and we feel assured that if he had desired provision could have been made to prevent the sacrifice of this land at the commissioner's sale, and could have secured same to the estate.

The judgment of the lower court very fully protects appellant, Mahala McQueen, by giving her a lien on said land for the full

amount of the purchase money so paid by her, and also securing to her, as widow, a homestead in same during her life, and we do not think any substantial error has been committed to her prejudice.

Wherefore, the judgment is affirmed with damages.

PITTBURGH, CINCINNATI, CHICAGO & ST. LOUIS RY. CO. V. LEWIS.

(Filed December 16, 1896—Not to be reported.)

1. *Contributory negligence—Question for jury*—The court ought not to take the question of negligence or contributory negligence from the jury where different findings might reasonably or even possibly be made by men of average intelligence.

2. *Same—Railroad crossing*—The failure to stop and look and listen before passing over a railroad at a public crossing in a crowded city is not *per se* contributory negligence.

3. *Railroads—Duty of servants in charge of engine*—After the plaintiff was in peril from the engine, which afterward struck him, it was the duty of those in charge of the engine to see him, the crossing being a public one, and the company is not exonerated if they did not actually see him; therefore, the court properly instructed the jury that, although they might believe plaintiff was guilty of contributory negligence, yet he could recover if after he "was in peril from the engine those in charge of it could have seen his danger and have prevented his injury by the exercise of ordinary care."

4. *Trial of case*—As the court, upon objection being made, told the jury to disregard improper statements made by counsel for plaintiff in his opening statement, this was all the court was required to do, as the court can not discharge the jury upon every improper remark of counsel.

5. *Witnesses*—A witness for defendant having made a statement upon the witness stand inconsistent with a previous written statement made by him, the defendant can not complain that the court refused to permit the witness to read his written statement for the purpose of refreshing his recollection, as the witness, even after his attention had been called by the proposed question to the fact that he had signed a written statement, and had been notified by counsel what it contained, still did not remember on oath what the writing had made him say while not on oath.

6. *It is immaterial whether or not the switch-tender called to plaintiff* at the time of the accident "to look out," as such a call would serve rather to confuse the plaintiff than to apprise him of his danger.

Petition for rehearing overruled March 26, 1897.

Charles H. Gibson for appellant.

O'Neal & Pryor, Alfred Selligman and Phelps & Thum for appellee.

Appeal from Jefferson Circuit Court, Common Pleas division.

Opinion of the court by Judge Hazelrigg.

While walking southwardly and obliquely over the tracks of the appellant, and when on a public crossing, the appellee, a negro man, some thirty-seven years of age, was struck by a locomotive coming from his right and at his rear and his leg so injured as to require amputation. For this injury he brought this action for damages, and recovered judgment for $5,920. Contrary to the general rule at this crossing, the proof conduces to show that no signal bell was ringing, and the car was moving with but little noise. It had

been on the track on Fourteenth street, but at a point something over 100 feet from the accident had been switched off toward Maple street, and over this crossing by a lever operated at the tower house some 200 feet away. By stopping or listening or looking to his rear the appellee would have discovered the train and so escaped injury. He claims, however, that the usual train out had already passed, and hearing no bell ringing he was not apprised of its approach until too late to escape.

If the appellee when hurt was in fact relying on the signal bell which it was the duty of the appellant to ring upon approaching the crossing, and which it was its custom to ring, and for this reason gave no heed to what was going on behind him, we can not say as a matter of law that he was guilty of such contributory negligence as would prevent his recovery. This is a question of fact for the jury under the proof and all the circumstances attending the injury. In such cases we ought not to take the question of negligence or contributory negligence from the jury where different findings might reasonably or even possibly be made by men of average intelligence. (Passamaneck's adm'r v. Louisville Ry., 17 KY. LAW REP., 767; Sherman & Redfield on Negligence, section 114; Beach on contributory Negligence, section 163.)

This court has not adopted the rule that the people of a crowded city are to stop, look and listen before passing over a railroad at a public crossing. On the contrary we have said that to prescribe such a rule would be unreasonable. (Ramsey v. L., C. & L. Ry. Co., 89 Ky., 103, and Wright v. Cincinnati, &c., 94 Ky., 114.)

It follows that appellant's motion for a peremptory instruction was properly overruled. Serious complaint is urged against an instruction which, while it denied the plaintiff the right to recover if his own negligence so contributed to the injury as that but for it the injury would not have been inflicted, yet added the qualification "unless the jury further believes from the evidence that after plaintiff was in peril from the engine those in charge of it could have seen his danger and have prevented his injury by the exercise or ordinary care."

We think this qualification embraces the well-settled law in such cases. Here was a public crossing—a sidewalk in fact in a large city—and it was the duty of those in charge of the train to keep a constant lookout for those on or about the crossing. After the appellee "was in peril from the engine" it was surely their duty to see him, and the appellant is not exonerated if they did not actually see him. (L. & N. v. Krey, 16 KY. LAW REP., 797; L. & N. v. Hackman, 17 KY. LAW REP., 81.)

In the opening statement of counsel for the appellee it was said that the place where the accident occurred was a dangerous one; that others had been injured there, and after the accident watchmen had been placed there, etc. Upon an objection to these statements being made the court told the jury to disregard them, and this, it seems to us, is all the court should have done.

If the jury is to be discharged of the case upon every improper remark of counsel, few trials could be finished. Ordinarily the good sense and sound discretion of the jury can be relied on to prevent injustice by reason of the incompetent statements of counsel, especially where the court directs that such statements are to be disregarded. (L. & N. v. Coyne, 17 KY. LAW REP., 285; State v. Rivers, 90 N. C., 738.)

It is also urged that appellant's witness, Montgomery, ought to have been permitted to examine a paper signed by him a few days

after the accident in order to refresh his memory, his testimony on the stand being to the effect that he did not hear the switch tender, Mulloy, call out to the appellee "to lookout" at the time of the accident, when the avowal is that by showing the witness the paper he would have remembered that he did hear Mulloy so call out. It developed that the witness did not write the statement or have it written, but the paper was made out from verbal statements made by him to some of the officials of the appellant a few days after the transaction, and it is there made to appear that the witness did hear Mulloy so call out to the appellee.

The witness testified to a number of facts favorable to the appellant without hesitation or confusion, and gave no evidence of lack of recollection as to any fact connected with the transaction. He answered at least three times most positively that he heard no one call out to the appellee. Counsel for appellant then said to the witness that for the purpose of refreshing his recollection he would ask him if he didn't sign a written statement of what he saw on the day of the accident.

The witness answered that he did a few days after the trouble. Counsel then said: "I am going to show you that statement and ask you to read it, and with your recollection refreshed I am going to ask you the question whether or not you heard anybody halloo 'lookout!'"

The court sustained an objection to the question, but counsel again —the fourth time—asked witness if his recollection was that he heard such a call and he answered, "No, sir; I don't think I did."

So it appears that even after the attention of the witness had been called to the fact that he had signed a written statement, and had been notified by counsel what it contained, he still did not remember on oath what the writing had made him say while not on oath. We think the process of refreshing the recollection of the witness was fairly tried by the course of the examination and the witness given every opportunity to remember the alleged fact in dispute. Moreover, the call of Mulloy, if made, would serve rather to confuse the appellee than to apprise him of his danger.

Judgment affirmed.

BUCKLER V. REESE & BRO.

(Filed January 6, 1897.)

Sale of lunatic's property under execution—Where one has been adjudged of unsound mind, and a committee is in charge of his person and his estate, a sale of his land under execution, issued upon a judgment rendered against him while he was sane, is a nullity and passes no title; and, therefore, no action lies to recover damages against the plaintiff in the execution or the purchaser on account of the sale. If, however, he has been damaged by the wrongful seizure of his land or its use and occupancy, he may have an action on that account against the plaintiff in the execution and the purchaser as co-trespassers, provided he has not, after restoration to his proper mind, confirmed the sale for a valuable consideration.

Winfield Buckler, Thomas H. Hines and Hanson Kennedy for appellant.

E. L. Worthington and L. W. Robertson for appellees.

Appeal from Mason Circuit Court.

Opinion of the court by Judge Hazelrigg.

This was a suit by the appellant against the appellees for damages growing out of an alleged wrongful issual of certain executions against the appellant, under which his lands were sold. The issual is alleged to have been wrongful because the appellant was not given credit on the bonds on which the executions were issued for certain sums claimed to have been paid by him to the appellees, who were the obligees in the bonds and the plaintiffs in the executions. We are of opinion that the appellant has not shown himself entitled to these alleged credits. Doubtless the arrangement by which he was to get the benefit of them would have been carried out but for the death of his father. When the administratrix of the latter, however, repudiated the arrangement, the appellees were relieved of their agreement to enter the credits. Moreover, the appellant was not divested of title by the attempted sale. He had been adjudged of unsound mind, and a committee was in charge of his person and his estate at the time the executions were issued and the sale made. At the common law this might have been done and the purchaser given a good title. Such were the conclusions reached by this court before our statutes were enacted empowering courts of chancery to sell the lands of such persons for debt, and to provide for their maintenance. (Allison v. Taylor, &c., 6 Dana, 87; Berry v. Rogers, 2 B. M., 308; Shirley v. Taylor's heirs, 5 B. M., 99.)

But in McNees, &c. v. Thompson, &c., 5 Bush, 686, where the defendant in the execution, sane at the time the judgment was rendered, became insane afterwards and before an execution issued, it was held that an action to revive against the committee was proper because the creditor, though entitled to have his debt satisfied, could not have it done by the issual of an execution against the debtor alone, the statutes then in force on the subject being cited. (Section 2, chapter 481, Stanton's Revised Statutes.)

It is true, as contended, that in that case no execution in fact was issued; but it is clear, if such a remedy had been held to be open to the creditor, he would have been forced to adopt it. His resort to an action against the committee was upheld because he had no remedy by execution.

Our present statutes are similar to the provisions of the Revised Statutes on the subject in question. (Section 2150, Kentucky Statutes; section 489, Civil Code.)

The issual of these executions is, therefore, to be held as a nullity and the sale as void. These acts were consequently harmless in themselves to the appellant; and while he might have been damaged by the wrongful seizure of his land or its use and occupancy, and could have instituted an action on this account against the plaintiffs in the executions and the purchasers as co-trespassers, he has not done so, but proceeds on the erroneous thereory that he was divested of title to his land by this sale. He probably did not institute a different suit because, after a restoration to his proper mind, he confirmed the sale to the purchaser, the co-trespasser with appellees, for a valuable consideration, and can assert no further claim for the damages indicated.

The judgment dismissing his action must be affirmed.

The court delivered the following response to a petition for rehearing March 27, 1897:

According to no decision ever rendered by this court can the value of a widow's own distinct tract or parcel of land be estimated

in determining the quantity of land left by her deceased husband to be set apart to her as a homestead. Appellee in this case is entitled to such quantity of land of her deceased husband as is of the value of $1,000, without reference to the tract she owned as of her own right.

Petition for rehearing overruled.

MITCHELL V. KERBY, &C.

(Filed January 12, 1897—Not to be reported.)

Suit to vacate judgment—Judgment having been rendered in favor of plaintiff in an action upon a promissory note held by him as collateral security, the payee in the note from whom plaintiff received it being made a defendant, in an action to vacate the judgment upon the ground that the payee in the note had promised the payor no steps would be taken against him at that term of court and advised him not to employ a lawyer, as they would meet after the term and settle the matter, the allegation of these facts, together with facts showing payments made to the payee upon the note before any notice to the payor of its transfer, and for which credit had not been given, were sufficient to entitle the defendant in the judgment to relief as against the payee in the note, and the court erred in dismissing the petition upon demurrer filed by him. As the plaintiff in the judgment, who held the note as collateral security, was not served with process in this action to vacate the judgment, it would be premature to pass upon the sufficiency of the petition as to him, but the facts alleged show the judgment in his favor to be unusually unjust and oppressive.

R. H. Tomlinson for appellant.

Wm. Herndon for appellees.

Appeal from Garrard Circuit Court.

Opinion of the court by Chief Justice Lewis.

June 13, 1891, W. J. Kinnard instituted an action against John Mitchell, making W. M. Kerby also party defendant, asking judgment for $585.96 and interest, being amount of a promissory note executed March 10, 1879, by Mitchell to Kerby; also for enforcement of a lien on certain real property secured by mortgage of the same date.

In his petition the plaintiff stated the note was, March 24, 1884, sold and delivered to him, though not in writing, as collateral security for a debt evidenced by note then executed by Kerby to him for $500.

August 20, 1891, personal judgment was rendered in favor of the plaintiff against Mitchell for the full sum of $585.96 and interest from March 10, 1879, subject, as recited in the judgment, to a credit of $100 paid to W. M. Kerby May 28, 1891, and for sale of the mortgaged property to satisfy it, which was sold by the commissioner December 28, 1891, for the sum of $378.

The present action was brought by John Mitchell against Wm. Kerby and W. J. Kinnard January 16, 1892, asking that the judgment rendered in the action referred to in favor of Kinnard against him, and the sale made under it, be vacated and set aside, and that said mortgage and note be canceled.

The facts constituting the cause of this action, as stated in plaintiff's petition, are, in substance, as follows: That Wm. Kerby, to

whom said note and mortgage were executed, met him on the first day of that term of court, to which the action by Kinnard was brought, and promised and assured him no judgment or steps would be taken against him in the action at that term of court; at the same time told him he need not employ a lawyer or incur any expense, as they would, after court, meet and settle the matter; and that relying upon those statements he (plaintiff) did go home, and did not know the judgment had been rendered until after adjournment of court for that term; that afterwards, but before sale of the mortgaged property, they again agreed to make a settlement, Kerby then assuring plaintiff no action would be taken under the judgment, which promise was likewise violated.

He further states that if said note was transferred to Kinnard as collateral security he (plaintiff) was never notified or had knowledge of the fact; but that Kerby continued to receive payments, and promised to enter credit therefor upon the note up to May, 1891, when the sum of $100 was paid; that said payments, a list of which is set out in the petition, are sufficient to satisfy and pay off the note, and he would have pleaded them as set-off against the note if not misled and deceived by Kerby, and in this action pleads and relies upon them.

The record does not show a summons was ever served on Kinnard in this action, but Kerby filed a general demurrer, and this is an appeal from the judgment sustaining that demurrer and dismissing the action.

As to Kerby the facts stated in the petition, which, for the present, must be taken as true, entitle plaintiff to have the judgment in question vacated, not only upon the ground of casualty and misfortune preventing him from appearing and making defense to the action, but also upon the ground of fraud; and it was manifestly erroneous to sustain the demurrer and dismiss the action at his instance. But whether the facts stated, if true, are sufficient to entitle plaintiff to the relief against Kinnard, it would probably be premature to now determine, as he has not been summoned. It is, however, not improper to say the judgment in his favor is unusually unjust and oppressive.

In the first place, although he was entitled to recover of Mitchell in his own name and for his own use only, the sum of $500 and interest from March 4, 1884, being the amount of the note Kerby executed to him, he actually obtained personal judgment in that action against Mitchell for $585.96 and interest from March 10, 1879, and judgment for sale of the mortgaged property to satisfy it; and, so far as this record shows, may still pursue Mitchell for the residue unpaid despite him or Kerby.

Second—Notwithstanding, according to his own allegation, he held the note on Mitchell as collateral security for more than seven years, he permitted him to remain ignorant of the fact, and without his objection to make payments from time to time to Kerby, now almost if not quite sufficient in amount to extinguish the debt, none of which, if that judgment stands, he can now get benefit of, except that for $100 made in May, 1891, because they are all barred by limitation.

The judgment is reversed, with directions to the lower court to overrule the demurrer of Kerby, and for further proceedings consistent with this opinion.

TRIMBLE V. SCOTT, &C.

(Filed January 15, 1897—Not to be reported.)

1. *Modification of judgment—Deficiency of land sold*—Where a tract of land held by a married woman for life, remainder to her brothers and sisters, was sold by the husband, and the proceeds reinvested in a tract of land belonging to him, which he conveyed to his wife upon the same conditions and limitations upon which she had held the other tract, and in a suit by the remaindermen to recover of the husband the proceeds of the tract sold, judgment was rendered denying the relief sought upon the ground that the husband had properly reinvested the proceeds. In this action to vacate and modify that judgment, the court properly so modified it as to allow plaintiffs to recover of the husband compensation for a deficiency in the tract sold and conveyed by him to the wife, they having been misled by the recitals of his deed to the wife, and thus prevented from sooner discovering the mistake.

2. *Limitation*—As no cause of action accrued to plaintiffs, the remaindermen, until the death of the life tenant, limitation did not begin to run against them until then.

J. J. Cornelison, W. H. Holt and H. C. McKee for appellant.

Tyler & Apperson for appellees.

Appeal from Montgomery Circuit Court.

Opinion of the court by Chief Justice Lewis.

It appears there was in 1891 instituted an action by Wm. Lindsay and others to recover of W. C. Trimble $3,984.40 and interest, proceeds of a tract of land in Montgomery county containing fifty-six acres and thirty-five poles, which had in 1870 been conveyed by Wm. Scott, now deceased, to Mary Belle Trimble, wife of W. C. Trimble, for life, remainder to her brothers and sisters.

It was alleged by plaintiffs in that action that the tract of land was sold for the sum mentioned, which was in 1871 reinvested in a tract in Bourbon county belonging to W. C. Trimble, and by him conveyed upon the same conditions and limitations to his wife, Mary Belle, and was stipulated in the deed to contain the same area as did the first named tract. But judgment in that action was rendered in favor of defendant, Trimble, upon the ground that his wife, then dead, had the right to sell and re-invest in the Bourbon county land, which was of value equal to the tract in Montgomery county. The present action was, in 1893, brought by the same plaintiffs to vacate and modify the judgment rendered in the former action, so that they may have judgment for $407.22 and interest, which is the sum to which they are entitled by reason of deficiency in the quantity of the Bourbon county tract, estimating it at $70 per acre, which was the price the Montgomery tract was actually sold for.

Neither party has filed record of the former action; but the pleadings of this sufficiently show plaintiffs in that were denied relief upon the ground that Trimble, as agent or trustee of his wife, had re-invested proceeds of the Montgomery county land in a tract in Bourbon county of equal quantity and value, and they were, therefore, not injured. But if it be true, as now appears, that judgment was rendered upon a basis that was incorrect, and about which the lower court was misinformed or deceived, it was proper for the court, as it did do in the judgment appealed from, to modify it. For it is alleged and shown plaintiffs in that action were misled by recitals in the deed from W. C. Trimble to his wife, Mary Belle Trimble, as to quantity of land in the Bourbon tract, and did not nor could, by

exercise of reasonable diligence, have sooner than was done by actual survey discovered the mistake.

There is no question raised as to actual value of either tract at the time Mary Bell Trimble died in 1889, and the criterion of value of the deficit and consequent recovery was properly adopted by the lower court as $70 per acre.

No cause of action accrued to plaintiffs in this action, who had only an interest in remainder until death of the life-tenant, and, therefore, limitation does not bar them.

Judgment affirmed.

WINCHESTER & LEXINGTON TURNPIKE CO. V. WICKLIFFE'S ADM'R.

(Filed January 27, 1897.)

1. *Corporations—Dividends—Limitation*—Limitation against an action by a stockholder to recover a dividend declared by a turnpike road company begins to run when the dividend is declared, although the stockholder must make a demand before he can sue.

2. *Same*—The fifteen years' statute, and not the five years' statute, applies to such an action, the declaration of the dividend being evidenced by the records of the company, signed by the proper officer.

Breckinridge & Shelby for appellant.

Samuel M. Wilson and Morton & Darnall for appellee.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Guffy.

This action was instituted by the administrator of Robert Wickliffe against the appellant to recover $232.50, dividends due from the appellant upon the shares of stock owned and held by the decedent in the Lexington & Winchester Turnpike Co., which dividends accrued and were declared upon the shares so held, commencing with the year 1877 and ending in 1889. The appellant pleaded and relied on the statute of limitations as its only defense, relying on the five years and also on the ten-years statute of limitations, and alleging that the dividends had been appropriated by the appellant to its own use more than five years as to part, and more than ten years as to the residue. This suit was filed October 16, 1894. The court below sustained a demurrer to the answer, and, appellant declining to amend, judgment was rendered in favor of appellee for the amount claimed; and from that judgment appellant prosecutes this appeal.

The only question presented for decision is whether or not the claim, or any part of it, was barred by limitation.

Appellant insists that the case of Mercer County Court v. Springfield, Maxville & Harrodsburg Turnpike Co., 10 Bush, 254, is decisive of this case, and determines that the five-years statute bars a claim for the dividends declared. It is true that the court held that the dividends in that case were barred by the five-year statute, but that case is unlike the case at bar. It will be seen, upon examination of the opinion in that case, that the company denied the right of the county to the shares of stock, and of course it had never declared any dividends as due to the county court; but in the case at

bar it is admitted, in effect, that the dividends had been declared in appellee's favor, and that if he had applied in time would have been entitled to the payment thereof.

Appellee's contention is that no right of action accrued to appellee until a demand for payment was made by him of the appellant; and, as no demand had been made until a few days before suit, the statute had not commenced to run prior thereto; also that the appellant held the dividends as trustee for appellee, and, therefore, the statute constituted no bar to a recovery, and cites Bank of Louisville v. Gray, 84 Ky., 575, in which the court said: "A bank is a trustee for its stockholder," and further announced the doctrine that the bank should not be regarded as holding the dividends of its stockholders adversely until after a demand is made. Appellant insists that so much of the opinion as is relied on by appellee was not necessary to a decision of that case, hence is only *obiter dicta* and not authority; but it is not necessary to pass upon that question, for the reason that in no event can that decision be decisive of this case.

A bank is in many respects different from a turnpike company, and the reasons for holding it to be a trustee for its stockholders might be much stronger than any reason for so holding in regard to a turnpike company. It is part of the business of a bank to receive and hold the money of its patrons payable on demand.

It is said in Beach on Private Corporations, volume 2, page 953, section 599: "A dividend declared operates as a specific appropriation of a part of the property of the company to its payment, and the claim of the shareholders as creditors develops into an absolute title to the property so appropriated."

"Accordingly, after the declaration of the dividend, the profits are considered as separated from the corporate property, and payable on demand to the individual stockholders as a debt due absolutely to them."

It is said, in Thompson on Corporations, volume 2, section 2232, that unless there is a statute dispensing with a demand, in actions for the recovery of money, a stockholder must prove a demand before he can maintain an action for a dividend. The same author says, in section 2229, that "dividends declared on the capital stock of a corporation, and payable on demand, are not subject to the running of prescription or limitation until there has been a demand and refusal;" and refers to 6 Md., 28 Pa. State, —, and other decisions.

The first-named case does not fully sustain the learned author, but the latter case seems to do so. It may, however, be conceded that a demand for payment of dividends declared in favor of stockholders must be made before suit can be maintained to recover them. The diversity of the statutes of limitation in the various States results sometimes in an apparent conflict of decisions of different courts of last resort. The question presented in this case must be governed by the statute of limitation of this State. Section 2514 of the Kentucky Statutes (which is but a re-enactment of former statutes) provides: "That civil actions, other than those for real property, shall be commenced within the following periods after the cause of action has accrued." * * * "An action or suit upon a recognizance, bond or written contract," * * * "or upon a bond or obligation for the payment of money or property, or for the performance of any undertaking, shall be commenced within fifteen years after the cause of action first accrued."

It seems clear to us that appellee's cause of action accrued when each dividend was declared. It is true that before he could main-

tain a suit he must make a demand. Our statutes require that the creditor of a decedent must make a demand of the administrator, accompanied with a proper affidavit, before he can maintain suit. Yet I presume that it would not be contended that the creditor could, by neglecting to make the demand, extend the time allowed by law in which to sue the debtor, if alive, or the administrator. It often happens that a party dies leaving notes not then due, and upon which no right to sue has accrued. Would it be contended that the creditor could neglect to make the proper demand of the administrator, and thus extend the time in which he might sue beyond the time mentioned in the statute as to limitation of actions? The statute of limitation begins to run from the time that the debtor is subject to be sued, or from the time that the creditor can, by his own act or of his own volition, become entitled to maintain an action. It is clear that the statute does not begin to run until the cause of action accrues; but the meaning of that is that whenever it is in the power of the creditor to enforce the payment of his demand, his cause of action has accrued, although he may be by law required to make a demand before he involves the debtor in a bill of costs. It may be said that the statute of limitation is a statute of repose, and should be so construed and enforced as to accomplish that object. It will be seen from the statute that an action upon a contract or obligation in writing is not barred until fifteen years from the time the cause of action accrued. The contract or obligation in this case was in writing, being part of the records of the company, signed by the proper officer—at least should have been so entered and signed; in fact, it is in law bound to be, and is so admitted in the pleading, not being denied. The appellee was, therefore, entitled to judgment for all the dividends that had been declared within fifteen years before the 16th of October, 1894 (the time of the institution of the suit).

It results from the foregoing that the court below erred in sustaining the demurrer to the entire answer. It should have been overruled as to the claim for dividends declared in 1877 and 1878, and sustained as to the residue of the answer.

The judgment is, therefore, reversed and cause remanded for proceedings consistent with this opinion.

HANCOCK V. COOPER.

(Filed January 30, 1897—Not to be reported.)

Guardian and ward—Where a guardian brought suit for the sale of land and a division of the proceeds, alleging that his ward had an interest in the remainder under her grandfather's will, but omitting to file the will as an exhibit, the land having been sold and the proceeds divided according to the construction indicated in the petition, the ward can not hold the guardian liable upon the ground that under the will she was entitled to a present joint interest with her father, the proper construction of the will being a matter about which skilled lawyers might differ.

P. B. Cheaney and Wm. R. Marrs for appellant.

W. P. Cooper and Montgomery Merritt for appellee.

Appeal from Henderson Circuit Court.

Opinion of the court by Judge Hazelrigg.

Milan Hancock in his will provided as follows: "I do also leave in trust to my friend and brother-in-law, H. U. Grigsby, for the benefit of my son, Milan Hancock, jr., and his children, two hundred and thirty-six acres of land. Said land, at the death of my son, Milan Hancock, jr., I wish equally divided between his children, and in case of the death of any of his children, they leaving children, said children are to receive a father's or mother's part."

There is abundant authoritative construction of language similar to that employed here to the effect that the son, Milan, took an estate for life and the children the remainder. Another clause of the will, however, may render this construction somewhat doubtful, and that is as follows: "It is also my wish that said farm be cultivated annually, and that my friend and brother-in-law, H. U. Grigsby, shall see that the proceeds are judiciously appropriated for the support of my son, Milan Hancock, and his family, and in educating his children."

What effect this provision should have on the construction heretofore suggested need not be determined, as the proper interpretation of the will is not now immediately involved, our only purpose in quoting it being to show that the true meaning is somewhat involved in doubt, and is a matter about which intelligent lawyers might well differ; a fact pertinent to the question before us, as we shall presently see.

Ella Hancock, the present appellant, was a daughter of Milan Hancock, jr., and the appellee at the instance of her father qualified as her guardian when she was nineteen years of age. In obedience to what seemed to be the best interests of all the parties interested in this land the appellee as guardian brought suit in the Henderson Circuit Court to sell it and invest or divide the proceeds. Accordingly he employed a firm of attorneys to bring the action, one of whom had been a circuit judge for some eighteen years, and the other a practicing attorney for some twenty-five years, and both of whom were of high standing professionally and otherwise.

The averments of the petition seem to the effect that Milan Hancock, jr., took an estate for life in the entire tract, with remainder to the children, Ella among the number. The will was referred to and made part of the petition, but seems not to have been in fact filed. The land was sold and the proceeds, in pursuance to the judgment of the chancellor, divided according to the construction indicated in the petition. Ella reached her majority in June, 1890, and in April, 1893, she filed the present action against her former guardian, the appellee, for the difference between what she ought to have received on a true construction of the will, namely, one giving her a present joint interest in the whole estate and limiting the interest of her father to a joint estate with his children but for his life only, and what she in fact did receive of the estate through the negligence and inattention, as she avers, of her guardian. Upon this state of case the chancellor dismissed her petition, and we think properly so. It does appear that subsequently to the distribution of the proceeds among the children of Milan Hancock, jr., of whom there were five, and his creditors, the children filed their separate petitions in the suit, charging that their father had only a life estate in one-sixth part of the land, and the court reversed its former ruling and adopted the construction for which the petitioners contended. Some of the children were, therefore, allowed to recover from the creditors the overpayment made them under the first construction. The appellant was not among those held entitled to re-

cover, perhaps because she was estopped by limitation, though the reason does not appear.

We can not see upon what principle the guardian can be held liable for the loss occasioned by the court not construing the will in the first instance as it did in its last judgment. If the pleadings were unskillfully drafted or an important exhibit omitted, the appellee had at least done all a prudent man could do and all he would be expected to do in the conduct of his own business. He was not one learned in the law, and must have depended on his attorneys to properly prepare the pleadings and present the necessary exhibits showing the title of his ward. Moreover, just what interest his ward took was a matter about which, as we have seen, there was room for difference of opinion. A majority of this court is inclined to the opinion that the last construction of the chancellor was right, and yet it is a matter of extreme doubt. Why should the grandfather cut off his son--the head of a growing family—to a pittance, a fractional part of his share of the estate, and limit that to his life, leaving such share, as well as that of every child, uncertain and dependant on the number of children born and to be born. Perhaps a more reasonable construction would have been to deny the creditors of Milan Hancock, jr., any part of the estate as long at least as it was necessary for the support of his family or the education of his children. Under these circumstances what could the guardian do except to leave the questions involved to those skilled in the law? (Harris, &c. v. Berry, 82 Ky., 137.)

The judgment must be affirmed.

HOLLON V. LILLY.

(Filed January 30, 1897.)

1. *Liability of judge for imprisonment of witness*—The judge of a circuit court can not be required to respond in damages for committing a person to jail for refusing to testify before the grand jury unless he acted either maliciously or corruptly.

2. *Same—Evidence*—In an action against a judge to recover damages for false imprisonment it was not competent for plaintiff to prove that the defendant had a jug of whisky in his room, and had taken two or three drinks on the morning he committed plaintiff to jail.

B. F. Day for appellant.

Hathaway & Cardwell and Beckner & Jouett for appellee.

Appeal from Clark Circuit Court.

Opinion of the court by Judge Burnam.

This suit was instituted by the plaintiff, Hollon, against the defendant, Lilly, alleging that defendant was the presiding judge of the Wolfe Circuit Court; that at the July term of said court, in 1892, whilst the grand jury was in session, he was called on to testify; that, after answering other questions, the foreman of the grand jury asked him if he had had carnal intercourse with any woman in Wolfe county within the past twelve months, and that upon his refusal to answer the said foreman of the grand jury carried him before the defendant, who ruled that he must answer said question; that upon his refusal to do so he willfully, maliciously and cor-

ruptly directed the jailer of Wolfe county to confine him in jail until he should answer; that said jailer, in conformity to said order, did keep him in jail for about eight hours, and that by the aforesaid malicious and corrupt conduct he had been humiliated and disgraced, and sought damages.

Defendant admitted that he was the circuit judge of the Wolfe Circuit Court; admits that the plaintiff was brought before him by the foreman of the grand jury, but denies that the foreman of the grand jury asked plaintiff if he had had carnal intercourse with any woman in Wolfe county within twelve months before that time; says, on the contrary, that the question propounded by the foreman of the grand jury was: "Do you know of any person committing the offense of adultery in Wolfe county within the past year?" and that plaintiff refused to answer this question, and notified the court that he could send him to jail if he wanted to, and that he would not answer; and after admonishing the foreman of the grand jury not to ask plaintiff any question that would incriminate himself, he notified the plaintiff that it was his duty to answer the question of the foreman of the grand jury, and upon his refusal to do so he committed him to jail for contempt. He claims that he was perfectly friendly to the plaintiff; that he had no ill-will, and that he was compelled, in the discharge of his official duty and the proper administration of justice, to force an answer to the question propounded by the foreman of the grand jury.

These allegations of the answer were all traversed of record, and, a jury being empaneled who were sworn to try the issue, the plaintiff was introduced as a witness. He testified, in substance, as follows: "Brown, the foreman of the grand jury, took me into the presence of the defendant, and announced that I had refused to answer a question before the grand jury. The defendant then asked the foreman to state the question, whereupon the foreman said: 'One of the questions was: 'Do you know anyone in Wolfe county being guilty of adultery within the past twelve months?'" I then spoke up and said: "Judge, I have answered that question in the negative, and my answer is true." The foreman, Brown, then said to the court that I had been asked, "Do you know of anyone guilty of the offense of fornication in Wolfe county during the last year?" I spoke up and said: "Judge, I have also answered that question in the negative, and my answer is true." The foreman then said to the court that I had been asked, "Have you had carnal sexual intercourse with any woman in Wolfe county within the last twelve months?" I then spoke up and said: "Judge, I decline to answer this question." The defendant then said to the foreman: "You can not make a witness criminate himself or testify against himself." He then turned and said to me: "You must answer the question, or I will have to send you to jail until you do." I responded that "I would never answer the question, and if I must go to jail for not answering the question, it had as well be done now as any time." Defendant then ordered me to jail. I was not confined in a cell, but in one of the rooms of the jail for about eight hours. The defendant and myself had always been friendly, and he was my attorney in one law suit before he was elected judge," etc. The testimony of the plaintiff was corroborated by several witnesses. He then introduced Brown, the foreman of the grand jury, who said: "I brought the plaintiff, Hollon, into court, and said to defendant that Mr. Hollon had refused to answer a question. I said: "We asked him if he knew of any person being guilty of adultery." Mr. Hollon said: "Judge, I have answered that question in the negative." I

Previous to this time, in October, 1891, being heavily involved in debt, the said McElroy and his wife conveyed to W. E. Selecman a deed to another tract of land in Washington county, Kentucky, containing 335 acres, on which his residence was situated, and the said Selecman immediately reconveyed same to his wife, Mary B. McElroy, in consideration of the surrender of her inchoate right of dower in all his other lands, and her agreement to unite with him in the conveyance of same.

Subsequent to the assignment aforesaid the assignee brought his suit in the Washington Circuit Court for a settlement of his trust, and for a sale of all the aforesaid real estate; and in said action the debts of the said McElroy were ascertained and his real estate was sold. The two tracts of land, known as the Cooper and Palmer places, were sold to pay the mortgage debt to the Mechanics' Trust Company, and brought about $2,200 more than the amount of said debt. The other unincumbered real estate was also sold.

Among the indebtedness of the said R. A. McElroy was a judgment recovered in the Franklin Circuit Court by the State National Bank of Kentucky on an obligation for $1,500 executed by the said McElroy to one McKay, and sold by McKay to W. J. Hendrick, and which was endorsed and discounted by said Hendrick to said bank. Upon the maturity of this obligation of McElroy the said bank brought suit and recovered judgment against R. A. McElroy, E. E. McKay and W. J. Hendrick. Upon this judgment executions were issued to Washington county, the home of R. A. McElroy, and to Nelson county, the home of E. E. McKay, which were returned "no property found" by the sheriffs of the respective counties. Suit had already been instituted in the Washington Circuit Court in the name of the Merchants National Bank, which was filed February 17, 1893, J. B. Wathen & Bro., and also by Isaac Curry, to subject the 335-acre tract of land, which had been conveyed to Mrs. Mary B. McElroy, to the payment of debts due to the said parties by R. A. McElroy.

After the return of no property found aforesaid the State National Bank also instituted a suit and sued out an attachment, and had it levied upon the same 335-acre tract of land, and sought to subject same to the payment of their debt upon the ground that the conveyance of said property to the said Mary B. McElroy was without sufficient consideration at a time said McElroy was insolvent and when he did not have the legal right to make such disposition of his property. These suits were prosecuted to judgment, and the conveyance to Mrs. McElroy was set aside by a judgment of the Washington Circuit Court, the court holding that the value of Mrs. McElroy's inchoate right of dower in all her husband's real estate was only worth the sum of $2,442.69, whilst the value of the tract of land conveyed to her by the deed aforesaid was fixed at $7,705; the court holding also that the conveyance of said land, to the extent that the value of said tract exceeded the inchoate right of dower to said Mrs. McElroy, was illegal. It further fixed the value of this land at $23 an acre, and held that the residue of said 335-acre tract was liable, first, to pay the debt of the Merchants National Bank, then the debt of Wathen & Bro., and lastly, was liable for the debt due the State National Bank, and that all these attaching creditors had acquired liens on same by reason of the institution of the suits aforesaid.

The judgment of the State National Bank v. McElroy had, in the meantime, been discharged by W. J. Hendrick, and this debt was assigned by the State National Bank to said Hendrick, and also all

the rights acquired by them by reason of the institution of the suit aforesaid. In the judgment of the Washington Circuit Court they held that the defendant, McElroy, was entitled to his homestead, and that the defendant, Mary B. McElroy, was entitled to her inchoate right of dower in all the lands of her husband, including those mortgaged to the Mechanics Trust Company, but, of course, same was subject to the mortgage which she had signed. There were some exceptions raised by the creditors to the homestead allotment, on the ground that same was worth more than the sum of $1.000. These exceptions were overruled, however, and the defendant, Hendrick, excepted and prayed an appeal to this court from said allotment of homestead.

As the proof on this point is contradictory, we do not feel authorized to disturb the homestead allotment. The said W. J. Hendrick also excepted to the action of the court in assigning to Mrs. Mary B. McElroy 106.2 acres of land out of the 335-acre tract which had been conveyed to her under the deed of Selecman as the value of her inchoate right of dower in all the landed estate of her husband. The defendant excepted to this action of the court in making this allotment entirely out of the 335-acre tract on which he had acquired a lien by reason of the institution by the State National Bank of said suit and the suing out of their attachment, and it is insisted by him that the value of her inchoate right of dower should have been ascertained in each tract of land, and the purchase money of each of said tracts should have been made to contribute its proportion to the fund due M. B. McElroy for her inchoate right of dower in same found to be due to her.

It is evident that this is entirely practicable, as the two tracts which were covered by the mortgages of the Mechanics Trust Company and the tract upon which Evans held a lien sold for more than enough to pay said lien, and to have contributed their *pro rata* to discharge the lien of the appellant.

The record shows that the court has under its control and in the hands of its officer sufficient funds arising from the sale of said land to make up to appellant the value of that portion of the home tract which was taken in the allotment of contingent dower to Mary B. McElroy.

By the action of the court in charging the whole of this sum so found to be due to Mrs. McElroy to the 335-acre tract of land, the lien which had been acquired by reason of the vigilance and activity of the State National Bank and Hendrick, as their assignee, was rendered nugatory, as said land failed to more than pay the lien debts which preceded his. In our opinion, this was an error on the part of the court below. The value of the inchoate right of dower of Mrs. McElroy should have been ascertained in each tract of land upon the basis that all of said tracts should pay to her the $2,442, which was found to be the value of same.

No exceptions seem to have been taken to the valuation placed by the court upon the 106 acres of land allotted to her, and that allotment is not disturbed; but the court is of the opinion that there should have been paid over to the defendant, Hendrick, from the purchase money arising from the sale of each of the other tracts the *pro rata* which would have been due to said Mary B. McElroy for her inchoate right of dower in the purchase price of same upon the basis that said interest in the whole of said lands was worth $2,442, to indemnify him against the allotment of this entire sum out of the land on which he held a lien.

And for this reason the judgment of the lower court in this case is

reversed and this cause is remanded for proceedings consistent with this opinion.

The court delivered the following modification and extension of opinion March 19, 1897:

As the entire sum allowed to the appellee, Mary McElroy, wife of R. A. McElroy, as the value of her contingent right of dower in the real estate of her husband, which was fixed at twenty-four hundred and forty-two dollars and sixteen cents ($2,442.16), was alloted to her out of the tract of land on which appellant, Hendrick, had acquired his lien, we think that appellant is entitled to have his judgment paid out of any funds which arose from the sale of such real property which is in the hands of the assignee of McElroy or the court, not, however, exceeding the amount fixed as the value of such dower.

BROWN, &C. V. ILLINOIS CENTRAL R. R. CO., &C.

(Filed January 27, 1897.)

1. *Carriers—Contract limiting common-law liability*—A stipulation in a contract with a railroad company for the shipment of live stock, to the effect that no claim for loss or damage shall be valid against the company unless it shall be made in writing, verified by affidavit, and delivered to a particular agent of the company within ten days of the removal of the stock from the cars, is in violation of section 196 of the Constitution, which provides that no common carrier shall be permitted to contract for relief from its common-law liability.

2. *Alternative pleading*—An allegation that a loss occurred by the negligence of one or the other of two defendants, and that plaintiff does not know which, is not good as to either of the defendants. Subsection 4 of section 113 of the Civil Code does not authorize such pleading, there being no effort to allege alternative facts, the alternative allegation being as to the party of whom the facts are alleged.

Jno. W. Ray for appellant.

Z. W. Bugg & Son and J. M. Nichols for appellee.

Appeal from Carlisle Circuit Court.

Opinion of the court by Judge DuRelle.

The appellant brought suit against appellee, the Illinois Central R. R. Co. and the Baltimore, Ohio & Southwestern R. R. Co., the petition setting out in three paragraphs damages claimed to have resulted from alleged negligence in transporting three cars of hogs from Bardwell, Ky., to Cincinnati, Ohio. The negligence was averred to have consisted in the delivery of another carload of hogs of inferior size and quality to those shipped by appellant in place of one carload of appellant's hogs, and unnecessary delay in the transportation of the other two cars to Cincinnati, by reason of which the animals deteriorated in weight and quality.

It is unnecessary to consider the motions to quash the return of service of process, or the demurrer to the jurisdiction interposed by the Baltimore, Ohio & Southwestern R. R. Co.

After these motions and demurrer had been overruled and the petition twice amended, a general demurrer to the petition as amended was sustained by the trial court, apparently upon the

theory that appellant had not sufficiently alleged compliance with paragraph 5 of the contract of shipment, as follows: "It is further agreed by the shipper no claim for loss or damage to stock shall be valid against said railroad company unless it shall be made in writing, verified by affidavit, and delivered to the general freight agent of the railroad company, or to the agent of the company at the station from which the stock is shipped, or to the agent of the company at the point of destination, within ten days of the time said stock is removed from said cars."

It is unnecessary to consider this question, as this court has decided, in the case of the Ohio & Mississippi R. R. Co. v. Tabor (17 KY. LAW REP., 1411), that such a stipulation is in violation of section 196 of the Constitution, which provides that no common carrier shall be permitted to contract for relief from its common law liability.

But there is another ground of objection to the petition. In each paragraph it is alleged in substantially the same language that the loss and damage occurred "by reason of the negligence of one or the other of defendants, or of both defendants, and as to which plaintiffs are unable to say as to whether the one or the other, or both, but one of these alternatives is true."

It is to be supposed that this alternative pleading was intended to be drawn under subsection 4 of section 113 of the Code of Practice, which provides: "But a party may allege, alternatively, the existence of one or another fact, if he state that one of them is true, and that he does not know which of them is true." But we do not think that such pleading is authorized by the Code provision. The Code provides for averment of alternative facts. The facts thus averred in the alternative must be alleged of and concerning a definite party or parties. There is no effort in this pleading to allege alternative facts. The facts are definitely averred, but the party of whom they are alleged to be true is alleged in the alternative. Under the rule that a pleading is to be taken most strongly against the pleader, this averment of the petition is insufficient as against either of the appellees.

Wherefore, the judgment is affirmed.

DAVIS, &C. V. CALVERT.

(Filed January 30, 1897—Not to be reported.)

1. Deed set aside on account of grantor's mental incapacity--A conveyance of land, in consideration of grantee's undertaking to support the grantor, should have been set aside in this action by the grantee against the widow and heirs of the grantor to have the deed reformed on account of a misdescription of the land, it appearing that the grantor did not have sufficient capacity to make a contract.

2. Dower—It appearing that the widow of the grantor had separated from him, and at the time of his death was living in adultery with another man, she is not entitled to dower and homestead as against the grantee's claim to have compensation for the support of the grantor secured to him out of the land.

Wm. H. Yost for appellants.

Jonson & Wickliffe for appellee.

Appeal from Muhlenburg Circuit Court.

Opinion of the court by Judge Burnam.

This suit was instituted by the plaintiff against the defendants, Mary E. Calvert, Annie L. Davis and Cordelia Shields, as widow and heirs at law of Joe Calvert, deceased, plaintiff claiming that during the lifetime of J. Washington Calvert the said J. W. Calvert had owned a tract of 100 acres of land in Muhlenburg county; that he had entered into a contract with the plaintiff to support, clothe, lodge and feed him during his lifetime, and that in consideration of said services he agreed to convey to plaintiff said land, and that pursuant to said agreement he took said Calvert into his family, fed, lodged and nursed him until his death on the 29th day of July, 1893, about four months thereafter; that said J. W. Calvert had put plaintiff in possession of the land, and that he has held possession ever since.

He says that said Calvert, in pursuance to said agreement, acknowledged a deed whereby he attempted to complete his contract and to convey to the plaintiff the land in question, but that in making said deed, by inadvertance of the draftsman, there was inserted a misdescription of the land, and instead of describing the land which he had purchased and which said J. W. Calvert sold him he put in the boundary to another tract of land of 100 acres which adjoins the one intended to be conveyed, and he brought this suit asking that the deed be reformed and corrected, and that a new deed be made to him in accordance with his contract.

The defendants, Mary E. Calvert, Annie L. Davis and Cordelia Shields are respectively the wife and daughters of the decedent, J. W. Calvert.

It is alleged that Mary E. Calvert had lived apart from her husband since 1872; that she had lived in adultery with defendant, Thomas Nelson, and that the other defendants had never made any provision for their father. The defendant, Davis, and others, for answer to the plaintiff's petition, admit that Washington Calvert owned the land mentioned in the petition; admit that he was old and feeble and had been living apart from their mother and themselves without any intercouse from the year 1871 to the latter part of March, 1893, but they deny that said J. W. Calvert ever proposed to the plaintiff to convey him the land in question in consideration of the agreement of plaintiff to take care of him, or that plaintiff ever accepted said proposal in good faith, or that Calvert ever surrendered the possession of said land to the plaintiff; deny that said Calvert made or acknowledged the deed on the 23d day of April, 1893, which is relied on, and charge that the alleged deed from J. W. Calvert to plaintiff was made and acknowledged only a short time before his death and at a time when he was confined to his bed in a low state of health, and when said Calvert did not have mind, or capacity to understand what he was doing, or to understand the purpose or object of said deed. They charge that at the death of said J. W. Calvert the plaintiff took forcible possession of said land. They claim that they are respectively the wife and children of the deceased, and that the deceased had never made any provision for them, and had driven them from his home and would never permit them to return, even though requested to do so. They charge that said J. W. Calvert, for many months before his death and at the time of his removal to the house of the plaintiff, did not have capacity to contract or convey or to understand the purport or conditions of any legal or other written contract; that he was in such a feeble condition that he had no mind, or not enough to understand

what he was doing, and that he was incapable mentally of executing any valid contract or binding obligation on him, and they ask that said conveyance from decedent to plaintiff be canceled; that the contract be declared void and the land owned by decedent be adjudged to them as the only heirs at law of said decedent; that plaintiff's petition be dismissed, etc.

The affirmative allegations of this answer were all traversed of record, and upon it considerable proof was taken. A good many witnesses testified for the plaintiff in substance that they thought the mind of the decedent, about the time of the making of the deed, was as good as it had ever been, and some witnesses testified that they thought he had capacity to execute such a paper, but it seems to us that all the evidence in this case conclusively shows that for several years before the death of decedent he had been unbalanced and unsound in mind, sometimes acting rationally and sometimes "flighty," as the witnesses put it.

Something more than two years before plaintiff took him to live with him he went to reside with one Walston and wife, who took care of him for the use of his hundred acres of land. Finally Walston and wife, upon their own statement, suggested to the decedent that he should execute to them a deed to the said hundred acres of land in consideration of their taking care of him and providing for him during his life. Their testimony shows that decedent for a long time refused to do this, but that ultimately, under apprehension that he might be turned out of doors, agreed to execute the deed; that thereupon the said Walston went to town and had an attorney prepare the deed in question, but that after he took it out home and thought about the matter he came to the conclusion that Calvert did not have sufficient mind to execute a binding contract and he, therefore, declined to go on with its execution. He then sent the decedent in a buggy to the house of plaintiff and suggested to the plaintiff that he make such a contract with the decedent, and after the old man had been at his house for some time he brought out the clerk and some witnesses and changed the name of the grantee in the deed which Walston had prepared, and he had him execute the same deed which had been prepared to be executed to Walston.

The clerk testifies that decedent was lying in bed at that time with a dreadful case of chronic diarrhoea; also suffering from dropsy and in a very miserable condition.

The testimony of Dr. Townes is to the effect that he had known Calvert since his youth; that he was a man of weak and unsound mind; that he could not understand the purport of a contract, and that he was not capable of transacting business of any kind. This evidence of Dr. Townes was strongly supported by the testimony of Dr. J. L. Taylor, the two Walstons, J. W. Maple, S. T. Love, C. M. Morehead, and perhaps others, and the fact that decedent executed the deed which is sought to be corrected in this action without knowing that the description in said deed did not conform to that of his own land clearly establishes to our minds, taken in connection with the evidence, the contention of the defendants that he was incapable of executing said conveyance, and that he did not have capacity at the time of its execution sufficient to contract; and the court is of the opinion that no title passed to J. L. Calvert under the deed executed to him by said J. W. Calvert, dated April 23, 1893, and that same should be canceled and the real estate owned by said J. W. Calvert at his death descend and belong to his heirs at law. But, in view of the fact that the said J. L. Calvert provided for and took

care of the decedent during his last illness, we are of the opinion that he is entitled to proper compensation for such services.

There being strong evidence that the widow has been living in adultery with another man since her separation from her husband, we are of opinion that she is not entitled to dower and homestead in said property as against the right of said J. L. Calvert to have such compensation secured to him out of the land in contest.

For the reasons indicated this cause is reversed and the same is remanded for proceedings consistent with this opinion.

KING, &C. v. TILFORD, &C.

(Filed February 2, 1897.)

Modification of injunction pending appeal—In granting an appeal from a judgment granting, modifying, perpetuating or dissolving an injunction the lower court may, in its discretion, make an order suspending, modifying or continuing the injunction during pendency of the appeal. But such order is subject to revision by this court or by a judge thereof in vacation. And this power to revise applies as well when a perpetual injunction is the relief sought as when the injunction is merely ancillary or temporary; and also applies to an order overruling as well as to one sustaining a motion to suspend, modify or continue the injunction. But the court is of opinion in this case that the ends of justice do not require this court to modify the injunction pending the appeal, the lower court having refused to do so.

Stone & Sudduth for appellants.

Pirtle & Trabue for appellees.

Appeal from Jefferson Circuit Court, Law and Equity division.

Opinion of the court by Chief Justice Lewis.

August 24, 1896, there was granted in the action instituted by appellees, members of the board of public safety, an injunction restraining appellants, members of the board of aldermen of the city of Louisville, from proceeding to try them upon certain charges and specifications and from removing, or attempting to remove, them from their offices as members of such board of public safety, or in any manner interfering with the exercise of the duties thereof. That injunction was, by the law and equity division of the Jefferson Circuit Court, where the action was pending, dissolved, but subsequently reinstated by order of a judge of this court, then in vacation.

Upon final hearing the injunction was perpetuated, and an appeal from the judgment so rendered was taken to the Court of Appeals; but, subsequent to rendition of that judgment, a motion was made under section 747, Civil Code, in the lower court for a modification of the injunction, which was overruled. And now this is a motion, made in the Court of Appeals pending appeal from the judgment of the lower court to modify the injunction in the manner to be mentioned.

In our opinion section 747 was, as language used shows, intended to make supersedeas on appeals thereafter inapplicable to judgments granting, modifying, perpetuating or dissolving injunctions, and instead to give the court rendering such judgment discretion at the time an appeal is taken to make an order suspending,

modifying or continuing the injunction during the pendency of the appeal. Though whatever order the lower court may make in respect to the injunction is, as in terms provided, subject to revision and final determination by the Court of Appeals; or, if in vacation, by any judge thereof, how far the injunction shall be suspended, modified or continued pending the appeal; and we think this power to revise pending an appeal applies as well where a perpetual injunction is the sum of relief sought in an action as where it is merely ancillary or temporary; and also as well to an order of the lower court overruling as to one sustaining a motion to suspend, modify or continue the injunction.

The motion then, being properly before and subject to present consideration by this court, must be determined as the ends of justice require.

The particular feature of the judgment appealed from, to which objection is made, and the nature and extent of the modification moved for by appellants is that the perpetual injunction applies to and restrains, pending the appeal, any and every trial of members of the board of public safety by the board of aldermen, whereas it should, and the motion is, that it, by this court, be limited in its operation to further proceedings upon the charges and specifications described and set forth in the petition of appellees.

Assuming without question the injunction adjudged by the lower court does in fact restrain appellants, the board of aldermen, pending the appeal, from proceeding to try and displace members of the board of public safety upon other and additional charges and specifications, it does not necessarily follow we should now, to prejudice of other cases having precedence, take up and pass upon this motion, when proper determination of it practically requires consideration of the whole case.

Appellants, composing the board of aldermen, and claiming jurisdiction to try appellees upon charges involving removal from office, may properly and decently insist upon conservation of all their rightful authority. But it does not seem to us they should know or seek to know there were new and additional charges ready to be made against appellants, or that a suggestion of that fact by them is deserving of consideration by this court. In this connection it is not improper to refer to the finding of the lower court that the charge made by appellees in their petition that the trial of them was in pursuance of a conspiracy by appellants to unlawfully displace them had been made out by proof. For, in view of that finding, this court should not dispose of the present motion until ready to determine on its merits the whole case.

The motion is, therefore, for the present, overruled.

DOWING V. CARR'S ADM'R.

(Filed Feburary 3, 1897—Not to be reported.)

1. Administrators—An administrator may, in course of settlement and distribution of the estate of his intestate, acquire by assignment a promissory note, and as such maintain an action thereon without specifically alleging the obvious fact that such note is an asset of the estate.

2. Pleading—A denial in the reply that the note sued on was obtained by fraud, misrepresentation "and" covin was good.

L. J. Moore for appellant.

Geo. C. Webb for appellee.

Appeal from Fayette Circuit Court.

Opinion of the court by Chief Justice Lewis.

An administrator may, in course of settlement and distribution of the estate of decedent, acquire, by transfer and assignment a promissory note, and of course as such, maintain an action thereon without specifically alleging the obvious fact that such note is an asset of the estate.

In the answer was a statement that execution of the note was obtained by fraud, misrepresentation and covin; and it is argued that the reply was defective because it contained simply a denial that said note was obtained by fraud, misrepresentation *and* covin.

Fraud means and comprehends deceit in all the modes in which it may be practiced; and, therefore, it is inaccurate to say a party was in a particular transaction guilty of fraud *or* misrepresentation, or fraud or covin; because, if guilty of either of the two last, he was necessarily guilty of the former. So, according to a fair interpretation of the language used in the reply, it may and should be held and considered as equivalent to a denial that execution of the note was procured by fraud committed by misrepresentation or covin, the two last being nearly, if not quite, synonomous terms.

The evidence on the trial of the case was sufficient to authorize the jury, under proper instructions given, to find that the note was based upon a valuable consideration, and executed by appellant voluntarily, and without fraud of any kind being practiced upon him.

Judgment affirmed.

LEWIS V. HAYDEN, &C.

(Filed February 3, 1897—Not to be reported.)

School trustees—Damages for breach of promise to employ teacher—Plaintiff is not entitled to recover damages on account of the refusal of defendants to reduce to writing and sign an agreement which she alleges they, as trustees of a common school district, made to employ her as teacher, it appearing that the promise was made by only two of the three defendants, and that one of them was not at the time of the promise a trustee, and that the other was willing to complete the contract.

H. P. Cooper for appellant.

H. W. Rives and Finley Shuck for appellees.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Burnam.

The appellant instituted this suit in the Marion Circuit Court against the three defendants, Hayden, Burdett and Wade, for damages for breach of contract in refusing to reduce to writing and sign the agreement, which she alleges they made, by which they promised her that she should teach the common school in District No. 14, in Marion county, for the year 1894, and in wrongfully and illegally compelling her to abandon the schoolhouse against her will and in violation of her rights.

The facts in this case, as stated by the appellant, are that she met Hayden in Lebanon and asked him to vote for her for the school; that he replied that so far as he was concerned he had no objection, but that he would see the other trustees and let her know; that on July 11, 1894, she went to the house of Burdett and there met Wade and Burdett, and that they talked over the matter; that Wade and Burdett agreed that she should have the school, and fixed the time at which the school should begin, viz, on the 20th day of July, 1894. No written contract was entered into, and Hayden did not know of the meeting and was not there. A few days after this conversation with Burdett and Wade she received a letter from Wade, in which he notified her that he could not comply with his promise.

The facts show that at the time of this meeting Wade had never qualified as trustee, and that Hayden was not present at the meeting referred to, and knew nothing about it.

Section 4445 of the Kentucky Statutes says: "The trustees in their corporate capacity, at a meeting called for that purpose, shall employ a qualified teacher; * * * no teacher shall be empoyed until after the election and qualification of the new board of trustees. It (the contract between the teacher and trustees) must expressly prescribe that its terms are subject to the provisions of the common school law, and shall be in writing, signed by the teacher and at least two of the trustees." It is evident that appellant never had any contract with the defendants in their official capacity as required by the above statute.

In this case Burdett admits that he promised her the school, and said that he was willing for her to have it. The evidence shows that Hayden never promised her the school at any time, and was not present at the meeting, whilst Wade admits that he promised her that she should have it, but says that said promise was made before he was qualified as trustee, and was wholly without consideration; that in a day or two he notified appellant that he could not comply with the promise, and that the agreement made by Burdett and himself with appellant was never reduced to writing or signed by anybody.

We do not think that any legal obligation rested on Wade to execute the mere promise made by him to appellant, and it is apparent from the evidence of appellant herself that she was not in any way prevented from making any other contracts by said promise, or that she was in any way subjected to loss by failure to find other employment by reason of same. We think she has wholly failed to make out a cause of action, and the judgment of the lower court is, therefore, affirmed.

CABEL, RECEIVER v. BINGHAM.

(Filed February 4, 1897—Not to be reported.)

Subscription—Peremptory instruction—In this action by the receiver of a bank to recover a subscription alleged to have been made by defendant to the capital stock of the bank, there was no testimony tending to show that the alleged subscription was made, and a peremptory instruction to find for defendant was proper.

Chapman & Sampson and J. W. Alcorn for appellant.

Tinsley & Faulkner for appellee.

Appeal from Bell Circuit Court.

Opinion of the court by Chief Justice Lewis.

Upon the issue whether appellee Bingham subscribed the sum of $2,000 to the capital stock of the Peoples Bank, we think appellant Cabell, receiver, failed to prove any fact from which can be drawn a reasonable inference that he did.

The subscription list is not produced with his name upon it, nor is there exhibited any books or papers of the bank showing that he made the subscription. Indeed the witness, Colston, who was the prominent and active person in soliciting subscription of stock necessary to establish the bank, and the subscription list fails to state that appellee's name ever was by himself or by his authority put upon it. It is admitted by appellee that he took stock to the amount of $1,000, which he transferred to his wife, and that appellant in his petition concedes was fully paid. But except what purports to be an account, taken from the books of the bank, there is nothing to show that he was a stockholder or entitled to any benefits as such, and even that account does not show, as counsel argues is so, that any dividend was ever declared or paid to him on stock amounting to the sum of $2,000. Indeed for that matter there is no proof he ever received any dividends at all.

In our opinion the lower court was bound to instruct the jury peremptorily to find for appellee.

Judgment affirmed.

WESTERN UNION TELEGRAPH CO. V. JOHNSON.

(Filed February 4, 1897.)

Appeals—Failure to file transcript in time—An order extending time to file bill of exceptions does not operate to extend the time for filing transcript in this court. If it becomes necessary to have an extension of time for that purpose, it must be granted by this court.

Wright & McElroy for appellant.

W. E. Garth for appellee.

Appeal from Warren Circuit Court.

Opinion of the court by Chief Justice Lewis.

As provided by section 734, Civil Code, "the mode of bringing the judgment of an inferior court to the Court of Appeals, for reversal or modification, shall be by appeal, which shall be granted as matter of right to a party or privy against a party or parties by the court rendering the judgment, on motion made during the term at which it is rendered or thereafter by the clerk of the Court of Appeals, on application of either party or his privy upon filing in the office of said clerk a copy of the judgment from which he appeals."

But section 738 provides that where an appeal has been granted by the court rendering the judgment "the appellant shall file the transcript in the office of the clerk of the Court of Appeals at least twenty days before the first day of the second term of said court next after the granting of the appeal, unless the court extend the time, as, for cause shown, the court may do."

And section 740 provides that "if he fails to file the transcript

within the time allowed by section 738, or by the court pursuant thereto, his appeal shall be dismissed."

The appeal granted in this case by the court rendering the judgment was, December 18, 1896, on motion of appellees, dismissed because the transcript was not filed within the time prescribed by section 738. And now the present motion is to set aside that order of dismissal upon the ground that at the time, which was during the June term, 1896, the judgment was rendered, and an appeal to the Court of Appeals granted, leave was given to appellant until the fifth day of the next term of the inferior court in which to present and file its bill of exceptions therein.

Section 334 does authorize the court rendering a judgment to give to the party objecting time to procure a bill of exceptions, not beyond a day in the succeeding term to be fixed by the court, but the time within which the appellant is required by section 738 to file the transcript can not be computed from the date of filing the bill of exceptions; but, as therein expressly provided, from the date of the order granting the appeal which, as prescribed by section 734, must be made, if at all, during the term at which the judgment is rendered. This court, therefore, had, according to the explicit requirement of section 740, no discretion but to sustain the motion to dismiss the appeal made December 18, 1896.

Whatever surviving hardship there may be in enforcing these rules of practice can be avoided by the appellant applying to the Court of Appeals for an extension of the time of filing the transcript, which, for cause shown, may, as provided by section 738, be done.

The motion to set aside the order of January 18, 1896, is overruled.

POWERS, LITTLE & MCCORMICK V. SMITH.

(Filed February 6, 1897—Not to be reported.)

Injunction—Evidence of payment—The evidence in this case is sufficient to sustain a judgment perpetuating an injunction restraining the levy of an execution issued upon a replevin bond upon the ground that the bond had been paid.

Howard & Clay for appellants.

Holt & Holt for appellee.

Appeal from Harlan Circuit Court.

Opinion of the court by Judge DuRelle.

The appellee, Smith, brought suit to enjoin the levy of an execution issued on a replevin bond executed in favor of appellants for $338, alleging that he had paid and satisfied the bond by payment made to J. C. McKnight, attorney for appellants, at the law office of W. F. Hall at Harlan Courthouse, and had taken a receipt in full of said amount, but that the receipt had been lost and could not be produced. The petition alleged that the settlement had been made in the presence of McKnight, A. L. Coldiron, the then sheriff, and W. F. Hall, who was appellee's attorney.

Plaintiff's testimony was to the effect that he paid the amount to Coldiron, as sheriff, and that Coldiron immediately, and in his presence, paid it to McKnight as attorney for appellants.

It is urged, on behalf of appellants, that this was a fatal variance between the allegation and the proof. This does not, however, appear to us to be material, as the evidence showed the money to have been paid to McKnight for appellee by the sheriff. It has been held that there is no material variance between the averment of a contract as made between A and B, and proof of such a contract made by an agent for and on behalf of A with B (Newman's Pleading and Practice, page 734). Moreover, the appellants in their answer denied that appellee had ever paid to them, *or to any person for them*, any amount on the debt aforesaid, except $36.

The lower court perpetuated the injunction, and the sole question remaining is whether the evidence sustains the judgment. The evidence is most unsatisfactory on both sides. The deposition of McKnight, who had removed to Oklahoma, was taken, but it was lost, and supplied on a reference to the master. In that supplied deposition he denies the receipt of any sum upon this debt except $36. He states that he received a considerable sum from Hall in payment of various claims which he held as attorney for appellants and other parties, amounting to some $900. He does not, however, undertake to give any exact data as to the amounts of the various debts, or what amount was paid upon any one of them.

On the other hand, the appellee, while stating that Hall paid debts amounting to somewhat over $900 on his behalf, gives no exact statement in regard to any of them; nor does Hall profess to be able to state the debts he settled for Smith, or that this debt of $338 was one of those which he settled. He states in general terms that he paid between $1,000 and $1,600 on behalf of appellee out of purchase money due by him to appellee for property purchased.

In view of all the testimony, we are unable to say that the chancellor, who may be supposed to have personal knowledge of the witnesses, erred in his conclusion of fact.

The judgment is affirmed.

The Kentucky Law Reporter.

EDITOR:
WALTER G. CHAPMAN, ... Frankfort, Ky.

VOL. 18. JUNE 1, 1897. No. 23

KENTUCKY COURT OF APPEALS.

MERCER v. PARK CITY MINERAL WATER CO.

(Filed January 15, 1897—Not to be reported.)

1. *Corporations—Individual liability of stockholders*—Where a corporation which purchased land upon which there was a vendor's lien undertook with its vendor as a part of the consideration to discharge that lien, the corporation becoming insolvent and the land failing to sell for enough to satisfy the lien, the stockholders are not personally liable to the holder of the lien, the chancellor's finding that they owe nothing upon their stock being sustained by the evidence, from which it appears that by agreement of the parties at the time of the organization of the corporation no stock was to be issued except paid-up stock, and that the land was received by the corporation in full payment of its entire capital stock, which was an adequate consideration, to which agreement the immediate vendor of the corporation was a party.

2. *Substitution*—The original vendor has no rights against the corporation or its stockholders except by way of substitution to the rights of his vendee, who sold and conveyed to the corporation.

Geo. H. Galloway for appellant.

Edward W. Hines, Mitchell & DuBose and Wright & McElroy for appellee.

Appeal from Warren Circuit Court.

Opinion of the court by Judge White.

This is an appeal from a judgment of the Warren Circuit Court dismissing appellant's action.

On the 10th day of October, 1891, the appellant, D. E. Mercer, sold and conveyed to L. C. Johnson a small tract of land, on which was located a well of mineral water, which was said to be of great value for medicinal purposes. The price paid and to be paid was $5,000, one-third of which was at the time paid in money, and the remainder to be paid in two equal payments in one and two years thereafter, and appellant, upon the payment and execution of the notes,

conveyed said land to Johnson, reserving a lien to secure the deferred payments.

The money to pay the cash payment on said land was furnished by appellees, J. W. Starks and I. B. Wilford, on the same day. The corporation known as Park City Mineral Water Co. was formed and articles of incorporation drawn up, signed and duly acknowledged, and said corporation fully organized by the election of J. W. Starks, president; I. B. Wilford, vice-president; L. C. Johnson, secretary, and T. S. McGinis, treasurer. These officers and F. G. Wooten composed all the stockholders of said company. The capital stock was $10,000, divided into shares of $100 each, upon the organization of said corporation. L. C. Johnson conveyed to said corporation the land bought of appellant in consideration of its entire capital stock, and said corporation assuming to pay the balance of the purchase money when due to Mercer, which was a lien on the land so conveyed. Thereupon the stock was issued and distributed, giving to J. W. Starks thirty-three shares, I. B. Wilford thirty-three shares and to Wooten, McGinis and Johnson eleven shares each, and the remaining share was given to Mitchell & DuBose for services rendered in the preparation of articles of incorporation. Appellee Stephens bought stock in the corporation after its organization. The notes of Johnson having fallen due and not being paid, Mercer, the appellant, sued Johnson and the Park City Water Co. and obtained judgment and the enforcement of his lien on the land. The land being sold brought the sum of $3,002. This amount was credited on the judgment, leaving something over $800 due and unpaid. An execution was issued on said judgment for the balance due Mercer against Johnson and Park City Water Co. and was returned by the sheriff of Warren county no property found, whereupon appellant brought this action in equity and made the original stockholders of said corporation parties defendant, charging that they still owed on their stock and had not paid to said corporation more than twenty-five per cent. of the par value of their stock, and averring that large sums were due from each of said stockholders to said corporation, and ask that the defendants be required to pay on their stock a sufficient amount to pay the balance of appellant's judgment and cost. The stockholders filed answer and deny that they owe to said corporation any amount on the capital stock of said corporation; that the stock issued to them was fully paid-up stock at par value, and that when said corporation was organized it contracted with Johnson to buy from him the land he (Johnson) had purchased from Mercer, the appellant, and agreed to give said Johnson $10,000 and pay the remainder of the purchase money to Mercer, averring that at the time of said trade said land was worth $10,000 or more; that the medicinal qualities of the water of said well was of great value.

Defendant also averred that at the time of the organization of said corporation it was agreed that Johnson should convey the land to said corporation for its entire capital stock, to be issued as paid-up stock; to be shared in by the stockholders in the proportion as set out—that is, Starks was to have thirty-three shares, I. B. Wilford thirty-three shares and the other appellees eleven shares each—all of which was to be issued as paid-up stock. The proof shows that the land and well, at the time of the conveyance to the company, was worth at least $10,000, and some of the witnesses estimate the value of it at from $30,000 to $100,000, considering the profits on the sale of water, which seems to have been enormous. No fraud is charged or intimated in the pleadings or proof in the case. There-

fore, the main question of inquiry is whether appellees still owe anything on the shares of stock issued to them or transferred to them by Johnson at the time of the organization of said corporation.

The judge of the circuit court who tried the case determined the issue in favor of the appellees, it being a question of what weight should be given to the finding of the circuit judge. The testimony, however, shows that by agreement of the parties at the time of the organization of said corporation no stock was to be issued except paid-up stock, and that the land was received by said corporation in full payment of its entire capital stock, and which was agreed to by Johnson and the purchaser of the stock. Therefore, Johnson could not claim anything from the stockholders on account of non-paid-up stock, and Mercer's right as against the corporation and its stockholders arises solely out of his right of substitution to the rights of Johnson. All that Mercer had was a lien on the land, as he made no contract with the corporation and created his debt before the corporation had an existence.

We concur in the judgment of the circuit court and, therefore, affirm the judgment.

McKEE'S ADM'R V. WARD & DICKSON.

(Filed January 20, 1897—Not to be reported.)

1. *Attorney's fee for defending one adjudged a lunatic*—While, in a proceeding to have one adjudged of unsound mind, such one is entitled to have the services of an attorney, and his estate is liable for a reasonable compensation for such services as were necessarily rendered in the conduct of the defense, the court can not presume that because the services were rendered at the instance of the defendant they were necessary, the defendant having no power to bind himself or his estate.

2. *Same*—Therefore, in this case, in the absence of an allegation that the services rendered were necessary, the appellees are not entitled to recover against the estate of the person of unsound mind a fee for defending him, they having been employed at his instance by counsel who were already representing him.

G. C. Lockhart and Hanson Kennedy for appellant.

J. Q. Ward for appellees.

Appeal from Bourbon Circuit Court.

Opinion of the court by Judge Paynter.

The appellees, Ward & Dickson, were partners in the practice of law, and bring this action on an account for services rendered Dinwiddie McKee in a proceeding in the name of the Commonwealth for the appointment of a trustee and committee for him.

They file as part of their petition a writing as follows, to wit:

"MILLERSBURG, KY., February 18, 1892.

"*Purnell & Brent:*

"DEAR SIRS:—You had better see Ward & Dickson and get them to help in the next suit. D. McKEE."

It is alleged that they were employed by Purnell & Brent, acting at the instance and on behalf of McKee; that they rendered services in that proceeding of the fair and reasonable value of $200, and which McKee had agreed to pay them.

It is alleged in the answer that at the time the services were rendered McKee was *non compos mentis*, and had not sufficient mind to understand or to make or enter into the alleged contract or any contract, or to authorize the employment of plaintiffs to assist in the proceeding.

A demurrer was sustained to the answer.

There was no denial in the answer that McKee executed the writing purporting to authorize Purnell & Brent to employ Ward & Dickson, or that the services were rendered, or that the amount charged was reasonable.

If McKee's condition was as described in the answer, he was incapable of making a contract for any certain amount for the services of attorneys to defend the proceedings to have him declared of unsound mind, nor could he bind himself or estate for any sum for such purpose, unless they were needed or were necessary to properly conduct his resistance of the proceedings.

It would not do to say that where proceedings are instituted to have one adjudged *non compos mentis* that he can not be made liable for the services of attorney reasonably necessary to defend the proceeding. If that were the case wherever such proceedings were instituted, he would be deprived of means necessary to properly try the question involved. If he is adjudged of unsound mind or to be a lunatic, it means that the management of his estate is taken from him, and perhaps the control of his person will be given to another. It is just and lawful that he should have the privilege of every reasonably available means to resist such proceeding, and this he will not have if he cannot bind himself or estate for reasonable attorney fees to a necessary number of lawyers. Although he may be in such proceedings adjudged of unsound mind, and have been so at the time they were instituted, still it would not follow that reasonable compensation should not be paid attorneys reasonably necessary to conduct his defense.

If he were of unsound mind he could not bind himself or estate for the services of attorneys, regardless of number and necessity for their services. If he have attorneys representing him, and desires others to assist, then those whom he so desires to assist can not render services and compel his estate to pay them, unless such services were reasonably necessary in the conduct of the defense.

While the court knows that, in proceedings to have one adjudged of unsound mind, he is entitled to have the services of an attorney, for the reasonable compensation of which his estate is liable, still it can not presume that because they were rendered at the instance of the person of unsound mind they were necessary.

Nayler v. Nayler, 4 Dana, 346, was a proceeding in chancery to have one adjudged of unsound mind, and the court held that pending the proceedings it was proper to allow a "competence for his support, and also allow him the means to *defend* and traverse the inquisition."

To sustain this conclusion the court cited *In re* Holmes, 3 Cond. Eng. Reports, 626, where the question arose as to what should be done with the estate pending the commission of lunacy, and the Lord Chancellor said: "It is absolutely necessary that the friends of Mr. Holmes should have the pecuniary means of resisting the commission."

The proceedings in question were of a more summary character than those in chancery, still the same necessity existed for legal services.

The demurrer to the answer should have been overruled. Instead

of the court being required to presume the services which the plaintiffs rendered were necessary, they should have alleged that fact.

A case might arise where an unnecessary number of attorneys began their work at the same time and under like circumstances, when it would be proper to make an allowance of a proper amount to cover a reasonable expense of attorneys for defending an inquisition, and apportion it among the attorneys rendering the services.

The judgment is reversed, with directions to overrule the demurrer to the answer, and for further proceedings consistent with this opinion.

BANNON V. MURPHY.

(Filed January 29, 1897—Not to be reported.)

1. Obstruction of alley—Measure of damages—The owner of land abutting upon a street or alley, one end of which is obstructed so that he can not have egress from his property to other streets "in that direction" has suffered an injury peculiar to himself by reason of the public nuisance, and is entitled to nominal damages upon that fact alone being made evident to the jury.

2. Same—The measure of damages for such an obstruction is the value of the use during the time the obstruction was continued; and while as to that part of plaintiff's property which was rented, it may be that the measure of recovery was limited to the diminution in rental value caused by the obstruction, the defendant can not complain that the jury was not specifically so instructed, no such instruction being asked, and the instruction given not authorizing the jury to go beyond compensation for loss in rental value by reason of the nuisance.

3. Same—As to property which the plaintiff permitted her son and his family to occupy free of rent, the measure of recovery was not limited to the diminution in rental value, plaintiff being entitled to recover for any diminution in the value of the use of the property as a home for her son.

Lane & Burnett for appellant.

Phelps & Thum for appellee.

Appeal from Jefferson Circuit Court, Common Pleas division.

Opinion of the court by Judge DuRelle.

This litigation grows out of an alleged obstruction to the use of the alley system in the city square in Louisville, bounded on the north by Maple street, on the east by Thirteenth, on the south by Lexington, and on the west by Fourteenth street. A 20-foot alley, 160 feet south of Maple street, connects Thirteenth and Fourteenth; a 40-foot alley, called Cotton street, 160 feet north of Lexington, also connects those two streets, and a third alley, 20 feet wide, runs north and south midway between Thirteenth and Fourteenth streets, connecting the two alleys first mentioned.

The appellant owns a lot fronting 95 feet on Thirteenth street, and extending west 200 feet to the connecting alley, and another lot fronting 180 feet on Fourteenth street, and extending east to the same alley, both lots being bounded on the south by the 40-foot alley called Cotton street.

Appellee owned a lot fronting 42½ feet on the west side of Thirteenth street, north of and adjoining appellant's first-named lot. Appellant had erected a building across the southern end of the 20-foot alley dividing his two lots, at its intersection with Cotton street,

and appellee brought this suit for damages alleged to have been caused her by denying ingress and egress to and from the rear of her premises through the 20-foot alley to Cotton street, and by reason of the impediment of the surface drainage from her lot through that alley, caused by the obstruction of the southern end.

The petition specifically negatives the idea that the suit is brought for any permanent injury to the land, and limits the recovery sought to damages to the use of said property during a period of about five years prior to the bringing of the suit.

The evidence having been heard and the jury instructed, a verdict for $300 was rendered in favor of appellee. The only questions presented for decision upon this appeal are: Whether the court properly instructed the jury; and if so, whether the verdict was excessive.

There were two cottages on appellee's lot, in one of which she permitted her son and his family to reside, rent free, and the other of which was in his charge as her agent to collect the rents, she allowing him the rents to aid in the support of his family.

No question is made by appellant that his obstruction of the alley was without right, and that question has been decided by this court (Bannon v. Rohmeiser, 90 Ky., 48). But it is contended that, inasmuch as appellee has an outlet from the rear of her property northward by way of the connecting alley and the 20-foot alley running between Thirteenth and Fourteenth streets; and, further, as the appellee did not live on the property, and suffered no personal inconvenience from the obstruction to the alley, the court should have instructed the jury that the measure of damages, if any had been suffered, was the diminution of the rental value during the period of the obstruction. It is further objected that the petition sets forth no specific damage which resulted to appellee, but in the case of Gargan v. L., N. A. & C. Ry. Co. (11 KY. LAW REP., 492), it was held that the stopping up of one end of a street or alley gave to the owner of property bordering thereon a right of action for damages, greater or less, according to the circumstances of the case.

We are of opinion that the owner of land abutting upon a street or alley, one end of which is obstructed so that he can not have egress from his property to other streets *in that direction*, has suffered an injury peculiar to himself by reason of the public nuisance, and is entitled to nominal damages upon that fact alone being made evident to the jury.

This very point was decided in the case of Bracken v. Min. & St. P. Ry. Co. (39 Min., 41), cited by appellant, where the court said: "The owner of lots abutting upon a public street has such special interest in the street different from that of the general public as to entitle him to maintain a private suit for damages against the party who wrongfully obstructs the street in front of or near his property, but not upon his soil, so as to practically cut off all public access to it."

So, in the case of Grogan v. L., N. A. & C. Ry. Co. (11 KY. LAW REP., 490), Judge Pryor delivering the opinion of this court, said: "While many of the witnesses say that the appellants ought not to complain, because they are not injured, the fact exists that the ingress and egress to and from their homes to Fourteenth street is closed if that ordinance of the city is enforced; and, as a result, when they wish to travel east on foot or in a vehicle, they must first go west, leaving Fourteenth street behind, and travel to Fifteenth street. That this works an inconvenience and injury to the lot owners who had, in the first place, but the two modes of ingress and egress, is too plain a proposition to be controverted, and, besides the

fact of the injury is established upon testimony not in effect disputed as to the great inconvenience that must necessarily result to the owners of lots bordering on this street and lying between Fourteenth and Fifteenth streets." (Gleason v. Schneider, 7 KY. LAW REP., 834.)

So in Wood on Nuisances, section 866: "In an action for a nuisance, the recovery is limited to the *actual* damage sustained. But, even though no actual damage is shown, if a nuisance is established, the law imports damage for an injury to the right, and at least nominal damages may be recovered to protect the right."

Upon appellant's motion the court gave to the jury instructions marked Nos. 1 and 2, as follows:

"1. The jury are directed not to take into consideration the injury or damage, if any, the plaintiff has sustained in consequence of the smoke from or heat of or proximity of the kilns to her premises.

"2. The jury can not take into consideration or allow the plaintiff any amount for depreciation in the value of her lots of land and improvements in consequence of the obstructions complained of by her."

And on the court's own motion two other instructions, numbered 1 and 2, were given, as follows:

"1. The court instructs the jury that the alley, twenty feet wide, in the rear of plaintiff's lot and Cotton street, or the alley, forty feet wide, mentioned in the pleadings and the evidence, are both public highways in the city of Louisville, and the defendant has no right to obstruct either of them in such a manner as to interfere with the plaintiff's reasonable use thereof as a means of ingress and egress through them to said lot; and if the jury shall believe from the evidence that the use of said highways has been so obstructed by the defendant, and that plaintiff has sustained injury thereby, then the law is for the plaintiff, and the jury should award her such a sum as they may believe from the evidence will fairly and reasonably compensate her for being deprived of the reasonable use of said highways during five years next before the institution of this action, not exceeding the sum claimed in the petition.

"2. During the five years next before the bringing of this action the plaintiff had the right to use the said highways, and it is no defense to plaintiff's right to recover whatever damages she may have sustained during that time, if any, by reason of the obstruction of the use thereof by the defendant that the said alleys could not be used (if that be the fact) prior to the erection of said obstruction."

Appellant did not ask an instruction limiting the measure of recovery to the diminution in rental value caused by the obstruction; but much stress is laid by counsel upon the fact that appellee herself did not occupy any part of the premises as a home, and that, therefore, the limit of recovery was the diminution in rental value caused by the nuisance. It might have been proper for the court to have included in its instructions a statement that the measure of damages as to the rented cottage was the diminution of rental value. Not so, however, we think, as to the cottage occupied by her son and his family. While from month to month she gave her son the use of the premises occupied by him free of rent, she was entitled to have the use of the property go to him without diminution in its value by reason of the wrongful acts of appellant. We think, however, that the instruction did not authorize the jury to go beyond compensation for loss in rental value by reason of the nuisance; and, in the absence of any motion by appellant to instruct the jury specifically upon that point, the verdict will not be disturbed, especially

as it is evident, taking all the testimony together, that the jury based their verdict upon the diminution in rental value.

As said in Bannon v. Rohmeiser, (17 KY. LAW REP., 1378), "the measure of damages in this case is the diminution of the value of the use during the time the nuisance was continued (see Woodin v. Wentworth, 57 Mich., 278), and the instruction given by the lower court properly presented that question to the jury." (Randolph v. Bloomfield, 77 Iowa, 50; Baltimore & Potomac R. R. v. Fifth Baptist Church, 108 U. S., 318.)

In the case last mentioned Mr. Justice Field, delivering the opinion of the court, said: "Plaintiff was entitled to recover because of the inconvenience and discomfort caused to the congregation assembled, thus necessarily tending to destroy the use of the building for the purpose for which it was erected and dedicated. The property might not be depreciated in its salable or market value, if the building had been entirely closed for those purposes by the noise, smoke and odors of the defendant's shops. It might, then, perhaps, have brought in the market as great a price to be used for some other purpose. But, as the court below very properly said to the jury, the congregation had the same right to the comfortable enjoyment of its house for church purposes that a private gentleman has to the comfortable enjoyment of his own house, and it is the discomfort and annoyance in its use for those purposes which is the primary consideration in allowing damages. As with a blow on the face, there may be no arithmetical rule for the estimate of damages. There is, however, an injury, the extent of which the jury may measure."

And in Wood on Nuisances, section 866, it is said: "In cases where the injury is of a visible, tangible character, the damage may at times be susceptible of exact measurement; but, in a majority of instances, the subject of damages will rest largely in the discretion of the jury. In the case of an action for an injury to the comfortable enjoyment of property by a person in possession no precise rule for ascertaining the damage can be given, as in the very nature of things the subject-matter affected is not susceptible of exact measurement; therefore, the jury are left to say what, in their judgment, the plaintiff ought to have in money, and what the defendant ought to pay, in view of the discomfort or annoyance to which the plaintiff and his family have been subjected by the nuisance; and whether the verdict is large or small, if, in view of the evidence, it has any reasonable foundation, it will not be disturbed because it is too small on the one hand, or too large on the other. But, in the case of an action by the reversioner for an injury to the estate, the damages are usually the subject of easy computation. Thus, if the injury complained of is the loss of a tenant, the actual rental value of the premises during the period that the premises have remained unoccupied is the limit of recovery."

In this case the appellee's use of one of the cottages as a home for her son, and diminution in the value of that use was an injury for which she was entitled to recover.

The second instruction given *suo motu* by the court is objected to by appellant; but it appears to us to be merely an instruction in strict accordance with the doctrines laid down in this opinion that, as matter of law, plaintiff was entitled to recover something for an obstruction to one end of an alley upon which her property abutted.

For the reasons given the judgment is affirmed.

BANNON V. KING.

(Filed January 29, 1897—Not to be reported.)

The judgment in this case is affirmed for the reasons given in Bannon v. Murphy, *supra*.

Lane & Burnett for appellant.

Phelps & Thum for appellee.

Appeal from Jefferson Circuit Court, Common Pleas division.

Opinion of the court by Judge DuRelle.

The pleadings and evidence in this case are practically the same as in the case of Bannon v. Murphy, this day decided, except that appellee's lot was the third lot on Thirteenth street, north of the 95-foot lot of appellant, and that appellee occupied the house on his lot as a home. The trial court refused to give the instructions offered by both plaintiff and defendant, but on its own motion gave instructions Nos. 1 and 2 as follows:

"1st. It is admitted of record by the defendant that Cotton street, or the 40-foot alley and the 20-foot alley mentioned in the pleadings and testimony, were public highways at the time of building defendant's brick building across the 20-foot alley. The court instructs the jury that the plaintiff, during the five years next before the filing of his petition in this action as the owner of the property of plaintiff mentioned in the testimony, had the right to the free and uninterrupted use of said 20-foot alley and Cotton street, and that defendant had no right to obstruct either said Cotton street in the manner stated by the defendant in his testimony, or to build the building across the 20-foot alley in the manner shown by the defendant in his testimony, and the court instructs the jury that the law is for the plaintiff, and the jury should find for the plaintiff such sum as the jury believes from the evidence will fairly and reasonably compensate the plaintiff for the injury sustained by the plaintiff by such obstructions during the five years next before the filing of the petition in this action.

"2d. During the five years next before the beginning of this action the plaintiff had the right to use the said highways, and it is no defense to plaintiff's right to recover whatever damages he may have sustained during that time, if any, by reason of the obstruction of the same thereof by the defendant that the said alleys could not be used, if that be the fact, prior to the erection of said obstructions."

The jury returned a verdict for $200.

These instructions are in full accord with the principles laid down in the Murphy case, as well as with the case of Bannon v. Rohmeiser, 17 KY. LAW REP., 1379–80.

The judgment is, therefore, affirmed.

FORTH V. LIGHTFOOT.

(Filed February 3, 1897—Not to be reported.)

Homestead—When the purchaser of land at execution sale, with a sheriff's deed, set apart to the execution defendant or his wife a part of the land without making a deed therefor, in an action by a creditor of the execution de-

fendant, brought almost twenty years after his death, and after the death of his widow, seeking to subject this land in the hands of their adult children upon the ground that it had been allotted as a homestead, the evidence failed to establish the claim that it was set apart for that purpose, or that the right to the exemption, if it existed, was ever asserted, the defense being that it was set apart to the wife for a consideration moving from her.

Mitchell & DuBoise and Walter G. Chapman for appellant.

John M. Galloway for appellee.

Appeal from Warren Circuit Court.

Opinion of the court by Judge Hazelrigg.

The appellee was the owner of a judgment rendered in the Allen Circuit Court in 1879 in favor of A. L. Richey against W. C. Forth, and brought this action against the appellant and others—children of W. C. Forth and all adults—to subject to the payment of his debt a tract of 40 acres of land alleged to have been set apart to their father, W. C., as a homestead, and which after his death had been occupied by his widow and children until her death in 1893. By the testimony of Potter and Hendrick the plaintiff proves that in March, 1877, these witnesses did lay off this land to Forth as a homestead, but whether they acted under an order of court or merely at the instance of the parties interested they did not remember, but thought they were selected by the parties and under an order. No report of such action, however, could be produced or any return of the sheriff or other officer showing the laying off of such homestead.

The defense is that this tract was never set apart to W. C. Forth as a homestead exemption, but that in 1874 it was sold under execution in favor of one Warden, in a tract of some 200 acres, and bought by one H. R. Hagerman; that the 200 acres sold for less than two-thirds of its appraised value, and upon the expiration of the time for redemption notice was given for writ of possession, and upon trial in the Warren Court of Common Pleas the writ issued and the sheriff put Hagerman in possession in accordance with the directions of the writ and under the sheriff's deed made in pursuance of the sale some two years theretofore; that Hagerman thus obtained the legal title and the actual possession of the entire tract, and was, therefore, its rightful owner. But that he held a mortgage on other lands belonging to Forth which he had sold under foreclosure proceedings, and which mortgages the wife had not signed, and, therefore, in consideration of her release of potential right of dower in those lands the tract of 40 acres was subsequently laid off to her as a home.

No mortgage to Hagerman of other lands, or the wife's release of her interest in it, or any agreement to set apart the 40 acres, are shown in support of this defense, but the levy of the execution in Warden's favor on the 200 acres, including this home tract, was shown, as well as the sale of the land thereunder to Hagerman; also the notice and proceedings by which Hagerman obtained a judgment for the possession of the land, and the return of the sheriff showing he put the purchaser in the actual possession of it. The sheriff's deed was also produced and filed. Thus is established a perfect title in Hagerman, accompanied with actual possession, and that, too, by the very papers which ought to have shown any setting apart of the lands under the homestead exemption act.

To meet this the appellee says it was still not too late, even after the possession was awarded the creditor, for the debtor or his wife to demand the homestead exemption. And this is true, but before

we may thus impeach the title of Hagerman as shown by the record it ought to appear clearly that the debtor not only was entitled to the exemption as against the Hagerman debt, but that in some appropriate way he or his wife or children asserted such right and were in fact given the homestead.

So far as these facts appearing clearly the presumptions are strongly the other way. If the debtor was entitled to this exemption the sheriff must have violated his plain duty and the very demands of the statute in not laying it off to him. The court also, on the notice and proceedings for possession, must have been flagrantly derelict in its judgment ousting the homesteader of his plain statutory right. And, besides, where was the debtor when he was then being robbed? He seems to have surrendered without a protest, and it is admitted he left the lands when ousted, and in 1877 went to an adjoining county, where he lived probably until his death, or he may have moved back to this tract and died there, the proof not being clear on this. In spite of this failure of the debtor to set up any claim to a homestead, we are asked to set it for him nearly twenty years after his death. It is readily seen that the transaction detailed by Potter and Hendrick is as consistent with the defendant's theory as with the plaintiff's. Hagerman was a party to that transaction, and these men were perhaps called on by him and by Forth and wife to lay off 40 acres, including the house, as a home for the wife. They do not remember to have been sworn as commissioners, and while they might not recollect this they would hardly have forgotten it if they had made a report of their action to the court, especially Hendrick, who was a surveyer, and must have made the report had one been made.

We are constrained to hold that under the proceedings in the Warren Court of Common Pleas Hagerman became the owner and was put in the actual possession of the entire tract, including the 40 acres in contest, and that the debtor, Forth, either because he was not entitled to the exemption as against this debt or for some reason not appearing in the record, was not given the tract as a homestead. This would seem to end the plaintiff's case, as his subjection of the land to his debt depends on the alleged fact that it was set apart as a homestead and occupied as such by the widow of his debtor. Certainly if it is Hagerman's land he can not take it any more than if it be the heirs of the mother who claim it as such by adverse holding for the statutory period against Hagerman and all others.

Judgment reversed, with directions to dismiss the petition and for proceedings consistent herewith.

WESTERN UNION TELEGRAPH CO. V. EUBANK & RUSSELL.

(Filed February 4, 1897.)

1. *Liability of telegraph company for mistake and delay in transmission of messages*--A provision in a contract with a telegraph company for the transmission of a message that the company shall not be liable for mistakes, unless the message is repeated, does not relieve the company from liability for mistakes caused by its negligence.

2. *Same*—A provision in such a contract that the company is not liable for damages in any case where the claim is not presented in writing within sixty days is against public policy, and also violative of section 196 of the Constitution, which provides that no common carrier shall be permitted to contract for relief from its common-law liability.

3. Interstate commerce—Section 196 of the Constitution is not a regulation of interstate commerce.

4. Same—The liability of a telegraph company for negligence in the transmission or delivery of a message from a point in another State to a point in this State is governed by the law of this State, which is the place of performance.

Richards, Baskin & Ronald, A. S. Walker, Geo. C. Harris and Geo. H. Fearons for appellant.

Goodnight & Roark and Sims & Covington for appellees.

Appeal from Simpson Circuit Court.

Opinion of the court by Judge Guffy.

It is substantially alleged in the petition in this action that appellees were partners in the live stock business, and that appellant was a common carrier of messages and telegrams; that on the 21st of December, 1893, plaintiff's agent, H. P. Russell, at Atlanta, Ga., delivered to defendant, to be transmitted to plaintiff at Franklin, Ky., the following telegram or message, viz:

"ATLANTA, GA., December 21, 1893.

"*J. W. Russell, Franklin, Ky.*:

"Ship to-day eighty-five dollar load; will make money; feeling good. H. P. RUSSELL."

For which message defendant received pay, and undertook and agreed to transmit same to plaintiff at Franklin, Ky.; that the same was received by defendant at Atlanta in ample time to be transmitted to plaintiff; in ample time for them to have shipped the carload of mules on that day to Atlanta, but said message or telegram was not delivered to plaintiff until too late to ship said mules; that it was not delivered to plaintiff until after dark, about 7 o'clock, when it could have been delivered early in the morning on said day, and it could easily have been delivered in time for plaintiff to have shipped said carload of mules on that day; but defendant, through the negligence and incompetency of its agents, employes and operators then in its employment and in charge of and operating its line and business, failed to deliver said message until about 7 o'clock and after dark of said day; that said failure to deliver the message in time was caused alone by the negligence and incompetency of defendant's agents and employes; that if they had received said telegram at the time it should have been delivered they could and would have shipped said carload of mules, twenty-five in number, to Atlanta, Ga., and said mules would have arrived in Atlanta, Ga., at a time when the market was high and good; that they could and would have sold said carload of mules if same had been shipped on day telegraphed for for $250 more than they could and did sell them for when shipped later; that if said mules had been shipped on December 21st, they would have arrived in Atlanta on December 23, 1893, when the market was good, and when they could and would have sold said mules for a good price; but, by the negligence of defendant's agents and employes, they were thus prevented from shipping, and said mules did not get to Atlanta till the following Tuesday, when the market had declined; that they have been damaged by defendant's negligence in the sum of $250, for which sum judgment was prayed.

The first paragraph of the answer may be taken as a denial of all

the averments contained in the petition, including a denial of the charge that appellant was a common carrier, but does not deny that it is a corporation engaged in transmitting messages, and that it can sue and be sued.

It is averred in the second paragraph that appellant received of H. P. Russell individually, not as agent for plaintiff, at 1 o'clock and 15 minutes, December 21, 1893, the message heretofore copied, except the word "the," before eighty, and files the original message marked "A." It is further averred that in receiving and transmitting messages, with the best of operators and under the most favorable circumstances, there is always some liability and probability of mistake, and especially as in this case when the message had to be transmitted several hundred miles and through relay offices; that mistakes and delays are inseparable from the nature of the business; that H. P. Russell, when he delivered the said message to defendant to be sent as aforesaid, requested defendant to send said message subject to the terms on the back thereof, which he then agreed to, and he was directed on the face of said message to "read the notice and agreement on the back," which notice and agreement, solemnly signed and made by him, is in the following words, viz:

"All messages taken by this company are subject to the following terms:

"To guard against mistakes or delays, the sender of a message should order it repeated—that is, telegraphed back to the originating officer for comparison. For this, one-half the regular rate is charged in addition. It is agreed between the sender of the following message and this company that said company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery of any unrepeated message, beyond the amount received for sending the same; nor for any mistake or delay in the transmission or delivery, or for non-delivery of any repeated message, beyond fifty times the sum received for sending the same, unless specially insured, nor in any case for delays arising from unavoidable interruptions in the working of its lines, or for errors in cipher or obscure messages; and this company is hereby made the agent of the sender without liability to forward any message over the lines of any other company when necessary to reach its destination. Correctness in the transmission of a message to any point on the lines of this company can be insured by contract in writing, stating agreed amount of risk, and payment of premium thereon, at the following rate, in addition to the usual charge for repeated messages, viz: one per cent. for any distance not exceeding 1,000 miles, and two per cent. for any greater distance. No employe of the company is authorized to vary the foregoing."

"No responsibility regarding messages attaches to this company until the same are presented and accepted at one of its transmitting offices; and if a message is sent to such office by one of the company's messengers, he acts for that purpose as the agent of the sender.

"Messages will be delivered free within the established free delivery limits of the territorial office. For delivery at a greater distance a special charge will be made to cover the cost of such delivery.

"The company will not be liable for damages or statutory penalties in any case where the claim is not presented in writing within sixty days after the message is filed with the company for transmission."

It is alleged that all the foregoing was legible and plain, and, so

far as it could apply to the sending of the message, was agreed to by H. P. Russell, and that he did not request that the message be repeated, but assumed the risk of mistake and delay, and paid only 58 cents for the transmission, which was the usual charge for such messages not repeated.

It is further alleged that no claim in writing has ever been presented to defendant for damages, unless this suit be so considered. This suit was filed more than sixty days after the filing of the message; that the message, by some mistake, was received at the Franklin office as to J. A. Russell at 2:05 P. M., and was immediately sent out by the messenger boy to be delivered to J. A. Russell, but he could not be found, and about 6 P. M., on the suggestion of some one acquainted with the people of Franklin, the message was delivered to J. W. Russell. It is also alleged that when J. W. Russell received the message he received notice of the contract, as before set out, and all the foregoing facts are pleaded in bar of plaintiff's claims; but appellant admits that plaintiff, or at least J. W. Russell, is entitled to fifty-eight cents; that getting the word J. A., instead of J. W. Russell, caused the delay in the delivery of the message.

In appellant's amended answer it alleged that if the message had been promptly delivered appellees could not have shipped the mules on that day; that they had no mules in or near Franklin on that day, but did get the message in time to have shipped the mules on the next day.

Appellees' reply may be considered a denial of all the averments in the answer and amended answer, and it is also alleged that appellant had at Franklin an incompetent agent on that day; that he was merely a "cub," and unacquainted with the exact business of appellant. Appellees also denied that H. P. Russell ever agreed to the stipulation on the back of the message, and also alleged that the same was null and void and against public policy. The reply was traversed by appellant.

Appellees were permitted to amend their reply, and in the reply a waiver of the sixty days' notice was pleaded, and the said plea was traversed by appellant.

A trial resulted in a verdict and judgment in appellees' favor for $125. Appellant's motion for a new trial having been denied, it prosecutes this appeal.

The first and second grounds for new trial need not be noticed. The third ground is that the verdict is not sustained by sufficient evidence, and is contrary to law. There was proof introduced by appellees conducing to show that they had a load of mules at the time which they could and would have shipped to Atlanta the 21st of December, 1893, if the message had been delivered to J. W. Russell within a reasonable time after it reached Franklin, and that they sustained a loss by reason of not shipping the mules on that day to the amount of more than $125; hence the jury were authorized to find the amount named. This case is unlike the case of Smith against this appellant, 83 Ky., 104. The damage in this case at bar was not remote or speculative in a legal sense.

Instructions Nos. 1, 2, 3 and 4, given by the court, were as favorable to appellant as it was entitled to, and if this be true then the instructions asked by appellant were properly refused by the court. It is very ably argued by appellant's counsel that the printed terms on the back of the paper on which the message was sent was assented to by the sender and, therefore, became part of the contract and binding upon the sender and receiver, and it is especially insisted

that the stipulation as to repeating the message is a complete bar to a recovery of more than 58 cents, the amount paid for the sending ing of the message, and we are referred to various decisions of courts of last resort in support of that contention.

It is true that in Camp against this appellant, 1 Metcalfe, 164, the same or a similar stipulation as the one in question as to the repetition of messages, was held to be valid, but that case was decided in 1858 and before the adoption of the present Constitution, and it will also be seen that there was no allegation by plaintiff that the mistake was the result of negligence or want of competency or skill on the part of the employes of the company; hence that case is wholly unlike the case at bar.

The decision of the Supreme Court in Primrose v. Western Union Telegraph, 154 U. S., 1, is also relied on by appellant. It is true that that decision upheld the stipulation in question as well as the stipulation in regard to cipher messages and obscure messages, but it is also true that Chief Justice Fuller and Mr. Justice Harlan dissented and Mr. Justice White took no part in the decision. It will also be seen from the opinion that many courts of last resort had decided otherwise as to such stipulation. We quote as follows from the opinion in the cases *supra:* "There are cases indeed in which such regulations have been considered wholly void. It will be sufficient to refer to those specially relied on by the learned counsel for the plaintiff, many of which, however, upon examination, appear to have been influenced by considerations which have no application to the case at bar. Some of them were actions brought by the receiver of the message, who had no notice of the printed conditions until after he received it, and could not, therefore, have agreed to them in advance. Such were New York & Washington Tel. Co. v. Drury, 35 Penn. St., 298; 25 La., 383; 9 Phila., 88."

It would seem from the foregoing that if the suit had been by the receiver, as in the case at bar, the court would probably have held the stipulation in question invalid.

In Smith against appellant, 83 Ky., 112, decided before the adoption of the present Constitution, this court, in discussing the obligations of the telegraph company, said: "It is, however, a public agent; it exercises a *quasi* public employment; carefulness and fidelity are essentials to its character as a public servant, and public policy forbids that it should abdicate as to the public by contract with the individual; he is but one of millions; his business will perhaps not admit of delay or contest in the courts, and he is *ex necessitate* compelled to submit to any terms which the company might see fit to impose, but the law should not uphold a contract under which a public agent seeks to shelter itself from the consequences of its own wrong and neglect; its liability for neglect is not founded purely upon contract; it is chartered for public purposes; extraordinary powers are, therefore, conferred upon it; it has the power of eminent domain; if it did not serve the public it could not constitutionally lay a wire over a man's land without his consent; and by reason of the gift of these privileges it is required to receive and transmit messages, and is liable for neglect, independent of any express contract; the public are compelled to rely absolutely upon the care and diligence of the company in the transaction of this business, so wonderful in its growth, so necessary to the life of commerce and useful beyond estimate; and if it relies upon a notice or contract to restrict its liability it must be one not in violation of public policy; and, in view of the vast interests committed to a telegraph company, the extraordinary powers given it and the virtual monop-

oly it almost necessarily enjoys, the court should compel it *nolens volens* to perform the corresponding duties of diligence and good faith to the public thereby created. Any other rule would defeat the very purposes for which these companies are chartered, to wit—the safe and speedy transmission of messages for the public—and, while they may reasonably restrict their liability, yet they can not do so as against their own negligence. They undertake to exercise a public employment, which in many respects is analogous to that of a common carrier, and they must, therefore, bring to it that degree of skill and care which a prudent man would under the circumstances exercise in his own affairs, and any stipulation by which they undertake to relieve themselves from this duty or to restrict their liability for its non-use is forbidden by the demands of a sound public policy. To hold otherwise would arm them with a very dangerous power and leave the public comparatively remediless. (W. U. T. Co. v. Fontaine, 58 Ga., 433; Wolf v. Western, &c., 62 Pa., 83; Sweetland v. Illinois, &c., 27 Iowa, 432; Breese v. U. S., &c., 48 N. Y., 132; H. S. T. Co. v. Gildersleeve, 29 Md., 232; West. Union v. Buchanan, 35 Ind., 429; Hibbard v. Western Union, 33 Wis., 558; Telegraph Co. v. Griswold, 37 Ohio, 301; Tyler v. West. Union, &c., 60 Ill., 421; Ellis v. The American T. Co., 13 Allen, 234.)"

It is often of the utmost importance to the sender or receiver of messages that the same should be in cipher or obscure, because if sent in plain language the contents would often become known and the object in view defeated, hence public policy forbids that appellant should by any contract exempt itself from the damage resulting from its negligence in transmitting such messages. It is the province of the law-making power to prescribe the limit in which an action may be brought, hence the limitation of sixty days, if not an attempt to vary the statute of limitation, would, if enforced, have that effect, and in this case the requirement that the demand should be in writing or as before stated is clearly unreasonable and contrary to public policy, and is in violation of section 196 of the Constitution. A contract that notice or demand of a claim for damages should be given in a reasonable time, and if not given that fact to be taken as *prima facie* evidence of the invalidity of the claim, might be upheld.

The real question in this case is as to the negligence of the appellant, and if the injury was caused by the negligence of appellant no contract or agreement can bar a recovery.

Appellant contends that section 199 of the State Constitution could not make telegraph companies common carriers. It is not necessary to discuss the question of fact as to whether said section did in fact cause such companies to become common carriers, for it is evident that by the provisions of said section they are to be treated as such carriers and, therefore, come within and are bound by the provisions of section 196, which provides that no common carrier shall be permitted to contract for relief from its common law liability. Nor is that section of the Constitution in conflict with the interstate commerce clause of the Constitution. A fuller discussion of the section *supra* may be found in O. & M. Ry. Co. v. Tabor, 17 KY LAW REP., 1411. The general rule is that the law of the place where the contract is to be performed governs, subject of course to the rule that a contract which is void by the law of the place where made is void everywhere. (Story's Conflict of Laws, section 243; Lawson's Remedies and Proceedings, seventh edition, section 3878.)

The proof in this case as to negligence was sufficient to sustain the verdict, and no error of law to the prejudice of appellant's substantial rights having occurred on the trial, the judgment of the court below is affirmed.

RUSSELL, &C. V. RUSSELL'S ASS'EE, &C.

(Filed February 5, 1897—Not to be reported.)

1. *Presumptions on appeal*—In a suit for the settlement of an assigned estate, the deed of assignment being made a part of the record below and not copied into the transcript, it will be presumed that it was sufficient to sustain the action of the court in denying to the debtor the right to a homestead.

2. *The reservation by the assignor in a deed of assignment of a "homestead exemption"* reserves only such right as the law gave him, and does not create the right to a homestead where none existed under the statute.

E. E. McKay for appellants.

Geo. S. Fulton for appellees.

Appeal from Nelson Circuit Court.

Opinion of the court by Judge Paynter.

The appellant made a deed of assignment for the benefit of his creditors. The assignee instituted this action to settle the trust estate. The appellant filed an answer, in which he substantially alleged that he was entitled to a homestead out of the assigned estate, and that he was willing to have it sold and its value adjudged him out of the proceeds.

We deem it unnecessary to state the character of the various claims against the trust estate, or the facts with reference to the real estate assigned and its occupancy by the assignor, and the date the debts were contracted and the land purchased. It is sufficient to say that the appellant seems to have abandoned his claim to a homestead because he was entitled to it under the statute. This conclusion is reached from the amended answer which he offered to file and the argument of his counsel in his behalf. It is sufficient to say that such abandonment of his claim to a homestead under the statute was proper, as he was not entitled to it. His claim to a homestead exemption as asserted in the amended answer offered, and as contended by counsel, is based upon what is the alleged agreement between the assignor and assignee, and to its alleged ratification by the creditors.

The deed of assignment is not copied in the record, hence we can not know its exact provision as to the reservation of a homestead out of the estate. The language of the deed may have been such as would alone have justified the court in refusing to allow the amended answer to be filed. It was made part of the record below and not copied in the transcript, hence we should presume it sustained the action of the court.

It was alleged in the amended answer offered that the assignor reserved "a homestead exemption, such as a *bona fide* housekeeper with a family would take under the statute laws of Kentucky."

An assignor can assign for the benefit of creditors such part of his estate as he may choose, and reserve such other part as he may desire. It is only the part he assigns which the assignee can administer for the benefit of creditors.

Accepting the allegation of the amended answer as true, did the assignor reserve anything except such interest in the land as the land gave him? He reserved a "homestead exemption," which was simply such right of exemption as was afforded him by law. He was not entitled to such right as against his creditors, hence he retained no interest in the land assigned.

The judgment is affirmed.

HOWE & JOHNSON V. COMBS, &C.

(Filed February 5, 1897—Not to be reported.)

1. *Sales of personal property—Rescission*—Where goods were purchased by one who represented that they were for a mercantile firm, of which he claimed to be a member, and he, claiming and exercising ownership over the goods, sold them to another, it turning out that the person whom the buyer represented to be his partner was the sole proprietor, and that he was merely an employe, the sellers are entitled to a rescission unless the person to whom the goods were subsequently sold was a *bona fide* purchaser, the circumstances being sufficient to show a fraudulent combination to cheat the sellers out of their goods.

2. *If the goods are not restored*, or their proceeds, when sold under attachment, which should have been sustained, are not sufficient to discharge the purchase price, then personal judgment should be rendered against the proprietor of the store, whom the buyer represented to be his partner, he having admitted in his answer that he was sole owner of the goods, and claimed them as exempt.

John D. Atkinson for appellants.

C. B. Hancock for appellees.

Appeal from Powell Circuit Court.

Opinion of the court by Chief Justice Lewis.

The evidence shows that when the goods were sold by appellants, Howe & Johnson, the representation was made by Bradley, who made the purchase, and relied upon by them. They were purchased for appellants, R. B. Combs and L. Bradley, doing business as a firm. But it turned out that Combs alone was the proprietor, Bradley being merely his employe, and, claiming and exercising ownership, actually sold or pretended to sell them to one Elkins, who executed a note for the purchase price thereof to the wife of Combs.

Upon filing their petition appellants obtained an attachment, which was levied upon the goods in question, but upon final hearing the attachment was discharged and personal judgment rendered against Bradley alone, the action, without, as we think, reason, being dismissed as to Combs; for he admitted in his answer he was the sole owner of the goods, and claimed, as a housekeeper with a family, exemption from paying anything for them.

It seems to us the circumstances of this case show a fraudulent combination and purpose to cheat appellants out of their goods, and they would be entitled to rescission of the contract unless the rights of Elkin as *bona fide* purchaser, if he be one, have intervened to prevent it. He has, however, set up no claim to the goods, though in possession of them when attached.

Upon the return of the case appellants should be permitted to amend by making Elkin a party, and unless he shows a superior title to the goods they will be entitled to a rescission of the contract of sale, or to the proceeds of the goods attached, which attachment was improperly discharged. It was also error to dismiss the action as to Combs, against whom there ought to be a personal judgment, in case the goods are not restored, nor proceeds sufficient to discharge the purchase paid to appellants.

For the errors mentioned the judgment is reversed and case remanded for further proceedings consistent with this opinion.

HENDERSON V. WORTHINGTON'S ADM'R.

(Filed February 5, 1897—Not to be reported.)

Judicial sale of notes and accounts—Title of purchaser—Where a commissioner, pursuant to judgment of court rendered in a suit for the settlement of a decedent's estate, offered for sale all notes and accounts that had been reported by appraisers of the estate to be worthless claims, the purchaser acquired title to a note included in the list, which, without his knowledge or knowledge of the commissioner, had been withdrawn by the administrator before the date of the judgment and the date of sale, and is entitled to judgment for the amount thereof against the administrator, who has collected it from the payor.

Bugg & Wickliffe for appellant.

Nichols & Worden for appellee.

Appeal from Ballard Circuit Court.

Opinion of the court by Chief Justice Lewis.

It is admitted or proved in this case:

1st. That pending an action instituted by the administrators to settle and distribute the estate of G. A. Worthington, deceased, a judgment was rendered directing the master commissioner to sell in a lump to the highest bidder, for cash down, all notes and accounts that had been reported by the appraisers of the estate to be worthless claims.

2d. That said notes and accounts, in a bundle, together with a list thereof, which included the note in controversy on Frank Payton, were therein and subject to order of court.

3d. That the commissioner did offer for sale and sell publicly said notes and accounts, making announcement at the time he was selling the identical notes and accounts directed to be sold when they were knocked off to appellant as the highest bidder, and thereafter the report of sale was confirmed by the court.

4th. That the commissioner did not at the time of the sale read a list of notes and accounts offered for sale, or announce to the bidders that the note on Frank Payton or any other of the claims had been taken from the bundle and reserved from the sale; nor did he even know that there was then offered for sale less or other than the entire list directed by judgment to be sold.

5th. Appellant purchased at a chance bargain the entire lot as described in and directed by the judgment to be sold without knowledge or notice that the Frank Payton note was not included in the list sold.

6th. That note was, between the time the judgment was rendered and the day of the sale, taken by appellee from the bundle without authority of court and without notice to the commissioner or to the bidders at the sale that it had been done.

Under these circumstances good faith and the preservation of public confidence in the fairness of judicial sales requires that the court affirm the title of appellant, duly and legally acquired to the note in controversy, and, therefore, the lower court ought to have rendered judgment in his favor for the amount of that note, which it appears the administrator, subsequent to the sale, sued for and recovered from Payton, and the judgment appealed from is reversed and case remanded for proceedings consistent with this opinion.

FAULKNER, &C. v. DAVIS, &C.

(Filed February 6, 1897—Not to be reported.)

1. Assault and battery—Evidence—In an action to recover damages for an assault upon a married woman, evidence tending to show that as a result of the kicking and beating plaintiff had a miscarriage was not incompetent.

2. Same—The beating complained of being done by a married woman in the presence of her husband, who was sued jointly with her, the error, if any, in requiring the husband to state upon cross-examination whether his wife had as a witness on the previous criminal trial of herself for the assault and battery stated that she had tied him down and several times whipped him, and that he knew not to interfere, to which he answered in the affirmative, was not prejudicial, as it was otherwise satisfactorily proved that the beating was without reason or excuse.

Tye & Sharp for appellants.

R. D. Hill and K. D. Perkins for appellees.

Appeal from Whitley Circuit Court.

Opinion of the court by Chief Justice Lewis.

The evidence in this case shows that appellant, Lucinda Faulkner, in the presence of and without interference by appellant, Daniel W. Faulkner, her husband, unlawfully and outrageously kicked and with a barrel stave beat appellee, Julia Davis. The verdict of $400 in damages, considering the indignity and injury suffered, was not, therefore, so excessive as to induce the belief that it was found by the jury under the influence of passion and prejudice; nor was evidence tending to show that as a result of the kicking and beating Mrs. Davis, in addition to other injuries and suffering, had a miscarriage.

Daniel W. Faulkner, having introduced himself as a witness and testified, was on cross examination asked if his wife (Julia) had not as a witness on the previous criminal trial of herself for the assault and battery, stated she had tied him (Daniel) down and several times whipped him, and that he knew not to interfere, and it is objected the court permitted him to answer that question in the affirmative; but it is not necessary to decide whether that evidence was competent, for even if it was not so the substantial rights of either appellant were not prejudiced, because it was otherwise fully and satisfactorily proved that Mrs. Faulkner, who was a large woman, without reason or excuse so severely kicked and beat Mrs. Davis, a small and weakly woman, having at the time a baby in her arms and appealing to Daniel Faulkner in vain for protection, and that she was disabled for three months.

Judgment affirmed.

GALOT, BY GUARDIAN V. PEARCE, &C.

(Filed February 2, 1897—Not to be reported.)

1. Jurisdiction of justices of the peace—The provision of section 882 of Myers' Code (as amended) declaring that judgments rendered by a justice of the peace against defendants not residing in his district should be void was in contravention of the Constitution then in force, which provided that "the jurisdiction of justices of the peace shall be co-extensive with the county."

2. *Void execution*—A justice of the peace being both judge and clerk, an execution issued from his court within ten days after the rendition of judgment was not premature, as it must have been ordered by the court.

3. *Same*—Even if the execution was prematurely issued, it was not void.

4. *Validity of levy—Description of land*—The failure of the sheriff in his levy upon an execution to properly describe the land levied on does not affect the title of the purchaser at the execution sale.

5. *A levy upon the right, title and interest of an execution defendant* in land without specifying the interest is sufficient to pass to the purchaser such interest as the defendant had subject to execution.

6. *A levy signed by the deputy sheriff* for the sheriff, instead of in the name of the sheriff by the deputy, is not void.

7. *Appraisement*—A failure to have appraisers sworn will not affect the title of the purchaser at the execution sale unless the purchaser participates in the irregularity.

8. *Same*—Where a whole body of land was valued by appraisers, and also the life-tenant's estate therein, this was a sufficient valuation of the execution defendant's one-fifth interest in remainder.

Woolfolk & Klein for appellants.

Grubbs & Morancy and Charles M. Lindsay for appellees.

Appeal from Jefferson Circuit Court, Common Pleas division.

Opinion of the court by Judge DuRelle.

Joseph Galot, by will probated in January, 1871, devised his estate to his wife, Generouse Galot, for life, with remainder to his five children. His wife died in 1888, and his estate, which at his death had consisted of eighty acres of land in Jefferson county, went to his children. One of his children, Joseph F., died in 1884, leaving a widow, Teresa, and two children, Mary and Bertha, in whose behalf this suit is prosecuted.

It is conceded that the four-fifths interest in the property belonging to the other children of Joseph Galot was duly conveyed to the defendants, and they have title thereto. On March 9, 1874, before the death of either Generouse or Joseph F. Galot, a judgment by default was rendered against them in favor of Anton Kutzleb, in the court of J. Speed Peay, a justice of the peace for Jefferson county, but whose magisterial district did not include the residence of the defendants. An execution was issued on said judgment on March 17, 1874, and returned "no property found." Thereafter a certified copy of the judgment, execution and return was filed in the office of the clerk of the Jefferson Court of Common Pleas, and on November 17, 1874, an execution was issued by the clerk of that court, which was levied December 11, 1874, "on reversionary interest of Joseph Galot and the life interest of Mrs. Generouse Galot in eighty acres of land in Jefferson county on Mann's Lick road, near the Burnt Knob, being the same property in which the said Generouse Galot now resides, which was advertised according to law, and was offered at public outcry on the 4th day of January, 1875, at the courthouse door, to the highest bidder, and was bought by the plaintiff, Kutzleb, for $1 for the reversionary interest and twenty-five cents for the life interest, and as the plaintiff was the buyer no bond was required. A. G. ANDERSON, D. S.,
"January 4, 1875. For THOS. SHANKS, S. J. C."

As alleged in the answer, an appraisement was made in writing by two disinterested housekeepers of Jefferson county before said sale, the eighty acres being appraised at $2,000, and the life interest of

Generouse Galot at $600. In January, 1875, a second execution was levied upon "the equity of redemption of Joseph Galot in interest in remainder eighty acres of land on Mann's Lick road, near Burnt Knob, being the same property on which Mrs. Generouse Galot now lives, this interest is the one-fifth in the above property in remainder," etc., etc. The equity of redemption was sold to Kutzleb for his debt, interest and costs, which was $105.97. The return of this execution was also signed by A. G. Anderson, D. S., for Thos. Shanks, S. J. C. Kutzleb conveyed whatever interest he acquired by said purchases to the defendants. The facts are fully set forth in the answer of the defendants. The petition prayed a division and partition of the eighty acres, and that one-fifth thereof should be allotted to the plaintiffs. A demurrer to the answer was overruled by the trial court, and from that judgment this appeal is taken.

It is claimed for appellants that the execution sales at which Kutzleb purchased were void, first, because the judgment was void. This claim is based upon section 832 of Myers' Code, as amended, requiring the officer who serves process to return it to the justice of the peace in the district wherein the defendant resides; and further providing that "all judgments which may be hereafter rendered by a justice of the peace against defendants who do not reside in the district of such justice of the peace when judgment may be rendered, or did not reside in such district when process was served, *shall be null and void.*" This provision, however (which was applicable only to the city of Louisville), appears to be in direct contravention of section 34 of article 4 of the Constitution in force at that time, which provided that "the jurisdiction of justices of the peace shall be co-extensive with the county."

It is well settled that "the territory marked out for the justice by the Constitution of the State over which he is to exercise his jurisdiction can not be reduced or changed by legislative enactments." (12 Am. & Eng. Enc., 404.)

In our opinion, the jurisdiction *co-extensive with the county* is not a mere power to issue process in actions, but the power to hear and determine causes (U. S. v. Arrendo, 6 Peters, 691), the proper remedy for the defendant in such a case being by motion to transfer to the court of the justice of the peace in the district of the defendant's residence.

The second objection is that the execution from Esquire Peay's court was issued less than ten days after the judgment. Section 4, article 1, chapter 38 of the General Statutes provides: "No execution shall issue on any judgment, *unless ordered by the court*, until after the expiration of ten days from the rendition thereof." The justice of the peace was both judge and clerk, and the execution, therefore, must have been ordered by the court. Nor can we admit that even if prematurely issued it would have been void, such premature issuance being merely an irregularity, the remedy for which would be by motion to quash in the proceeding in which the execution was issued. (Freeman on Executions, section 25.)

The third objection is that the returns on the executions did not sufficiently describe the land levied on and the interest of the execution defendants therein. The return of the first execution issued out of the common pleas court seems to us sufficiently to describe the property to enable it to be identified. It was held in Reid v. Heasley, 9 Dana, 324, and approved in Bell v. Weatherford, 12 Bush, 508, that failure of the sheriff to properly describe the land in his levy, or to have it valued after his execution sale, could not affect the purchaser, for "these are directory duties inculcated by the statute

upon the officer; but their omission can not be construed to retroact upon the sale, so as to affect the rights of the purchaser. His right rests upon his purchase under a valid execution issuing upon a valid judgment; and, being fairly made, can not be defeated by the subsequent omissions or delinquencies of the officer. The officer might unquestionably be made responsible to the debtor for any injury he sustained by reason of his delinquency; but to permit his subsequent omissions or derelictions of duty to invalidate the sale, without fault on the part of the purchaser, would be to establish a doctrine that would expose titles derived under execution to an uncertainty and insecurity that would drive from the arena of bidders all prudent and cautious persons, diminish competition in bidding, and tend to produce a sacrifice, to the injury of debtor and creditor. We can not *sanction* such doctrine." (And see Freeman on Executions, section 281.)

The objection that the return did not specify the quantity of Joseph F. Galot's remainder interest has been passed upon by this court in Brown v. Smith, 7 B. M., 362, in which case the levy was made upon the right, title and interest of the execution defendant in the land, and not upon the land itself. The court there said: "The distinction is but nominal, and has been too generally disregarded in making levies and sales for it to be now questioned whether a levy and sale in either mode is not sufficient with the sheriff's deed to pass to the purchaser such title as the defendant had subject to execution."

And in Humphreys' ex'or v. Wade, 84 Ky., 400, the court says: "The right, title and interest of the defendant may be levied on and sold without specifying the particular interest. Such a levy is certainly not void."

The fourth objection is that the levies were void because the returns were signed by the deputy sheriff, for the sheriff, and not in the name of the sheriff, by the deputy. This court has expressly decided the contrary of this contention in Humphreys' ex'or v. Wade, 84 Ky., 400.

The fifth objection is to the appraisement, and is that it bears no date, and that there is no proof that it was made before the sale as required by the statute. As to this, it need only be said that this case comes up upon demurrer to the answer, and the answer specifically avers that the land was appraised before the sale. This averment, upon demurrer, must be taken as true. A further objection to the appraisement is that the deputy sheriff had no authority to administer the oath to the appraisers. There was at that time no direct authority given to the officer to administer this oath, but it was held in Sayres v. Hahn, 5 KY. LAW REP., 320, that "a failure to have the appraisers sworn will not affect the title of the purchaser unless the purchaser participates in the irregularity." A further objection to the appraisement is that it does not describe the land nor designate the quantity of Joseph F. Galot's interest therein. The appraisement shows that the land valued was the same property levied on by the sheriff of Jefferson county to satisfy execution No. 12,030. The description is practically the same. The whole body of land was valued at $2,000, and the life-tenant's estate therein was valued at $600. In our opinion, this was a sufficient valuation of Joseph F. Galot's one-fifth interest in the remainder, the entire remainder interest being thereby shown to be worth $1,400.

The same objections are made to the appraisement of the equity of redemption. As no appraisement was necessary, these objections

need not be considered. The appraisement was made for the benefit of the debtor to secure him the legal right to redeem in case the estate should not sell for two-thirds of its value. Had there been no appraisement, or had the appraisement which was made been absolutely void, it is possible that the execution defendant might in equity be allowed to redeem if in reasonable time he made the offer; but in this case the execution defendant does not offer to redeem.

For the reasons given the judgment of the trial court must be affirmed.

BRUNER & BLOOM V. CLAY CITY.

(Filed February 3, 1897.)

Liquor License—Excessive charge—Voluntary payment—Where parties having obtained State license to retail liquor and rented premises in which to conduct their business upon the assurance of the city authorities that city license would be granted when the State license had been secured were charged against their protest for the city license a sum far in excess of what the law had fixed as the maximum rate, the payment of such amount was not a voluntary payment, and they are entitled to recover the excess over the legal rate.

A. T. Wood & Son for appellants.

J. A. Wilburn and C. B. Hancock for appellee.

Appeal from Powell Circuit Court.

Opinion of the court by Judge Paynter.

On the 5th day of January, 1893, the board of council of Clay City refused to grant to the appellants a license to sell liquors unless they would pay the sum of $750 therefor. They knew at the time this sum was demanded and paid that under the charter of the town the board of council could only require the payment of $300 for such license if the board saw proper to grant it. In view of this fact they protested against paying any sum exceeding $300. The city refunded $200 of the amount which they paid. This action was brought to recover $250, the amount which appears to have been illegally demanded.

The appellants allege that, before they made an application to the county court of Powell county therefor and obtained a State license to retail liquors in Clay City, they applied to the authorities of the city who had the authority to grant a license to retail liquor, and were informed that if they obtained a State license that the council would grant them a license to retail liquors; that in view of that fact they obtained a State license, rented a house, and got ready to do business.

These facts appear in the petition as amended, to which the court sustained a demurrer.

There is no statement of facts which indicated that the board of council had, in its organized capacity, made any order to this effect. If it had done so it could have reconsidered its action and refused to grant the license; hence, we are of the opinion that the statements as to the alleged promise of the authorities is immaterial as to the question involved. The question is, was the payment a voluntary one. The peculiar facts of each case must determine whether the payment is involuntary or voluntary. If the facts be as alleged, and we must assume them to be true on demurrer, the appellants

had incurred the expense of having obtained a license from the State, the expense of renting a building in which to do business, and in getting ready to do business. Notwithstanding these facts, they could not have compelled the council to grant them a license to retail liquors.

We assume the council regarded them as suitable persons to engage in the business of retailing liquors, or it would not have made the order to grant the license. Having reached the conclusion to grant the license, it was wrong and illegal for them to demand a larger fee than $300, as the law-making branch of the government had declared that to be the maximum amount to be demanded. When the demand was made for $750, the appellants were confronted with a condition which compelled them to sustain a loss. If they refused to take the license on the condition imposed, then the expenses of the State license, the rent of the premises, and the expense of getting ready to do business was a total loss to them. If they paid $450 in excess of the amount which the council had the right to demand, then their apparent loss was an amount equal to the sum illegally demanded.

Presumably in the exercise of their judgment as to the best way to extricate themselves from a bad situation, forced upon them by the illegal conduct of the council, they determined to *protest* and pay.

We believe the facts of this case remove it from that class of cases where a recovery is denied because the payments were voluntary.

The conduct of the council in demanding the illegal sum was such oppression that, in our opinion, it can not be said that the payment of the excess of $300 was voluntarily made.

If the facts of this case were substantially the same as those in Tyler v. Smith, 18 B. M., 799, we would hold the payment was voluntary, and that the action could not be maintained.

In reaching the conclusions we have in this case, we have not failed to consider the adjudged cases of this court wherein questions of voluntary payments were involved.

The judgment is reversed, with directions that the demurrer to the petition be overruled, and that further proceedings conform to this opinion.

WARE, &C. V. FRANK'S ADM'R, &C.

(Filed February 3, 1897—Not to be reported.)

Purchase of remainder by life tenant—No such trust relation exists between a life tenant and the remainderman as to prevent the life tenant from purchasing the remainder, and as the evidence in this case fails to show actual fraud the chancellor properly refused to set aside a deed from the remainderman to the life tenant.

R. K. Smith for appellants.

J. B. Clarke and Cochran & Son for appellees.

Appeal from Bracken Circuit Court.

Opinion of the court by Judge Paynter.

Henry Frank, sr., died in 1880. By the provisions of his will his widow, Avarilla Frank, was to "have, hold and enjoy" his personal and real estate during her life. At the death of the widow, the life-

tenant, it was to go to his five children. One of them died without issue before the testator, hence the estate in remainder went to the four children who survived him. The estate consisted of real estate, which, after the death of the widow, sold for $6,250, and the personal estate was so well managed by the widow that it amounted at the time of her death to about $7,500. She died in December, 1889, testate, and by the terms of the will she disposed of her estate to various persons who, together with the executors of her will, and the administrator, with the will annexed, of the estate of Henry Frank, sr., deceased, were made defendants to this action, which was brought by the appellant, Susan Ware, and her husband, Lewis Ware. Susan Ware is the daughter of Henry Frank, sr., and to whom her father's will gave one-fourth of his estate in remainder.

In March, 1889, in consideration of $1,400, Susan Ware—her husband joining her—by deed conveyed to Avarilla Frank her undivided one-fourth of the real and personal estate left by her father.

The evidence tends to prove that the consideration was paid by Avarilla Frank out of her own means. At any rate, there is nothing in the record tending to show that it was paid out of any of the assets of Henry Frank, sr.'s, estate.

This action was brought by Susan Ware to set aside the deed which she made to Avarilla Frank, insofar as it embraced the personal estate, and to be adjudged one-fourth of the estate left by her father.

It is contended, first, that the widow obtained the deed by fraud; second, that as she had the use of the estate during her life, she was a *quasi* trustee; therefore, she was precluded from obtaining a valid conveyance from a remainderman.

It is insisted that Avarilla Frank represented to the agent of Susan Ware that there was none of the personal estate of Henry Frank, sr., left for his heirs.

There is a conflict in the testimony of W. O. Ware, who was acting for his mother in negotiating the sale for her and a servant girl, who appears to have been present when the terms of sale were agreed upon. This agent was fully advised by a kinsman and the administrator of Henry Frank, sr.'s, estate as to the proximate amount thereof which was held by the widow. Mrs. Ware's son says that he gave her the information imparted to him by the kinsman and the administrator. The deed which the mother executed embraces the personalty as well as the real estate. The check, which was given her by the widow in payment of the consideration for the deed, recites it is given in full consideration of her interest in the real and personal estate of her late father, Henry Frank, sr. The attorney, who represented Mrs. Frank in the execution of the deed, says that he fully explained to Mrs. Ware the effect of the deed. The question is suggested, if Mrs. Frank represented there was no personal estate to be conveyed, why did the deed and check describe the property as consisting of both personal and real estate? There is no evidence as to the age of the widow and the condition of her health at the time the deed was made, hence no data is given from which the court can have an opinion as to whether the consideration paid was inadequate. Of course it would not follow merely because the consideration was inadequate the deed should be set aside. The plaintiff wholly failed to establish the charge that the deed was obtained by fraud. The fact that the widow died shortly after the deed was made does not affect the question of the value of the remainder interest at the time it was conveyed, as the probable prolongation of life as determined by life tables would fix the value of the life estate, consequently the value of the estate in remainder.

We know of no principle of law or rule in equity which prevents a life tenant from purchasing the interest of a remainderman. Certainly no such fiduciary relations exist between them which would make applicable to their transactions the rules of equity which govern the trustees and *cestui que trust*. The life tenant has no right to destroy or waste the estate in remainder, but this obligation to preserve the estate in remainder does not preclude the life-tenant from acquiring it by gift or purchase. We can see no good reason why one who has the lesser may not acquire the greater estate.

The judgment is affirmed.

PHILLIPS V. OFFUTT, &C.

(Filed February 3, 1897—Not to be reported.

Building contract—Acceptance of order drawn by contractor—Set-off—Where one who had employed a contractor to build a house accepted an order drawn by the contractor in favor of a material man, to be paid when the house should be completed in full, in an action upon that order, it appearing that the contractor afterward substantially abandoned the job, and that defendant completed the house chiefly by the employment of hands who had been working for the contractor, the plaintiff was entitled to recover the amount due the contractor after deducting from the contract price the money expended by defendant in the completion of the house, defendant not being entitled to deduct the rental value of the house for the time the contractor was in default in construction, or the value of his services, the date of the order being after the date fixed in the contract for the completion of the house, and there being nothing to show that plaintiff knew of the conditions of the contract as to the time for its completion.

Jno. W. Lewis for appellant.

W. J. Lisle for appellees.

Appeal from Marion Circuit Court.

Opinion of the Court by Judge Burnam.

The appellant, J. G. Phillips, entered into a written contract with appellee, E. B. Smith, in which Smith agreed and contracted to build a residence for Phillips in the town of Lebanon, Ky., on the lot of Phillips, according to plans and specifications, for the sum of $3,000, to be paid, one-fourth when the foundation was completed and all the framing material on the ground; one-fourth when the building was under roof; one-fourth when the plastering was completed; and the remainder when the house was completed; and it was further stipulated that the house was to be completed and ready for occupancy by the 1st day of October, 1891.

The evidence in this case shows that this house was not completed and ready for occupancy until the 28th day of May, 1892, nearly eight months after the time provided for in the contract. The contractor, Smith, in order to comply with his contract, purchased of A. Offutt—who owned a planing mill and furnished building supplies—material to the amount of more than $800, which was used in the construction of this dwelling. In November, 1891, Smith, the contractor, gave this order to Offutt:

"Mr. J. G. Phillips: You will please pay to A. Offutt the sum of $750 when your house is completed by E. B. Smith. The above

sum is for material furnished and to be furnished; an order made by J. G. Phillips for sash, doors and stairs. (Signed) E. B. SMITH."

This order was accepted by endorsement on the same in these words:

"I agree to pay the within order when my house is completed in full by E. B. Smith. (Signed) J. G. PHILLIPS."

Subsequent to the execution of this order the contractor, Smith, substantially abandoned the job, and appellant completed it himself, chiefly by the employment of the same hands who had been working for the contractor previous to the time when appellant took charge of it, about the only difference being that instead of paying the contractor or his assignee for the work he paid the hands himself directly, and for necessary material.

This suit was instituted by the plaintiff at the September term, 1893, of the Marion Circuit Court, upon the aforesaid order against both Smith and Phillips. Recovery was controverted by the appellant, Phillips, on the ground that the house was not completed by Smith, the contractor, on the 1st day of October, 1891, as he had agreed to do; that he was entitled to the reasonable rental value of the house—which was alleged to be $25 per month—from the time it should have been completed until the time it was completed as a set-off, the allegation being that Smith was insolvent; and by the further claim that Smith, having abandoned the job of completing the house, and that appellant had been forced to do so in person, and he had been compelled to pay out of the balance of the funds which would have been due Smith the sum of $694.83; that he had also been compelled to give a great deal of his time to the work, and that his services were worth $50.

Upon the trial of the case the court below allowed the appellant, for moneys necessarily expended in the completion of the house according to plans and for extras, the sum of $717.25, and it also allowed appellant the further credit of $2,237.25 for the money which had been paid by the appellant, Phillips, to Smith previous to the acceptance of said order, the court charging Phillips with the sum of $34 for extra work contracted for after the date of the contract, making the total contract price of the house due Smith amount, under the contracts aforesaid, to the sum of $3,034; and, deducting the total credits from this sum, left a balance of $79.50, for which sum the court gave judgment against Phillips in favor of appellee Offutt. Appellant excepted to this judgment because the court failed to credit him with the reasonable rental value of the house from the time the contract with Smith stipulated it should be completed until the time it was actually completed, and also because the court failed to allow him anything for his services, and brings his appeal to this court.

There can be no doubt that Phillips was entitled to recover from the contractor, Smith, the reasonable rental value of the house for the time Smith was in default in the construction; but we do not think that this was a just or proper set-off against the claim of the appellee herein.

There was nothing said in the order from Smith to appellant in favor of the appellee, Offutt, for the $750 about the time said house was to be completed, and appellant made no such condition in his acceptance of said order. The date of the order was after the date fixed in the contract for the completion of the house. There is no evidence to show that Offutt knew of the conditions as to the time

for completing the house. Offutt testifies that he notified appellant that if he did not accept the order that he would file a lien against the property for the material which he had furnished to build the house, and would furnish no more material.

It seems evident that appellant received and appropriated materials furnished by the appellee under this order after the date of its acceptance in the completion of said house, and, the court having allowed him as deductions from the contract price with Smith every dollar of the money expended by him in such completion, all the substantial conditions upon which said order was accepted by appellant had been complied with. The house was undoubtedly completed with the money which was due Smith, and completed largely by the hands which he had employed.

We concur in the opinion of the lower court that the appellant was not entitled to have the reasonable rental value of the house, or the value of his services set off against the money due appellee on the order.

Therefore, the case is affirmed, with damages.

DRESSMAN V. FARMERS & TRADERS NATIONAL BANK, &C.

(Filed February 3, 1897.)

Assessments for street improvements—Lien superior to mortgage—The lien upon abutting property given by a city charter to secure assessments for street improvements is superior to a mortgage lien existing when the improvement was made, although the charter does not expressly so declare.

D. A. Glenn for appellant.

James W. Bryan for appellee.

Appeal from Kenton Circuit Court.

Opinion of the court by Judge Burnam.

This case involves a question of law growing out of these facts: The city of Covington, through its contractor, the appellant, improved Linden avenue by grading and paving, and, by an ordinance properly passed, assessed and levied a lien upon a couple of lots located in Morton's subdivision and fronting said Linden avenue, where the work was done, to pay their proportionate part of the expense of the improvement. This ordinance was passed and lien imposed August 2, 1892, upon the property which was owned by H. T. Morton, who, previous to his death in December, 1889, had given a mortgage on this property to the appellee, the Farmers & Traders National Bank.

There is no question raised as to the regularity of the proceedings of the council, or as to the validity of the mortgage to appellee. The sole question is, which lien has priority. The court below held that appellee was entitled to be paid first, and ordered a sale of the property to satisfy both liens. Upon the sale of said property, it brought less than the amount of appellee's claims, and appellant was left without relief, and brought his case to this court and asks a reversal of the judgment of the lower court.

The legislature of Kentucky, by its act of March, 1850, amending and reducing into one the various provisions concerning the city of Covington, in article 2, section 7, gave the council full power and

authority to cause and procure all streets to be graded and paved, and apportion the costs and expenses thereof equally on the fronting and abutting property and the owners thereof, according to the front feet, and gave a lien on the property for its proportion of the expenses in this language: "A lien is hereby given on the lots or parts of lots for same, which cost and expenses may be listed and collected as other taxes are by the city collector, or any special collector who shall have authority to sell and convey the lots or parts of lots, according to such by-laws and regulations as shall be adopted by the council." The legislature also provided by subsequent legislation that such lien might be enforced in a court of equity, "wherein all the lien-holders could come and have their liens adjusted."

The mortgage of appellee was acquired December 11, 1889, a date subsequent to the city charter, but prior in time to the date of the ordinance requiring the improvement to be made. "The appellee contends that an assessment made for constructing a street by the city council does not partake of the character of a tax levy, and that in the absence of a charter provision making it a first lien upon the property abutting the improvement it takes its place in line with the existing lien claims against said property," and can only be paid after all prior lien encumbrances have been discharged in full.

It is manifest that this contest for priority is really between the city of Covington, on the one hand, and the mortgagee on the other. It is admitted by appellant that the sections of the city charter quoted above do not, by express provision, give the city a first lien for local assessment for street improvement, but it is insisted that such was the intention of the "law-making" power.

The attention of the court has not been directed to an adjudicated case where the precise question involved in this appeal has been passed upon. The distinction between taxes, pure and simple, and assessments for local purposes, has been frequently pointed out in opinions of this court, and it has been held that an assessment for a supposed benefit was not a tax within the meaning of the law exempting property from taxation. (Zabel v. Louisville Baptist Orphans' Home, 92 Ky., 89; Johnson v. Louisville, 11 Bush, 527; Sheehan v. Good Samaritan Hospital, 50 Mo., 155.)

A pure tax is a burden imposed by the sovereign power on all property and persons alike, and is compensated for by the equal protection which all receive from such power; and, whilst the property is resorted to for the purpose of ascertaining the amount of the tax, it is the individual and not the property, who pays the tax. Whilst in the case of a local assessment for local improvement it is the property which is primarily liable and not the individual, as it is supposed to be compensated for by local benefits which come from such improvements enhancing the value of the property assessed to the extent of the assessment laid upon it. This is the real distinction between them.

But it is not apparent why this difference in the character of these taxes should be so confidently invoked to defeat the claims of the appellant for a priority. Both are levied under the sovereign power of the State, and both are levied under the theory that they are for the general good; and the same general powers for enforcing their collection are given. It is true that in the case of a local assessment the city is limited to the property specially benefited in the steps it may take for collection of the assessment; but it seems to us that this is a greater reason why this claim against such property should be paramount to all others. The legislature certainly has the power to create such a lien, and to give it priority over all private rights

and interests. "One who acquires an interest in land takes it subject to the right to lay general taxes upon it, and to impose upon it the burden of paying the expenses of necessary public improvements which confer upon the land a special benefit. * * * Statutes giving a lien are remedial, and, therefore, to be liberally construed, and so construed as to accomplish the legislative purpose. In creating liens for improvement assessments, the legislature makes secure compensation for what is, in truth, an industrial annexation of the land, for the street improved is, in a sense, an appurtenance of the land which increases its value, and whoever holds an interest in the land profits by the appurtenance, and ought, in justice, to be subjected to the lien which secures the assessment. It is, for these reasons, often proper to deduce from the general language of a statute giving a lien the conclusion that it gives a paramount lien to which mortgage estates or judgment liens must yield." (Ellison on Roads and Streets, page 334.)

By section 7, article 2, of the charter of the city of Covington, the city council of Covington are given absolute power in their discretion to cause all streets to be graded and paved, and to apportion the costs and expenses thereof equally on the abutting lot-holders, according to the front feet, and a lien is given upon the lots for cost and expenses of such improvements, and they are authorized to direct a sale of these lots in accordance with the by-laws and regulations to be adopted by the city council by their city collector. Whilst this language does not expressly say that such liens shall be prior in rank to other liens on said property, it seems to us that it does this by necessary implication. This power the city can exercise against the owner of the property, and certainly a mortgagee can have no higher equity or claim in the property than the mortgagor gave to him. His interest and title in same are conditional and less than that of the mortgagor, and his rights in the property are entitled to no greater consideration than those under whom he claims. He, with the owner, has profited by the enhanced value given the property by the improvements which the assessment is made to pay for.

In Nevin v. Allen, 15 KY. LAW REP., 836, this court held that a homestead set apart to a widow and children, and which was by law exempt from liability for the owner's debts, might be subjected to pay an assessment for street improvement for which it was liable.

We are of the opinion that the lien provided for in the section of the charter quoted *supra* existed from the date when such charter became operative against all the real property within the limits of the city. It was simply a suspended power which the council could enforce whenever, in their discretion, the public interests required it, and all persons dealing in such real property were bound to take notice. Any other construction gives to the land-holder the power to so encumber his land as to render nugatory the power vested in the common council for the benefit of the whole community to improve streets at the expense of the abutting property holders.

We hold in this case that appellee took the mortgage on the lots in question subject to the power of the city to require said lots to bear their proportion of the expense of constructing the streets on which they fronted, and that appellant was entitled to have his claim for such construction paid first out of the proceeds of the sale of such lots.

For these reasons the judgment of the lower court is reversed and the case is remanded for proceedings consistent with this opinion.

LOUISVILLE & NASHVILLE R. R. CO. v. COX.

(Filed February 5, 1897—Not to be reported.)

1. *Railroads—Injury to passengers—Instructions*—In this action against a railroad company to recover damages for injuries alleged to have been sustained by plaintiff in a wreck caused by a collision between two of defendant's trains, upon one of which plaintiff was a passenger, defendant not denying that the collision was caused by the gross negligence of its agents, the instructions to the jury, which are set out in the opinion in full, contain no substantial error.

2. *Same*—The cause and extent of plaintiff's injuries were questions of fact for the jury, and their finding for plaintiff is not flagrantly against the evidence.

3. *Excessive verdict*—A verdict for $500 is not excessive if plaintiff was injured to the extent stated by his witnesses, as the jury, as they had a right to do, must have believed.

J. W. Alcorn and Boyd & Craft for appellant.

Appeal from Laurel Circuit Court.

Opinion of the court by Judge Burnam.

This action was instituted by the plaintiff against the defendant in the Laurel Circuit Court to recover damages for injuries alleged to have been sustained by him in a wreck caused by a collision between two of defendant's trains, upon one of which he was a passenger, which collision was alleged to have been caused by the willful negligence and careless acts of defendant's agents and employes. The injury occurred from the plaintiff being thrown out of his seat against the wall of the coach and on the seat, floor and side of said coach with great force at the time of and by reason of the collision, inflicting injuries upon the body of plaintiff, his back, kidneys, bowels, breast, ankle, etc.

The defendant does not deny the collision of its trains, or that the same was the result of the gross or careless negligence of its agents, but does deny that plaintiff was injured in such collision, or that he is entitled to damages.

The case came on for trial, and being submitted to the jury, they returned a verdict in favor of the plaintiff for $500 damages, and in a motion for a new trial defendant relies, first, that the court erred in instructing the jury, in that the instructions are erroneous and misleading; and second, that the verdict is not sustained by sufficient evidence; and third, that the damages are excessive, and appear to have been given under the influence of prejudice. The instructions are as follows:

"1. The court instructs the jury that if they believe from the evidence that the defendant, the Louisville & Nashville Railroad Co., by its agents, servants or employes, caused or produced a collision of a freight and passenger train on its road near Hazel Patch, in Laurel county, Kentucky, on the 28th day of September, 1893, and that E. J. Cox was at the time a passenger on said passenger train, and that said Cox sustained injuries from said collision upon the back, side, and internal injuries in the kidneys or bowels, caused by the collision of defendant's trains on its said railroad at the said time; if the jury believe from the evidence he received injuries, they will find for the plaintiff such damages as they believe from the evidence he has sustained, not exceeding $5,000, the amount claimed in plaintiff's petition, although they may believe from the

evidence that the collision was not brought about by the willful neglect of the defendant's agents, servants or employes.

"2. The court instructs the jury that if they believe from the evidence that the defendant, the Louisville & Nashville Railroad Company, by its agents, servants or employes, caused or produced a collision, near Hazel Patch, of a freight train and a passenger train, and that the plaintiff, E. J. Cox, was at the time a passenger on said passenger train, and that said collision was brought about by the willful, negligent and careless acts of said agents, servants or employes, and that the plaintiff, E. J. Cox, by reason thereof, was injured upon the back, side, or sustained internal injuries in the kidneys or bowels, they will find for the plaintiff such damages as they may believe from the evidence he has sustained therefrom, not exceeding $5,000, the amount claimed in the petition. The finding of the jury under instructions 1 and 2, or upon the entire case, shall not exceed $5,000."

We do not think these instructions contain any substantial error, or are prejudicial to the defendant; and whilst the evidence in behalf of the defendant, upon the question of the injuries sustained by plaintiff, is very strong and reflects very gravely upon the character of the plaintiff, yet, as the injuries complained of and their extent were questions of fact, and as the plaintiff introduced a good deal of evidence conducing to establish his contentions, both as to the cause and extent of said injuries, we can not say that the verdict is flagrantly against the weight of evidence, or is not sustained by the evidence; nor do we feel warranted in saying that the damages were excessive if the jury credited the statements of plaintiff's witnesses.

Wherefore, the case is affirmed, with damages.

REYNOLDS V. WRIGHT.

(Filed January 23, 1897—Not to be reported.)

Attachment—In this action to enforce a mortgage lien upon personal property, in which an attachment was sued out and levied upon the property, judgment for the debt and for the sale of the property under the mortgage was proper, as was also the judgment sustaining the attachment, the grounds of the attachment therefor being insufficiently controverted.

D. D. Fields and John L. Scott & Son for appellant.

W. H. Holt for appellee.

Appeal from Letcher Circuit Court.

Opinion of the court by Judge White.

This is an appeal from the Letcher Circuit Court. The appellee, Wright, sued the appellant on a claim for $145, secured by mortgage on four mules. At the commencement of the action the appellee filed an affidavit and sued out an attachment and had said attachment levied on three of the mortgaged mules. Appellant executed bond and retained the possession of the mules. A demurrer was filed to the plaintiff's petition and was overruled, and defendant excepted to the rulings of the court. Defendant filed an answer, to which plaintiff demurred, and the court sustained the demurrer and defendant excepted.

The court did not err in overruling defendant's demurrer to plaintiff's petition. The petition stated a cause of action, and was prosecuted in the name of the proper party. The court properly sustained the demurrer to the answer of defendant, so far as the same attempted to set up a defense to the action. The defendant failing to plead further, the court rendered judgment against him for the amount of the debt sued on, and adjudged the sale of the mortgaged property to satisfy said judgment and sustaining plaintiff's attachment, and from this judgment appellant has appealed.

Appellant in his answer denied the ground of attachment upon which appellee procured the issual of the attachment, and, therefore, made an issue. The burden of proof was on the appellee. The court, so far as is shown in this record, sustained the attachment without hearing any proof, and this was error to the prejudice of appellant.

We are of opinion that the judgment on the debt and order to sell the mortgaged property is correct, and is approved by this court; but for the error of the court in sustaining the attachment, and this error alone, the cause is reversed and remanded for proceedings in accordance with this opinion.

The court delivered the following response correcting the opinion and sustaining petition for rehearing to that extent March 4, 1897:

Appellee Wright having filed petition herein asking a rehearing of this case so far as the judgment of this court reversed the judgment of the lower court in sustaining the attachment, and having called the attention of the court to the failure of the appellant to deny that the property was about to be *concealed*, the defective denial of the grounds of attachment having escaped the attention of the court, a rehearing is granted appellee, and the court is of the opinion that the denial of the grounds of the attachment were insufficient, and the circuit court did not err in its judgment sustaining the attachment.

The judgment of the circuit court is affirmed with damages.

GLOVER & DURRETT V. SUTER, &C.

(Filed January 27, 1897—Not to be reported.)

1. *Husband and wife—Fraud as to creditors*—In this action by creditors seeking to subject to the payment of their debts property claimed by the wife of the debtor, the evidence sustains the wife's claim, and the charge of fraud is not established, it appearing that the money with which the property was purchased was the result of fortunate investments made by the wife, and not of the husband's skill and industry.

2. *Evidence*—It was competent for the wife to waive her right to testify and introduce her husband as a witness.

Geo. C. Drane and Frank Chinn for appellants.

John W. Rodman, John B. Lindsey and James A. Violett for appellees.

Appeal from Franklin Circuit Court.

Opinion of the court by Judge Guffy.

This appeal is prosecuted by Glover & Durrett from a judgment rendered by the Franklin Circuit Court in the two consolidated actions of Glover & Durrett against B. F. Suter, &c.

One of the suits was brought to enforce the collection of a judgment in appellant's favor against B. F. Suter for more than $5,000, and the other suit was to recover on a note for about the same amount. Attachments were obtained and levied on a large amount of tobacco, a tract of land, some sheep, and White, Dunkerson & Co. were also summoned as garnishees.

Julia Suter, wife of B. F. Suter, claimed the property levied on. White, Dunkerson & Co. claimed liens on the tobacco under contract with Julia Suter.

The pleadings, proof and exhibits are voluminous, and it would be unprofitable to discuss at length the various issues raised or attempted to be raised, or to recite at length the evidence introduced. The real question to be decided is as to the title to the property levied on, or, in other words, was it the property of B. F. Suter? The contention of appellant being in substance that all the claim or claims of Julia Suter to the property in contest was fraudulent as to them, as was also her obtention of the judgment of the Franklin Circuit Court giving her the rights and powers of a *feme sole*.

The evidence seems to show that B. F. Suter had been from 1884 buying tobacco for appellants or soliciting shipments of tobacco to them, and part of the time buying tobacco for himself and consigning the same to appellants for sale, they being warehousemen in Louisville, Ky., and that although for a time he seemed to make money he finally became largely indebted to appellants as well as indebted to other parties, and in 1889 made an assignment for the benefit of his creditors to J. C. Noel. Afterwards an arrangement was made between appellants, B. F. Suter and his other creditors, by which the appellants were to have delivered up to them most of the assigned property and a secured note for $1,000, and Suter to execute the two notes, the amounts of which are involved in this suit, appellants agreeing that a payment of $1,500 made by Suter to his wife might remain unassailed, and also leaving some tobacco in Suter's hands. This agreement seems to have been fully executed. Afterwards Julia Suter obtained judgment aforesaid, empowering her to trade and do business as a *feme sole*.

It also appears that B. F. Suter had mortgaged his home farm for about $1,200 to Noel, &c., who proceeded in 1890 to sue and enforce their lien on the same, and Hockinsmith bought the farm. It is claimed Hockinsmith bought same with some kind of an agreement that B. F. Suter should have the right to redeem the same, which claim is not only denied by appellees but disputed. Some time after the judgment granting *feme sole* rights to Mrs. Suter she rented the farm of her brother (Hockinsmith) for a year and raised or had raised a crop on same, and that she bought of B. F. Suter the tobacco turned over to him under the agreement aforesaid, and did other trading, and made an arrangement with White, Dunkerson & Co. to buy tobacco for them, and that for a time she made money in so doing, and purchased of her brother the farm aforesaid at the price of $13,000 and paid $7,000 cash, executing three notes for $2,000 each for the residue of the purchase money, and paid off one of these, but afterwards gave a mortgage on the farm for $2,000.

The court upon final trial adjudged that the property attached was not subject to the attachment and dismissed appellant's petition in so far as it sought to subject said property, and adjudged that White, Dunkerson & Co. had a lien on the tobacco attached and adjudged

the proceeds to them, it having by agreement been sold by them, and also rendered judgment in their favor on their cross petition against Mrs. Suter for more than $500. It is not necessary to determine whether they had a valid lien on the tobacco, inasmuch as it was not liable to the attachment, and no appeal has been taken by Julia Suter from that judgment.

It is urged by appellants that the tobacco was shipped in the name of B. F. Suter and sold in his name and claimed by him, but if it was really Mrs. Suter's property such action could not divest her of title. If she had consented to all this, and B. F. Suter had obtained credit by reason thereof, a different question from the one under consideration might arise. It is also claimed, and truly so, that B. F. Suter acted as agent for his wife, and transacted most, if not all, of the trades as her agent. It is also claimed that it was his credit that enabled her to obtain the advances from White, Dunkerson & Co., and his skill, etc., that caused the profits that were made.

It does not clearly appear that he devoted much time to the farming or other business ventures, and it may be remarked that, inasmuch as in a few years he had become largely in debt over and above the value of his property, his credit or capacity would not be likely to be very valuable. It is true that fraud must be generally proven, if proven at all, by circumstances. It can rarely be expressly proven, yet the party alleging fraud must in some way prove the charge or fail in the suit. It is true, as often held by this court, that the creditor has a right to look to the skill and industry of the husband for the payment of his debts, and the right to subject so much thereof as may be left after the support of the family dependent on him is met to the payment of his debt can not be denied, yet in this case it seems to us that the money made by Mrs. Suter by her own industry and the capital of about $2,000 was more the result of fortunate investments or luck than through or by the skill of her husband or herself either.

Various exceptions were filed to depositions, but we perceive no error to the prejudice of appellants in the rulings of the court below on the exceptions. B. F. Suter was a competent witness under the provisions of the Code of Practice, as has been heretofore held by this court. If the wife in such a case chooses to waive her right to testify and introduce her husband she can do so. The testimony in many cases might be of more weight than that of her husband, but that fact can not deprive her of the right to so use the testimony of the husband.

We deem it unnecessary to notice further the many questions raised and ably argued by counsel on both sides.

The judgment appealed from is affirmed.

SWEENEY V. COMMONWEALTH.

(Filed February 5, 1897—Not to be reported.)

1. Criminal law—Increased punishment on account of former conviction—Where the minimum punishment fixed by the statute for a felony charged in an indictment is confinement in the penitentiary for a term of years, which is twice the length of the term for which the defendant was sentenced upon a former conviction for another felony, it is not proper to allege in the indictment the facts as to the former conviction as the punishment, if there be a verdict of guilty, must in any event be for a term twice the length of the

former term. But the defendant in this case was not prejudiced by such allegations, and, as there was no objection to the evidence offered to sustain these allegations, there can be no reversal on account of its admission.

2. *Indictment—Election*—The indictment charged but one offense, and it was not error to overrule a motion to require the Commonwealth to elect.

3. *Same*—Where a former conviction of another felony is charged in an indictment for the purpose of increasing the punishment, that charge may be considered upon the trial of the offense under investigation, and it is not necessary that it should be considered separately after the return of a verdict as to the offense charged in the indictment.

Walter Darby for appellant.

W. S. Taylor for appellee.

Appeal from Jefferson Circuit Court, Criminal division.

Opinion of the court by Judge Paynter.

The indictment charges the defendant, first, with burglary; second, that he had been previously convicted of grand larceny and sentenced to the penitentiary for one year.

On a trial of this case the jury returned a verdict as follows, to wit: "We, the jury, find the defendant guilty of burglary as charged in the indictment and fix his punishment at eight (8) years in the penitentiary."

The indictment sufficiently alleged the facts constituting the crime of burglary, and the court did not err in overruling the demurrer thereto, nor did it err in overruling the motion to compel the Commonwealth to elect which count it would prosecute, as but one offense was charged in the indictment.

It was said in the Chenowith case, 11 KY. LAW REP., 562, wherein this court was construing the statute (now section 1130, Kentucky Statutes), "if, therefore, the punishment awarded for the second offense be equal to or exceed double the time of the former one, judgment is to be rendered only for the punishment fixed in the present offense."

So when one has been convicted of a felony and is the second time convicted of one, the punishment, of which is confinement in the penitentiary, shall be confined in the penitentiary not *less than double* the time of first conviction.

The minimum punishment for burglary is confinement in the penitentiary for *two* years. If the defendant was found guilty of burglary the jury was compelled to fix his punishment at confinement in the penitentiary at two years, which would make his punishment not less than double his punishment for the first conviction, which was one year in the penitentiary.

It would, therefore, seem to follow that in such case it would be unnecessary to allege in the indictment the facts with relation to his first conviction, as on the second conviction his punishment could not be added to because of the first, as the statute is necessarily complied with by the court rendering a judgment on the verdict of the jury, even for the minimum punishment. The allegations in the indictment as to the first conviction could not have been prejudicial to the defendant, except that evidence was offered to sustain them. There was evidence offered for this purpose, but no objection made to its admission, hence we can not reverse the action of the court as to this error.

It is insisted that the facts as to the former conviction should be withheld from the jury until after the verdict upon the charge on

which the defendant is being tried. This is upon the idea that proof that the defendant has been convicted of felony is calculated to produce a prejudice in the minds of the jury against him.

The statute provides that the "judgment in such cases shall not be given for the increased penalty unless the jury shall find from the record and other competent evidence the fact of former convictions for felony committed by the prisoner in or out of the State."

While the statute does not say in terms that the jury shall on the trial of the charge under investigation pass upon the charge of former conviction, yet it contemplates that it shall do so on such trial. If the law-making power had intended that the practice should be to submit the question of former conviction after the verdict of guilty on the charge under investigation it would have said so. This it failed to do; besides, the language of the statute indicates the contrary to have been its purpose. This court has also, by sustaining judgments on verdicts returned on evidence introduced on the trial of the accused, sustained the practice complained of by counsel for appellant.

The judgment is affirmed.

GLENN V. MILLER.

(Filed February 5, 1897—Not to be reported.)

Sale of timber - Construction of contract—Under a contract for the sale of timber to be paid for in installments in advance of the cutting of the timber, each succeeding installment payable when all the timber theretofore paid for had been cut, the buyer being given one year from the date of the contract "in which to cut said timber," the seller's right of action upon the contract was not postponed for one year, but all the timber paid for having been cut the next installment then became due, and the seller was entitled to sue therefor, or for so much thereof as the value of the uncut timber amounted to. But he can not recover both the contract price and damages for breach of contract set up in an amended petition filed after the expiration of one year from the date of the contract, and may, therefore, be required to elect.

Jonson & Wickliffe for appellant.

Charles Eaves for appellee.

Appeal from Muhlenburg Circuit Court.

Opinion of the court by Chief Justice Lewis.

November 1, 1892, the following written contract was made between John Glenn, of Muhlenburg county, and H. E. Miller, of Owensboro: "Said Glenn doth sell and convey to said Miller all the gum timber upon the tract of land whereon he resides. Said timber shall be 18 inches and upward, and be cut a reasonable height from the ground. Said Miller agrees to pay 65 cents per foot across the stump, and to pay $150 cash before cutting any of the timber, and then to cut until the $150 shall be expended at the price across the herein stated, at which time another payment shall be made, based upon an average of the number of trees standing by a like number cut, and when all are cut the number of trees included in the last payment shall be measured, and if it is found that it has been overpaid said Glenn agrees to refund that amount, and if there has not been enough paid at the rate per foot as herein stated said Miller

agrees to pay the same. Said Miller is given one year from the date of this article in which to cut said timber."

June 12, 1893, Glenn brought this action to recover $148.85, amount alleged to be then due under said contract. In his petition he states that Miller paid the first installment as agreed and cut timber to that value, and again paid an installment of $155 and cut timber to that value and more; and again paid $27.60, and has cut timber to the value of more than the amount so paid of at least $26.95. He further states there are trees yet standing upon the land, and included in the contract, of the value when measured, as prescribed in the contract, including that already cut and not paid for, of the value of more than $135.85, in addition to the excess of $26.95, before mentioned. He also sues for $13 balance unpaid upon an order drawn in his favor by one McKinney and accepted by Miller.

To the petition a demurrer for want of jurisdiction by the court of the amount sued for, and also a general demurrer, was, January 22, 1894, filed, the former being sustained and the latter overruled. Thereupon the plaintiff moved to file an amended petition, but the motion was overruled and the action dismissed.

In the amended petition, which, as will be seen, was filed after the expiration of one year from the date of the contract, it is charged that Miller has refused to cut or pay for a large number of trees on said land of the description and dimensions mentioned in the contract, and has put it out of his power to perform it; that the trees he has cut were the most valuable portion of the timber and most accessible to a railroad near the land, and he, therefore, asks judgment for $75 in damages.

As the amount claimed in the original petition is much more than the sum necessary to give it jurisdiction, we suppose the lower court sustained the special demurrer upon the idea that an action could not then nor until after the end of one year from the date of the contract be maintained for the value of the uncut timber.

In our opinion the only meaning that can be properly given to the contract is that Glenn sold and Miller purchased at an ascertainable price per tree all the timber of the described kind and dimensions on said tract of land, and that each parcel or lot of the estimated value of $150 was to be paid for in advance, and when cut another lot was to be likewise paid for in advance, and so on until all was paid for and cut; and that such was the intended meaning and effect of the contract is shown by the provision that when all the trees were cut the number included in the last payment were to be measured, and Glenn to refund any excess received by him, and Miller to pay any deficiency there should be. Besides, the fact that Miller paid and Glenn received in advance of the cutting two installments of $150 and $155 shows the parties so interpreted the contract.

Plainly it was not intended that payment for any part of the timber should be postponed to the end of the contract period, because Miller was, by the terms of the contract, given one year from the date of it, and no more, in which to cut the timber. The object of that provision was simply to leave him without restriction as to the time within which to cut any particular lot already paid for, but require him to cut it all within the prescribed period. When the action was commenced all, and, according to the allegation of the petition, even more timber had been cut than was paid for, and as we construe the contract Miller was bound to pay and Glenn entitled to recover $150, or whatever may have been the amount in value, less than that sum, of all the uncut timber sold and purchased; and

as it is alleged there were trees standing on the land and included in the contract of the value, when measured as prescribed, of more than $135.85, we think there was not only a cause of action stated in the petition, but the court had jurisdiction, and it was error to sustain the demurrer. But there can not for the cause stated in the amended petition be a recovery of damages in addition to what the plaintiff may be entitled to under the contract, and, therefore, he may be required to elect according to which pleading he will prosecute the action.

The judgment is reversed, with directions to overrule the demurrer and for further proceedings not inconsistent with this opinion.

OSTERMEYER, &C. V. OSTERMEYER, &C.

(Filed February 6, 1897—Not to be reported.)

Collection of rents by one of several joint tenants—Right to credit for disbursements—In a suit for the sale and division of proceeds of a tract of land descended to plaintiffs and defendant jointly, in which plaintiffs alleged in their petition that defendant had for many years collected and retained rents from the property, amounting to more than the value of his interest, and asked a reference to a commissioner to ascertain the amount he had received, and there was a reference to a commissioner without the filing of an answer, under what was in effect a consent order, it was proper for the commissioner to hear proof of all disbursements; and, it appearing that defendant had paid out money to reimburse his uncle for money advanced to defendant's mother to pay off a mortgage upon the land, defendant is entitled to credit for the amount thus paid by him; and plaintiffs can not defeat the credit upon the ground that defendant and his mother and uncle were volunteers.

Geo. Washington for appellants.

Thomas Healey for appellees.

Appeal from Campbell Circuit Court.

Opinion of the court by Judge Guffy.

This appeal is prosecuted from a judgment of the Campbell Circuit Court rendered in the action of appellants against the appellees, etc.

It is alleged in the petition that the plaintiffs and appellees, John Ostermeyer and his sister, were the joint owners of three lots of land in the Licking addition to the city of Newport, and that the same could not be divided without detriment to its value.

It was also alleged that the said appellee had for many years past collected and retained rents from said property amounting in the aggregate to very much more than the value in money of the said appellees' one-fourth interest in the property. Precisely how much he has so collected and retained plaintiffs are unable to state or to ascertain with certainty, unless upon a reference to the master.

A sale of the property and division of the proceeds was prayed for, and a reference to the master was also asked to ascertain and report what rents had been collected from said property by the said appellee, for which he was properly chargeable. Without answer or further pleading the case was referred to the master, who proceeded to take proof and made his report to court, which was excepted to by appellants, which exceptions were sustained as to appellee's claim for commission for collecting the rents, and overruled as to the

residue of the report, and judgment entered allowing a claim of $550 to appellee, which item is the only matter now in dispute. It is claimed by appellee that there was a $900 mortgage on the land or lots mentioned, and to save the property that many years ago his uncle in some way paid for his (appellee's) mother or furnished her the money to pay off the mortgage so held by Miller, and that the mother repaid $300 thereof, and that afterwards the appellee paid the $550, which his uncle accepted in full of the balance due. The appellants insist that the claim was barred by the statute; that it was not a lien on the realty; that both the uncle and appellees were volunteers and acquired no claim against appellants nor lien on the lots by reason of the payment; that appellee did not plead the claim, hence no proof or consideration could be legally given to the claim, but the court below, as before stated, adjudged in favor of appellee as to the claim.

We quote as follows from the opinion and judgment of the learned chancellor: "It appears by the petition, the only pleading filed in the case, that Joseph Ostermeyer died in 1876, in this county, intestate, leaving four children, the plaintiffs and defendants, as his heirs at law. It charged that the defendant, John Ostermeyer, had collected the rent, etc. No answer was filed or required of John Ostermeyer, but an order of reference in the handwriffs of plaintiffs' attorney was made. While this is not expressly a consent order of reference, it was in fact so, and by it instead of requiring an issue to be made by the pleadings the master was to report what rents John Ostermeyer had collected 'for which he had failed to account.' Under this the court is satisfied he could hear proof of all disbursements and report thereon. It appears in the proof that Joseph Ostermeyer left a widow; that the real estate he left and which is sought to be divided was encumbered by a mortgage to one Miller. An uncle advanced the money to pay this off, and John Ostermeyer and his mother paid him back, John Ostermeyer paying $550 and reimbursed himself out of the rents. The master allowed him the credit, and plaintiff excepted to it, not because it was not an honest transaction or that there is the least doubt that he did pay it, but because he and his uncle were mere volunteers, because when he paid it he was an infant and the money he had belonged to his mother, as he could have none not her's, and because of the statute of limitations. The mother of John Ostermeyer had such an interest in preserving the property as entitled them to pay and be subrogated, and the uncle, while not having an interest in the property, and owing no duty to preserve it for his deceased brother's family, was not a stranger but very near of blood to them, and John Ostermeyer having reimbursed himself during the twelve years he collected rents without question, and by his brothers and sisters, for it can not be presumed that they allowed him to retain the rent during those years except for some such purpose. The court will not make him pay back the money and thus lose it."

It seems to us that the judgment of the court below ought to be and it is hereby affirmed.

BROOKS' ASS'EE, &C. V. SUMMERS.

SUMMERS V. BROOKS' ASS'EE.

KNIGHT V. BATES' ADM'R, &C.

(Filed February 6, 1897.)

1. *Dower—Estoppel*—In a suit by an assignee for creditors for the settlement of his trust, the prayer of the petition for the sale of the debtor's land free of dower, the consent of his wife to accept the value of her right of dower in money, followed by a judgment of sale, and an order directing the value in money of her potential right of dower to be ascertained, constituted a contract of record which ensued to the benefit of her estate after her death, although the value of her dower had not been ascertained at the time of her death.

2. *Advancements*—When a father conveyed land to his daughter, stating in the deed that a certain part of the recited consideration was the amount due from the grantor to the grantee on account of a sale of her land, in a proceeding brought by the grantor as guardian for her and her sister, in which he described himself and his two infant daughters as owners of the land, he being tenant by the courtesy, and further stating in the deed that the balance of the consideration was an advancement to the grantee, the acceptance of that deed by the grantee and her husband was a settlement of the amount due from the father on account of the sale of his daughter's land; and she can not in any event complain that a judgment in her favor for a balance found to be due her on that account was rendered subject to the value of her father's life estate, as he has not waived his right to have the value of his courtesy out of the proceeds of the land.

3. *The advancement operated to cancel* the remainder of the father's indebtedness to his daughter, even if that indebtedness was not adjusted by the agreement carried out by the execution of the deed, as an advancement to a child, unlike a legacy, operates to satisfy a debt due the child if the advancement be in amount equal to or greater than the debt.

Fairleigh & Straus for Brooks' assignee.

J. F. Combs for Knight and Summers.

Appeal from Bullitt Circuit Court.

Opinion of the court by Judge DuRelle.

Upon this record three appeals are presented for consideration. W. B. M. Brooks made an assignment to W. T. Morrow for the benefit of his creditors in October, 1892. In November, 1892, the assignee brought suit for the settlement of his trust, praying instructions by the court for a sale of the lands owned by his assignor, and for an adjudication as to the priorities of the creditors. Brooks, the assignor, and his wife, Bettie C. Brooks, were made parties defendant to this suit, and the petition prayed that the value of the dower should be fixed in money and the homestead assigned, in order that the lands might be sold free of lien, dower and homestead. To this petition Bettie C. Brooks filed an answer consenting to the sale of all the land mentioned in the petition, free from her potential right of dower, and agreeing to take the value of her said right of dower in said lands to be determined by the life-tables, and prayed that that value be ascertained. This answer was acknowledged before the clerk, after a separate examination of defendant, Bettie C. Brooks.

At the November term, 1892, the case was submitted for the advice of the chancellor, and a judgment rendered directing a sale of the lands belonging to the assignor. In that judgment it was pro-

vided as follows: "All questions as to the value of the defendant, Bettie C. Brooks' potential right of dower, and the priorities of the lien-holders in the funds arising from the sale of said lands, are reserved for further judgment of this court."

At the September term, 1893, the commissioner was, by an order of court, directed to take proof as to the age and condition of health of W. B. M. Brooks and his wife, Bettie C. Brooks, and report upon the value of the potential right of dower of Bettie C. Brooks. At the December term, 1893, the report was filed, showing the commissioner's estimate of the value of Mrs. Brooks' potential right of dower. Mrs. Brooks died the day after the report was filed.

In March, 1894, the administrator of Mrs. Brooks filed an answer claiming the value of the potential right of dower, praying the court to fix the same, and for its recovery by him as her administrator. It is claimed, on behalf of one of the creditors, that the death of the wife before any judgment fixing the value of her potential right of dower defeated her claim and that of her estate to be compensated for its value. In other words, the claim is that it was a mere possibility, and no right could pass to her estate until after a judgment establishing the right and fixing the value of dower had been entered. We are unable to agree with this contention. In our view, the prayer of the petition for sale, free of dower, the consent of Mrs. Brooks to accept the value of her right of dower in money, followed by a judgment of sale and an order directing the value in money of her potential right of dower to be ascertained, constituted a contract of record which enured to the benefit of her estate after her death. Had she lived, she would have been estopped from claiming dower in any of the lands sold, and, therefore, she parted with something of value as a consideration for the record contract which was thus entered into. The title obtained by the purchasers was free from her right of dower, and the purchase price was necessarily enhanced by that fact. When this was done her right to receive the value, to be thereafter ascertained, out of the proceeds became fixed and determined and passed to her legal representative.

The questions raised upon the two other appeals will next be considered. By his first wife Brooks had three daughters. Upon her death he was entitled to the possession, as tenant by curtesy, of certain land owned by her. In 1868 a suit was instituted in the Bullitt Circuit Court by Brooks, as statutory guardian, praying a sale of the land, upon the ground that a sale thereof would redound to the benefit of the infants. It is stated in the petition that the infants, "in conjunction with their said guardian," are the owners of the land. Commissioners were appointed to report the value of the infants' real and personal estate, the annual profits thereof, and whether their interests required a sale to be made. Judgment was rendered for a sale of the land, and bond was executed by Brooks in accordance with chapter 86 of the Revised Statutes. A sale was had, the purchase price being $5,511.82, and the purchase money was duly paid over to Brooks. One of his daughters died in infancy, her share passing to her sisters. One of the surviving daughters, Anna M. Brooks, married the defendant, Wilson Summers.

In March, 1884, Brooks and wife sold and conveyed to Summers a hundred acres of land at $30 per acre, and by the same deed conveyed to Anna M. Summers ninety-eight acres of land adjoining the hundred acre tract, the consideration for the ninety-eight acres being recited as follows: "The $2,830 mentioned as the consideration of the said ninety-eight acres is paid in this way, to wit: $1,830 of same was due from said W. B. M. Brooks to the said Annie May

Summers on account of money realized by him out of the sale of a certain tract of land which the said Annie May and her sister inherited from their deceased mother, Mary Jane Brooks (whose maiden name was Mary Jane Pendleton).

"Said land was sold by the said W. B. M. Brooks as guardian of the said Annie May under and by virtue of a decree of the Bullitt Circuit Court, rendered in the suit of W. B. M. Brooks, guardian, on petition for sale of land, No. 331, and $1,000, the balance of the $2,830 hereby given to the said Annie May Summers as an advancement, for which she is to account in the final settlement of the estate of the said W. B. M. Brooks."

Mrs. Summers appears, by the testimony, to have been between twenty-five and thirty years of age at the date of the execution of this deed. The deed was duly accepted, and the $3,000, stipulated as the price of the hundred acres, was paid by Summers. Mrs. Summers and her husband, in their original pleadings in this suit, admitted that Brooks was entitled to a life estate in the proceeds of the sale of the land as tenant by curtesy. In a subsequent pleading this admission was specifically retracted, and the claim, as made finally by the pleadings and in the briefs, is that she was entitled to $2,755.91, as heir of her mother and sister, out of the proceeds of the sale; and it was claimed in the pleadings that she was entitled to interest thereon. The trial court gave judgment in her favor for $925, *subject to the value of the life estate* of her father, W. B. M. Brooks.

It is contended also that Mr. Brooks' estate by the curtesy was not sold by the judgment, and did not pass to the purchaser under the sale, and that, therefore, he should be required to look to the property sold for his curtesy, and has no interest whatever in the proceeds of sale; but Mr. Brooks in that suit correctly described himself and the infant daughters as the owners of the land in question. Having so described himself in the petition, he would undoubtedly after the sale be estopped from setting up any claim as tenant by the curtesy.

Much stress is laid by counsel for Mrs. Summers upon the phraseology used in the deed and in Mr. Brooks' deposition, viz, the recital in the deed that the money "was due" from Brooks to Mrs. Summers, and the statement in the deposition that it was what he "owed her," as showing that he had waived his estate by curtesy. But we are of opinion that these recitals did not estop him from claiming his life estate by the curtesy up to that date in the sum of money which he then described as due, even if the language used was intended to amount to any thing more than a mere expression of the fact that so much money was to come to Mrs. Summers from him.

Upon the other hand, it is claimed by counsel for the assignee that the acceptance of the deed, with full knowledge of its recitals, and the retention of the land by Summers and wife without protest, indicate that the value of Brooks' life interest had been deducted from the amount which he paid over to Mrs. Summers by the conveyance of the land. In this contention we are inclined to agree. It is true, however, that it is not definitely shown that at the time of the conveyance Mr. Brooks made any full statement of the amount received by him from the sale of the land which descended from his wife, and it is claimed with much earnestness that that fact prevents Summers and wife being estopped by their acceptance of the deed. But in the same deed was made an advancement of $1,000, and from the testimony there can be no doubt that the intention of the grantor, Brooks, was to fully pay his daughter the share which

would ultimately come to her out of estate of her mother, and to give her the surplus, whatever it might be, by way of an advancement, to be accounted for out of her share in his estate. Such being the manifest intention of the grantor, we can not hesitate in the conclusion that the advancement operated to cancel the remainder of his indebtedness to his daughter, even if that indebtedness was not adjusted and settled by agreement carried out by the execution of the deed.

The weight of authority seems to be clear that an advancement to a child operates to satisfy a debt due the child if the advancement be in amount equal to or greater than the debt. The rule as to advancements appears to be directly opposite, in this respect, to that followed in the case of legacies, though the reason for the difference, as said by Mr. Pomeroy, "is certainly difficult to perceive." (Pomeroy's Equity Jurisprudence, section 540; 1 Am. & Eng. Enc., second edition, page 771; Kelly v. Kelly's ex'ors, 18 Am. Decisions, 710.)

For the reasons given the judgment is reversed upon the appeal of Morrow v. Summers, and affirmed upon appeals of Anna M. Summers v. Morrow, assignee, and Knight v. Bates' adm'r.

BEARD V. SHARP.

(Filed February 5, 1897.)

1. Life insurance—Under the charter of the United Order of the Golden Cross, a co-operative life insurance company, a member must designate as a beneficiary either one of the members of his family or one dependent upon him.

2. Insurable interest—Even if the law of the order were so construed as to allow a member to name a stranger as beneficiary, the benefit certificate would be void as to the stranger for want of an insurable interest, as insurance can not be taken out upon the life of a person for the benefit of one who has no insurable interest therein.

3. Same—Where a son, who had for a number of years kept up a benefit certificate upon his mother's life for his own benefit, consented, in order to raise money to pay the premiums, to accept a stranger as a joint beneficiary with him, and a new certificate was issued for that purpose, that certificate was void as to the stranger, and one-half of the insurance having been paid to him, the son is entitled to recover it from him, less the amount paid by him in premiums, for, although both were parties to an illegal transaction, the plaintiff was not equally in fault with the defendant.

T. T. Forman and C. F. Elkins for appellant.

H. Marshall Buford for appellee.

Appeal from Fayette Circuit Court.

Opinion of the court by Judge Burnam.

The plaintiff, Beard, alleged that in 1881 he procured his mother, Julia Beard, to apply to the Supreme Commandery of the United Order of the Golden Cross for insurance upon her life for his sole benefit; that on the 8th day of February, 1881, there was issued upon said application a benefit certificate upon the life of said Julia Beard, payable upon her death to the plaintiff out of the benefit fund of said association, alleging further that the United Order of the Golden Cross was a regularly-incorporated insurance company under the

laws of the State of Tennessee, having for its purpose co-operative life insurance, and by assessment upon its members to create a benefit fund, and with authority to pay out the same upon the death of a member, to the family of such deceased member, the amount of said benefit certificate.

Plaintiff files a copy of the charter of said company. Law 2, section 2 of said charter provides that applicants shall enter upon the medical examiner's blank the names of the members of his family or those dependent upon him to whom they desire their benefit certificate paid, and the name shall be entered in the benefit certificate.

The plaintiff alleges that he paid all the dues and assessments upon the benefit certificate above mentioned from the time it was issued to him to the 9th of December, 1893; that he had paid out in the aggregate to keep said benefit certificate alive the sum of $923.70; that about this time, owing to financial distress, he was unable to pay the assessments and applied to the defendant, Sharp, for assistance, and offered to assign him a fourth interest in the benefit certificate if he would pay the dues and assessments upon the policy from that time on as long as Julia Beard might live. The defendant declined this, but said he would take it on the terms proposed if the plaintiff would agree to give him one-half of said benefit certificate. He alleges that at the instance of defendant he surrendered his certificate, issued in 1881, and the defendant induced the mother of the plaintiff in 1893 to ask for a cancellation of the benefit certificate of 1881, and for the issuance of another, wherein the plaintiff and the defendant were both named as beneficiaries, one-half each. In accordance with said application the company issued another benefit certificate on December 9, 1893, on the life of said Julia Beard, wherein J. B. Beard, the plaintiff and son of Julia Beard, and S. G. Sharp, the defendant, named as friend, were to have one-half each of said benefit certificate, and the old certificate was surrendered up to the company by defendant, and the provisions of the latter were accepted by the deceased in writing on the face thereof. The new certificate was delivered to and held by the defendant until the death of Julia Beard, which occurred on the 16th day of January, 1894.

Defendant, pursuant to his agreement, paid all the dues and assessments chargeable against said certificate from December 9, 1893, up to February, 1894, amounting to $37.80. Due proof of the death of Julia Beard being made and the benefit certificate of December 9, 1893, having been surrendered, the company issued its draft for $2,000, the amount of the certificate, payable to the order of both plaintiff and defendant, which money was collected by the defendant, the latter retaining $1,000 of said sum and paying over to the plaintiff the other $1,000.

It is further alleged that defendant Sharp was not of kin to Julia Beard nor a creditor of hers nor in any manner interested in the continuance of her life, and that he assumed the payment of the assessments on the certificate from the 9th day of December, 1893, as a mere speculation with the hope of realizing a large profit by the early death of Julia Beard.

Plaintiff claims that the agreement made with Sharp by which he became a beneficiary under the certificate, was contrary to public policy and void; that the withholding by Sharp of the $1,000 realized from said certificate was illegal, and that same properly belonged to plaintiff, less the sum of $37.80, with interest thereon, the money paid out by Sharp. He further alleges that at the time the benefit certificate was collected it was managed by the defend-

ant, and that he did not know his legal rights at the time he accepted the $1,000 from said Sharp as his part of said benefit certificate.

The defendant filed a general demurrer to plaintiff's petition, which was sustained by the court below, and, plaintiff declining to plead further, the court dismissed his bill. Plaintiff at the time excepted, and brings his appeal to this court and asks a reversal.

It has often been held by this court that a party who has no insurable interest in the life of another can not sue for or recover on a policy of insurance which has been issued to him, and that he can only collect and hold the insurance money to the extent that the deceased may be indebted to him.

This court, in the case of Caudell v. Woodward, 96 Ky., 646, has passed upon the rights of parties under circumstances almost identical with the case at bar. In that case Matilda Woodward was a member of the United Order of the Golden Cross, and the benefit certificate of Mrs. Woodward was payable to her son, James Woodward, one-half, and one-half to her friend, Katherin Caudell. In the contest over the fund the court below adjudged the whole of it to the son. That opinion construed the provisions of the charter of the company under facts similar to those in this case, and held that the beneficiary of a certificate identical with this must be one of the members of the family or one dependent upon him, holding further that any other construction would open the flood-gates of speculative insurance and frustrate the humane and generous purposes of the order. The member might direct the beneficiary of the certificate, but himself must do so within the restrictions contemplated by the organic law of the society, and confine his choice to some member or members of his family, or some one or more of those dependent upon him. We construe the organic law of the order, therefore, as limiting the choice or direction of the applicant as provided in the Constitution, and requiring him to name a member of his family or some one dependent upon him as the beneficiary of the benefit certificate; holding, moreover, that if the law of the order were so construed as to allow a member to name a stranger the certificate would be void as to the stranger, for nothing is better settled in this State than that one obtaining a policy of insurance on the life of another must have an insurable interest in the life of that other, and that the stranger does not obtain the insurance but the assured voluntarily does do for the other's benefit was held to embody the dangerous principle of allowing speculative insurance.

The court further held in that case that the contract of insurance was not invalidated by the designation of a person prohibited by the law to be a beneficiary, but that the member of the family named jointly with the stranger was entitled to the whole fund. (Cook on Life Insurance and Benefit Societies, page 106, and the case of Weigelman v. Bronger, 96 Ky., 132.)

The only difference between that case and the case at bar is that there the money had not actually been paid over by the insurance company, and the contest was as to whom the fund belonged, whilst in this case the money has been actually paid and divided, and the appellee seeks to defeat responsibility on the plea that the arrangement under which the appellant and the appellee, Sharp, became joint beneficiaries under the benefit certificate of 1893 was against public policy and void, but that as the contract had been executed and that both appellant and appellee were parties to said contract they were in *pari delicto* and, therefore, equity would not relieve either party against the other, but would leave both parties exactly

where it found them, because both were equally at fault. The maxim, *in pari delicto portior est defendentis*, had been supported by the uniform current of decisions of this court and of the courts of nearly every State in the union, but the question involved is whether that doctrine should be applied in this case.

The appellate court, in the case of Ford's adm'r v. Lewis, 10 B. M., 127, where Lewis, for the purpose of hiding his property from his creditors, conveyed same to Ford, held that no trust resulted, as the grantor acted fraudulently and without consideration, and that, therefore, it left the parties in *statu quo*.

Another case was that of Laughlin v. Dean, 1 Duvall, 20. In that case it was held that the public policy forbid the courts to aid either party in a contract for the sale of Confederate money.

In another case, that of Creekmore v. Chitwood, 7 Bush, 318, the court held that a contract for moonshine brandy, made and sold in violation of the revenue laws, was void, and declined to interfere.

In the case of Radcliffe v. Smith, 13 Bush, 173, the court held that a contract between the principal and his surety on a bail bond, whereby the principal conveyed lands to the surety in consideration of the surety's agreement that the principal might leave the State and fail to answer the charge against him, was unlawful and against public policy, and that the parties were in *pari delicto*, and, therefore, the petition of the principal to have the deeds declared mortgages ought to have been dismissed by the court.

It has been pointed out that in all these cases there was an element of moral turpitude which involved the nullification of the laws of the State. Now, does the case at bar come within the class of these adjudicated cases? The law holds that the contract of insurance by which the defendant became a beneficiary under the benefit certificate on the life of Julia Beard, a stranger in blood and not as debtor, was against public policy because it was a wagering contract; but, while such a contract might lead to crime, it was not necessarily criminal as in all other cases cited above, in which this principle of law has been invoked and sustained by this court. In all the above cases the party complaining was equally at fault with the defendant, but is that so in the case at bar? He had an insurable interest in the life of his mother, and had carried this insurance for thirteen years at heavy expense to himself. His necessities compelled him to borrow money on some terms to prevent the loss of the whole policy to keep up the assessments. There was nothing criminal in this. The appellant was a necessary party to the making of the contract by which the second certificate was issued; its terms and conditions were all suggested and executed by the appellee. The latter's only motive in entering into the arrangement was gain, whilst the appellant sought to save what he had already invested in carrying the said benefit certificate from 1881 to 1893, and only acceded to the terms of appellee under the pressure of poverty and dire necessity.

In the case of Carmack v. Lewis (15 Wallace, 643), the court used this language: "John E. Lewis, the husband of complainant, who sues as administratrix, being indebted to Carmack in the sum of $70, and being in bad health, procured at Carmack's suggestion the insurance of his life in the New Jersey Mutual Life Insurance Company for $3,000. Carmack paid the premium for the first year, and took an assignment of the policy from Lewis to himself. He also took from Lewis a note for $3,000, which he admits was without consideration, and he had Lewis' note for $70, the indebtedness really due. Lewis died before the expiration of the first year, and Carmack collected from the insurance company the $3,000 and paid over

one-third of that sum, less the amount of the premium paid by him, to the widow of the deceased, and this suit was brought to recover the balance of the $3,000." Carmack alleged that the policy was taken out under an agreement between Lewis and himself that he should pay the premium for the seven years the policy was to run, and in consideration of those payments and what Lewis owed him that he should, in the event of Lewis' death during the life of the policy, receive two-thirds of the amount of the policy, and pay over the other third to his wife and heirs. The court held that under these circumstances Carmack could, in equity and good conscience, only hold the policy as security for what Lewis owed him when it was assigned, and such advances as he might afterwards make on account of it, and that the assignment of the policy was valid only to that extent, and decreed that he should pay over the balance after deducting this sum. The court further held that they did not see such evidences on the part of decedent of a corrupt transaction as to forbid the court from doing justice between the administratrix and Carmack after the amount secured by the policy had been paid by the company to the latter; and it further held that "the receipt of the one-third of the insurance money by the complainant does not, we think, under all the circumstances of the case, conclude her as a settlement of the matter in dispute. It is obvious that she was ignorant of the full extent of her rights."

The case of Warnock v. Davis (104 U. S., 924), was a case where decedent applied to the Protection Life Insurance Company for a $5,000 policy on his life, and on the same day agreed with Scioto Trust Association that if the latter would pay all dues and assessments on said policy that he would assign nine-tenths of said policy to said trust association, the other one-tenth to be paid to Crosser's widow, and such assignment was made. Crosser died, and said trust association collected the $5,000, and paid one-tenth ($500) to the widow, and Warnock, as administrator of Crosser, sued the association for the balance after deducting the $500 and dues and assessments paid by said association. The Supreme Court, in deciding this case, held that the policy executed on the life of the deceased was a valid contract, and as such was assignable by the assured to the trust association as security for money lent to him or advanced for premiums and assessments upon it, but that it was not assignable to the association for any other purpose. The association had no insurable interest in the life of the deceased, and could not take out a policy in its own name, as it would be a mere speculative contract on the life of the assured; and, although the agreement between the trust association and the insured was invalid, is, so far as it provides for an absolute transfer of nine-tenths of the proceeds of the policy upon the conditions named, it was not of that fraudulent kind with respect to which the courts regard the parties as alike culpable, and refuse to interfere with the results of their action. No fraud or deception upon anyone was designed by the agreement, nor did its execution involve any moral turpitude. It was one which must be treated as creating no legal right to the proceeds of the policy beyond the sums advanced upon its security; and the courts will, therefore, hold the recipients of the money beyond those sums to account to the representative of the deceased." The court further held in that case that "it was lawful for the association to advance to the assured the sums payable to the insurance company on the policy as they became due, and it was also lawful for the assured to assign the policy as security for their payment. The assignment was only invalid as a transfer of the proceeds of the policy beyond

what was required to refund those sums, with interest. To hold it valid for the whole proceeds would be to sanction speculative risks on human life and encourage the evils for which wager policies are condemned." The court directed a judgment for plaintiff for the amount collected from the insurance company, with interest, after deducting the sums already paid to the widow and the sums advanced by the defendant.

In the case of Martin v. Richardson, 94 Ky., 183, Martin had sold to Richardson a lottery ticket. After the drawing he noticed that same had drawn a prize. He then went to Richardson and, concealing from him this fact, induced the said Richardson, by artifice and subterfuge, to exchange this ticket with him for another ticket in another lottery. The facts coming to the attention of Richardson, he brought suit to recover the amount of the prize drawn on said ticket. In passing upon this question, the court held that dealing in lottery tickets was a violation of law, and that if the action had been on the ticket for the prize no relief would have been granted; but the money, having been collected and in the hands of Martin by reason of frauds practiced on Richardson, the latter was allowed to recover, the court, in passing on the case, using this language: "Not all contracts in which both parties are at fault are to be held to be so equally, but the court will, in certain cases, even when both appear to be at fault, inquire as to where the greater blame rests, and grant relief to the one less in fault."

In the case at bar the appellee holds $1,000 of the money collected on the aforesaid benefit certificate under a contract which he could not have enforced against the company in his own name, except to the extent he had in good faith advanced money to pay the accrued assessment; but, as the court held in the case of Caudell v. Woodward, *supra*, the contract of insurance was not invalidated by the designation of appellee as one of the beneficiaries under same, he being a person prohibited by law to be a beneficiary. The appellant in this case could have maintained an action against the insurance company to recover on the certificate, and he would have been entitled to a judgment for said fund. It seems to us that the appellee in this case could have legally held the benefit certificate for no other purpose than as security to indemnify him for moneys advanced to pay the premium and to be so advanced, and to this extent his claim to said policy was just; but all overplus of said fund he holds as trustee for the benefit of the appellant in this action, and under an implied obligation to pay over same.

For the reasons indicated herein, it seems to us that the petition of plaintiff in this case states a good cause of action if the facts are as alleged, and that the lower court erred in sustaining the demurrer to same.

Wherefore, this cause is remanded for proceedings consistent with this opinion.

PHŒNIX INSURANCE CO. OF BROOKLYN V. ANGEL, &C.

(Filed February 2, 1897—Not to be reported.)

Fire insurance—Void condition—A provision in a policy of fire insurance, declaring that the failure of the insured to keep his books and inventory in a fire-proof safe shall work a forfeiture of the policy, is without consideration, and, therefore, void.

B. F. Buckner for appellant.

P. B. and Upton W. Muir and Richards, Weissinger & Baskin for appellees..

Appeal from Jefferson Circuit Court, Law and Equity division.

Opinion of the court by Judge Guffy.

This appeal is prosecuted by the appellants, the Standard Fire Insurance Co. of Kansas City, Missouri, and the Phœnix Insurance Co. of Brooklyn, New York, from a judgment of the Jefferson Circuit Court, Law and Equity division, rendered in the consolidated actions of S. Lehman & Son and Curry, Tunis & Norwood v. Angel & Vanderpool, &c. The above-named appellees held debts due them from the appellees, Angel & Vanderpool, and instituted suit thereon and caused appellants to be summoned as guarnishees, and alleged that appellants were indebted to Angel & Vanderpool in the sum of $750. The indebtedness was alleged to exist by reason of a policy of insurance issued by the first-named appellant, payable to appellee Angel for $750, $300 being on the store, $150 on the furniture and fixtures, and $300 on the stock of goods. The entire property was destroyed by fire in October, 1891. The appellants resisted a recovery upon several grounds, viz: that $130 of the claim had been assigned to C. W. Howe; that the building and personal property insured were not at the time the property of D. B. Angel, but were the joint property of the firm of Angel & Vanderpool. The policy only requires the company to pay three-fourths of the value of the property lost; that the assured shall at least once a year take an itemized inventory of the stock and keep books of accounts showing the purchases and sales of said stock, and shall, during the hours that said store is closed from business, keep such books and inventory securely locked in a fire-proof safe or other secure place from fire, and that a failure to observe the above condition shall work a forfeiture of the policy. Angel & Vanderpool made no defense to the suits of their creditors, hence the contest was between the company and the appellees. The proof clearly showed that Angel owned the land, had paid for it at the time of the insurance, but had no deed to the same, but that the agent of the company was advised of the state of the title, and that part of the defense is not insisted on now. The Phœnix Insurance Co. had reinsured the risk, and for that reason was made a party and held bound with the other appellant.

It seems that appellants moved for a rule on plaintiffs to compel them to make Howe a party, which motion was properly overruled. If appellant had made its answer a cross petition against Howe and had sufficiently shown that he was a necessary party, doubtless the court would have permitted him to have been made a party. It is admitted that Vanderpool was the owner of half the stock of goods at the time of the insurance, but there is proof conducing to show that the agent of appellant was aware of the fact, and included the goods in the same policy to Angel to save the trouble of issuing two policies, Angel being the sole owner of the other property. The taking of the inventory and account of purchases and sales seem to have been complied with, hence the effect of noncompliance need not be decided.

It is, however, admitted that the inventory and books were not kept in a fire-proof safe nor in any fire-proof place or apartment, but it is claimed that the agent at the time knew that the assured had no fire-proof safe or anything of the kind, and waived that part of the policy, and if that be true then the failure of the assured in that regard can not defeat a recovery in this case.

But we are of the opinion that a failure to comply with such a provision, although in the policy, would not work a forfeiture thereof. It is without consideration. It does not decrease the risk, and at most would only tend to the better preservation of the evidence to show the amount of the loss sustained in case of fire. It does not seem to us that it is competent to contract with the assured for the preservation of testimony in behalf of either party.

It is also contended by appellant that the evidence did not authorize the judgment, and especially as to the furniture and fixtures. The evidence as to the value of the entire property shows it to be worth $1,400 or $1,500.

It seems to us that the evidence introduced sufficiently sustains the judgment of the court below, and that judgment is affirmed with damages.

SOUTH COVINGTON & CINCINNATI STREET RY. CO. V. MCCLEAVE.

(Filed February 3, 1897—Not to be reported.)

1. *Carrier—Duty to warn passenger of danger*—It was the duty of the conductor of an electric street car, when he saw a passenger in danger from having his arm partly outside the car window, to warn him of his peril, and contributory negligence of the passenger is not a legal excuse for non-performance of that duty.

2. *Witnesses*—That the conductor had been in the courtroom during the trial, and heard some of the other witnesses testify before he was called, was not sufficient reason for depriving defendant of his testimony.

3. *Same*—The plaintiff's wife was not a competent witness for him, and the court, when informed by the attorney for defendant that he inadvertently, while suffering from a severe headache, consented for her to be sworn, should, on his motion, have excluded her testimony.

Simrall & Galvin for appellant.

Wright & Anderson for appellee.

Appeal from Campbell Circuit Court.

Opinion of the court by Chief Justice Lewis.

The cause of this action as stated by the appellee in his original petition is that while occupying as passenger a seat in an electric street car belonging to appellant that was going over the bridge from Cincinnati, Ohio, to Newport, Ky., his right elbow, which protruded through the window slightly outside the car, came in contact with an iron girder of the bridge and his arm was broken in two places; that said injury resulted from the negligence of appellant in failing to provide a screen or guard on the sides of the car so as to prevent passengers putting their arms or other parts of the body outside the windows, and in failing to put on the inside of the car the printed notice or warning of the danger to passengers thus exposing their persons.

To the petition a general demurrer was sustained, and thereupon appellee filed an amended petition, in which he stated that the conductor having charge of the car in which the injury occurred saw the peril of appellee in time to have warned him of his danger, so that he could have withdrawn his arm and avoided the injury.

To the petition thus amended appellant filed an answer, in the first paragraph of which is contained a denial that said conductor

saw appellee's peril in time to warn him of it, and in the second is the statement that appellee voluntarily and negligently put his arm through and beyond the window frame of the car in which he was riding when injured, and but for that carelessness and negligence the injury would not have occurred.

But to the second paragraph of the answer a general demurrer was sustained, thus leaving for trial the single issue stated in the following and only instruction given: "If the jury believe from the evidence that the conductor in charge of defendant's car saw the plaintiff with his arm out of the car window so as to be in danger of being struck by any part of the bridge in time to have warned him of his peril before the accident occurred, and failed to warn him, they will find for the plaintiff and will fix his damages at an amount which will reasonably compensate him for any pain he endured, for any expense he incurred for the attendance of a physician or for medicine, for any loss of time from the pursuit of his avocation and for any impairment of his capacity to earn money, the direct result of said accident in their discretion governed by the proof; not, however, in all to exceed five thousand dollars."

Appellant requested the court to instruct the jury to find for it upon the hypothesis that appellee would not have been injured but for his own negligence in putting his arm so far outside the car as that it came in contact with the bridge. But the court refused to so instruct, and we think did not err in that particular, for no degree of contributory negligence on the part of even a trespasser will release a person in charge of a train or single car, whether operated by steam or electricity, from the legal obligation to use reasonable effort to avoid injuring him if his peril is discovered in time to do so, and we do not see why the conductor of an electric or steam car should not be held to the duty of giving warning to one of his passengers when he actually sees him in a position or place on the car of peril to life or limb, and contributory negligence of such passenger is not a legal excuse for the nonperformance of that duty; and that a passenger on one of appellant's cars passing over that bridge is in peril when his arm or head protrudes two or three inches is plainly shown by the evidence.

But in our opinion the lower court erred to the prejudice of appellant in refusing to permit the conductor in charge of that car to testify, and also in permitting the testimony of appellee's wife to go to the jury.

That the conductor had been in the courtroom during the trial, and heard some of the other witnesses testify before he was called, was, under the circumstances, not sufficient reason for depriving appellant of the benefit of his testimony; for on the single issue submitted to the jury whether he did in fact see the position in which appellee had his arm he could probably better than any other person know and state.

Appellee's wife was not a competent witness, and, when informed by the attorney of appellant that he inadvertently and while suffering from a severe headache consented for her to be sworn, the lower court ought, it seems to us, to have on his motion excluded her testimony.

For the errors indicated the judgment is reversed and case remanded for a new trial consistent with this opinion.

GAULT, &C. V. EQUITABLE TRUST CO. OF NEW LONDON, CONNECTICUT.

(Filed February 3, 1897.)

1. *Mortgages—Plea of limitation by junior mortgagee*—A junior mortgagee who was not made a party to an action to enforce a prior mortgage, can not after the lapse of nearly ten years after judgment in favor of the prior mortgagee on his debt and a sale of the land, at which sale the junior mortgagee was present, institute his action to recover on his mortgage, and set up the statute of limitation to annul the former decree of the court.

2. *The only right of a junior mortgagee*, who has not been made a party to the foreclosure of a prior mortgage, is to redeem the property from that mortgage.

3. *Interest*—The bonds in question having been dated at Louisville, Kentucky, and delivered there, and the amount received on same having been paid there, the contract was with reference to the Kentucky laws, there being nothing in the transaction to make it a New York contract, except the bonds being made payable in that State; hence, the provision for the payment of interest at the rate of ten per cent., which was then lawful in this State, should govern the computation of interest.

4. *The appellee having become the owner of all the interest of the mortgagor* in the land by having all that interest sold and conveyed to itself, the latter can not be forced to account for the rents from the property.

W. O. Harris, Lane & Burnett and R. W. Woolley for appellants.

Bullitt & Shield for appellee.

Appeal from Jefferson Circuit Court, Law and Equity division.

Opinion of the court by Judge Paynter.

In 1874 Joshua J. Hair, the owner of certain property in Louisville, gave the Equitable Trust Co. of New London, Conn., a mortgage on it to secure the sum of $5,000, evidenced by five bonds for $1,000 each, payable five years after date.

In 1875 Hair gave appellants, Joseph Gault & Sons, a mortgage on the same property to secure a debt which he owed them.

Hair failed to pay the sums due the Equitable Trust Co. and certain taxes on the property. In 1879 it brought suit in the Federal Court to enforce its mortgage lien on the property. To this suit it failed to make Joseph Gault & Sons parties. A judgment was rendered in that court enforcing its mortgage lien.

By the provisions of the mortgage the trust company had a lien for taxes and insurance premiums paid on the property, and such as were thus paid, together with the debt, interest and costs, amounted to something like $6,500 when the property was sold. The Equitable Trust Co. became the purchaser of the property under the judgment at $5,000. The sale was confirmed, deed was made to it, and it was regularly placed in the possession of the property. The appellant, Joseph Gault, was present at the sale. Appellee took possession of the property in 1880, and held it until this suit was brought. It has endeavored to sell it, but has never been offered more than $6,000 for it.

Nearly ten years after the appellee took possession of the property this action was brought by the appellants, setting up its junior mortgage, and, among other things, they plead that the bonds executed by Hair were bills of exchange, and their recovery barred

by statute of limitations. They do not plead that the statute barred them at the time the suit was filed by the appellee against Hair to recover judgment thereon and enforce the mortgage lien. Counsel for appellants insist that, although appellee obtained judgment on its debt, and had the mortgagor's equity of redemption sold to pay it, still the appellants can plead the statute of limitations against the mortgage debt which was merged in the judgment debt, and all of the mortgagor's interest in the property sold to pay it. Some cases are cited which counsel claims supports his contention. We have examined the cases, and are of the opinion that none of them sustain this view. If any court had delivered such an opinion we would not follow it because, in our opinion, to do so would be to follow a rule which had for its foundation neither reason nor justice.

In Sauger v. Nightingale, 122 U. S., 185, the statute of limitations was pleaded on a state of facts substantially the same as in this case, and the court said: "It is difficult to see from what standpoint he, in this suit, in which he is complainant, seeking to foreclose his own mortgage, can set up the statute of limitations, not as a defense, for he is not sued, and nobody is troubling him about his claim, but as a positive weapon to set aside and annul in this collateral proceeding the decree of a court of competent jurisdiction, with proper parties before it, which foreclosed a mortgage prior in time and equal in equity to his, under which the property was sold and passed into other hands. Certainly the court which rendered that decree had jurisdiction of the property and of Nightingale, the defendant, who was in possession, and who had the legal title. It is equally as certain that whether Nightingale ought to have pleaded the statute or not he did not do so, and it is now too late to set it up as a defense to that suit. In this case there is no pretense that the statute had barred the right to recover before appellant filed its suit in the Federal Court."

In Jones on Mortgages, volume 11, section 1431, it is said: "The only right of a junior mortgagee, who has not been made a party to the foreclosure of a prior mortgage, is to redeem the property from that mortgage."

The case of the Bank of U. S. v. Carrolls, 4 B. M., 4, involved the question as to the rights of a holder of a junior deed of trust when the holder of a prior deed of trust, in an action to which the beneficiary of the junior deed had not been made a party, had obtained a decree therefor, and had sold thereunder the grantor's equity of redemption. The court said that "the deed of trust for the benefit of the Carrolls being valid, and prior in time to that of the complainants, their specific prayer can not be granted. But they, according to well established precedents, could be entitled to relief only upon the terms of paying the money to the Carrolls received by their prior deed, and redeeming their prior lien."

At the time the money was borrowed the laws of Kentucky allowed ten per cent. interest, while under the laws of New York seven per cent. interest was allowed, and if a greater interest was charged the contract as to principal and interest was rendered void; besides the party contracting for a rate above seven per cent. was guilty of a misdemeanor.

The contract was for ten per cent. per annum, payable semi-annually, the bonds to bear seven per cent., and the loan to be discounted so as to net to the lender ten per cent. This was the terms of the contract as to interest until the debt matured; then it was to draw ten per cent. per annum.

The bonds were dated at Louisville, Kentucky; they were deliv-

ered there, and the amount which was received by Hair was paid to him there by draft.

There is nothing in the transaction which would make it a New York contract, except the bonds were made payable in New York.

The entire transaction shows that the parties were contracting with reference to the interest laws of Kentucky. In view of that fact, we are of the opinion that the rate of interest contracted for being allowed by the laws of this State, the debt should be computed at ten per cent. interest.

It was said, in Cromwell v. County of Soc., 96 U. S., 62, "the position of counsel that, because the rate of interest in New York, where the bonds were payable, is only seven per cent., the bonds can only draw that rate after maturity, is not tenable. When the rate of interest at the place of contract differs from the rate at the place of payment, the parties may contract for either rate, and the contract will govern. Miller v. Tiffany, 1 Wall., 298; Depau v. Humphreys, 8 Mart (La.), 1; Chapman v. Robinson, 6 Paigs (N. Y.), 627, 634; Peck v. Mayo, 14 Vt., 33; Butters v. Olds, &c., 11 Iowa, 1.

The bonds were made with reference to the law of Iowa as to interest, and not to that of New York, where interest above seven per cent. is deemed usurious, and avoids the whole contract."

In Balme v. Wonbrough, 38 Barbour, 362, the court said: "The usual rule of law is that contracts are to be construed and adjudged by the law of the place where they are made, except when they are to be performed in another State or country, and in such cases their validity is to be decided by the law of the place of performance. It appears, however, that cases involving the rate of interest, where it is stipulated in the contract at the place where the loan is made, in conformity with the law of the place, at a higher rate than is permitted by the law of the place where the payment is to be made, are not within the exception, but the specified rate of interest at the place of the contract has been allowed."

Many cases could be cited in support of this doctrine. The appellee entered upon the premises in question, not *as a mortgagee*, but as the *owner* of the property. It had become the owner by having all the interest which the mortgagor had in it sold, and that interest conveyed to it.

The mortgagor had no interest remaining, and under no circumstances could he have compelled the appellee to have accounted to him for rents of the property. The person holding mortgage did not have any interest in the rents, and consequently no right to recover them against the purchaser of the equity of redemption.

There is a well-defined and marked distinction between a *mortgagee* in possession and the *purchaser* of the mortgagor's equity of redemption.

Until the mortgagor has lost his equity of redemption, or his right to redeem from a sale, he is entitled to the rents and profits of the mortgaged property. When the fee has vested in another by purchase or decree of court, then his rights to rents and profits cease.

Jones on Mortgages, section 1118, says: "The purchaser, standing in the place of the mortgagor or owner of the premises, is not liable to account for rents and profits."

In Gaskell v. Veguesney, 122 Ind., 244, it was said: "The junior mortgagee has no right, therefore, to compel an accounting when the mortgagor has no such right, for it is through the mortgagor and the equity existing between him and the senior mortgagee that he is enabled to compel an application of the rents and profits to the satisfaction of the senior mortgagee. For these reasons, it is well

settled that in order to charge a mortgagee with rents and profits it must be shown that he has occupied the mortgaged premises under his mortgage. If the title of the mortgagor has been divested, and the mortgagee has been in possession under a title derived from the mortgagor, he is not chargeable with rents and profits of the mortgaged premises."

Authority for this conclusion is abundant. If there was an error, the matter of taxes and repairs in fixing the amount due appellee, more than $2,000, was remitted of record and credited on that amount.

In view of the fact that appellants have never offered to or alleged a willingness or ability to redeem the property from appellee, and in view of the fact that the property is not worth but little more than one-half the amount due appellee, it is not at all clear that a reversal should be granted for a slight error in fixing the amount due appellee, one that could not affect the rights of appellants, because it is perfectly clear from the evidence in this record that appellants never will nor could they afford to redeem the property for two-thirds, much less the whole of the debt due appellee. The value of the property would not justify them in doing so. Fifteen years ago it sold for $5,000, at which sale Joseph Gault was present, and, notwithstanding appellee has improved it somewhat since then, it is of but little more than that value now.

The judgment is affirmed.

HALE V. HOWARD'S ADM'R, &C.

(Filed February 3, 1897—Not to be reported.)

Settlement of partnership.—In this action against an administrator upon a promissory note executed by his intestate to the plaintiff for the balance due upon the purchase price of an interest in a stock of goods owned by plaintiff, whereby they became partners, as it appeared that the plaintiff, upon the death of his partner, retained the stock of goods without accounting therefor, and the evidence as to the state of the partnership accounts was so unsatisfactory that no settlement could be based thereon, the chancellor properly dismissed the petition, thus leaving the partnership to stand settled, and the note sued on to stand satisfied.

Howes & Patrick and Wm. H. Holt for appellant.

D. D. Sublett and John L. Scott & Son for appellees.

Appeal from Magoffin Circuit Court.

Opinion of the court by Judge Hazelrigg.

The appellant, Benjamin Hale, sued the appellee, who was the administrator of Vincent Hale, the brother of the plaintiff, on the following memorandum: "Vincent Hale, remainder debt, $224.48, to Benjamin Hale. December 22 day, 1889."

He alleged that the memorandum was written by Vincent and delivered as his promissory note for the sum named in it, and was so accepted by the plaintiff.

In an amended petition he averred that a short time before the date of the writing he sold his brother a half interest in a store at Goodloe, Floyd county, Ky., and for which his brother paid him all the purchase price except $224.48, and the writing was executed for that balance.

The administrator denied the execution of the paper by his in-

testate, or that it was executed or delivered as his promissory note or was so intended He further alleged that Benjamin and Vincent Hale were full partners in the store at the date of Vincent's death, and that there was on hand at that time a large stock of merchandise belonging to the firm, of which there had been no invoice taken or account rendered by the surviving partner, but that he had continued the business on this stock and ignored the interests of his brother's estate; that the partnership had been a profitable one, and as administrator he was entitled to one-half the profits accruing before and after his intestate's death. He asked that the cause be referred to the court's commissioner, to settle the partnership and the estate of his intestate. His motion subsequently made to transfer the case to equity was sustained without an exception to the order of transfer, and without objecting either to the form or substance of the answer the plaintiff replied admitting the previous existence of the partnership, and that it had been a profitable one, but averred that some time before the death of his brother he had bought him out and had made a complete settlement with him, and was the owner of the entire stock.

The proof on these issues is very indefinite. The chancellor found it so unsatisfactory that he twice referred the cause to his commissioner for additional testimony, but which, when taken, was of the same indefinite character. He finally dismissed the petition, and we are not disposed to disturb his finding.

The proof conduces to show that in the spring of 1889 Vincent bought a half interest in his brother's store. What he was to pay nowhere appears, though appellant says he only paid $100 down. We think that the memorandum was intended to represent Vincent's note to Benjamin for the amount sued for, and was received by the latter. It was the balance due on the interest Vincent bought in the firm, and gave him a share in the body of the partnership. The appellant admits the business was a profitable one, and as Vincent drew out less than he put in—about $70—according to a witness who summed up the accounts, his estate ought not to pay the balance due for his share if appellant is to keep the entire stock. The fact that the invoice of the goods a short time before Vincent's death amounted to some $1,700, and the debts which have been paid by the appellant amount to some $1,900 proves nothing, as admittedly there are debts due the firm; and while appellant has testified twice without objection he does not disclose the amount so due or produce any of the firm books. While ample opportunity has been offered him to show up the whole transaction, he has failed to do so, and on this state of case, resulting, we doubt not, rather from a want of information as to his duties toward his deceased brother's estate than from any intentional concealment of the facts, he is in no condition to ask judgment on this peculiar writing, especially so as there is proof to the effect that after Vincent's death appellant informed the administrator that he had no claim against the estate, and further that he presented a claim of some $34 to the widow, who paid it.

It is said the case ought at least to go back for further proof, and a settlement of the partnership affairs, but in view of the chancellor's effort and failure to ascertain the facts, we can see no reason for further effort in that direction.

On the facts as they appear in the record the old partnership stands settled, and the writing sued on stands satisfied by the appellant's retention of the stock for which it was executed.

Judgment affirmed.

CRAIG, &C. V. PYLES.

(Filed February 13, 1897—Not to be reported.)

Slander—A statement made of a married woman, that "she is a dirty bitch; that she has no character and is no account," is not actionable, and the innuendo, as averred by plaintiffs, can not change the meaning of the words from their common acceptation.

Gaunt & Downs for appellants.

Appeal from Carroll Circuit Court.

Opinion of the court by Judge Hazelrigg.

The words spoken by appellee of and concerning the appellant, Katie A. Craig, wife of her co-appellant, namely, "She is a dirty bitch; she has no character, and is no account," are not actionable words, in themselves importing, as averred in the petition, that appellant was "a whore, common prostitute, or was guilty of fornication and adultery."

In Schurick v. Collman, &c., 50 Ind., 336, the words spoken of the wife were that she was a d—n b—h, meaning to charge, as is averred, a want of chastity and virtue.

The court held that the words did not amount to a charge of either incest, fornication, adultery or whoredom, saying further that "the word b—h, although a very coarse and ruffianly expression when applied to a woman, does not in its common acceptation import whoredom in any of its forms," citing K— v. H—, 20 Wis., 252. The latter case is to the same effect. The *innuendo*, as averred by the plaintiffs, can not change the meaning of the words from their common acceptation. "It is a well-settled rule," said this court in Watson v. Hampton, 2 Bibb., 319, "that an *innuendo* can not extend the meaning of words beyond their natural import. It is only explanatory of some matter already expressed; it may show the application, but can not add to or enlarge or change the sense of the words." We think that the other words relied on are in themselves indefinite and meaningless, or at least wholly fail to import the crime of fornication or adultery without a *colloquiem* to show the connection in which they were used.

The judgment sustaining the demurrer and dismissing the petition is affirmed.

BRADFORD, &C. V. CLAYTON.

SAME V. SAME.

(Filed February 16, 1897—Not to be reported.)

1. *Assignment for creditors—Purchase by assignee*—Where an assignee for creditors purchased the bid of one who had, prior to the assignment, bought the land of the debtor at execution sale, he must be regarded as having redeemed the property for the benefit of the debtor, although he did not intend to do so. But he is entitled to be repaid, with interest, the amount which he paid. He is not entitled, however, to compensation for his improvements, as he has, by the use of the land, been compensated therefor to the extent they have increased the vendible value of the land.

2. *Same—Settlement*—The debtor having executed to the assignee a receipt reciting the settlement of all matters pertaining to the assignment and releasing the assignee from liability, and that settlement having been acquiesced in

for years by all parties, the debtor is concluded by it, the proof failing to satisfactorily show that there was either fraud or mistake in the settlement, or in procuring the receipt.

H. C. Weaver and J. B. Clark for appellants.

J. R. Minor, George Doniphan and B. K. Smith for appellee.

Appeal from Bracken Circuit Court.

Opinion of the court by Judge Guffy.

The above-named cases were heard together in this court, and it appears were heard together in the court below.

The first named was a suit instituted in the Bracken Circuit Court by appellee, P. H. Clayton, against appellant, S. W. Bradford, which suit was filed March 28, 1889.

It was alleged in the petition that plaintiff was the owner of one-third of a lot in Brooksville, in said county, known as the carding machine property, and that the other two-thirds was owned by said Bradford, and that the lot was indivisible without great detriment to its value. A sale of the lot and division of the proceeds was prayed for. Bradford, in his answer, denied that the appellee (plaintiff below) had any title or interest in said lot, and pleaded title and possession of the same under a conveyance from appellee and wife to the appellant and to Poage & Day. The reply of appellee alleged in substance that the deed referred to by appellant, Bradford, was in fact a deed of trust to the vendees, given for the purpose of effecting a settlement of appellee's indebtedness, he having taken the benefit of the bankrupt law, and having made or expected to make a composition settlement with his creditors, who had proved up their claims, and also to pay some other creditors in full, and that the said vendees had executed to him a separate writing evidencing such facts. He also made Poage & Day parties; appellee also filed an amended petition. The answer of Poage and the next answer of Bradford claimed that the one-third interest in the lot in controversy had been levied on and sold under execution against said Clayton before the execution of the conveyance to them and Day, and that they never took possession under said conveyance, and, upon consultation, decided that although the lot could be redeemed it was not worth it, and that they had no funds of Clayton to redeem with, but on the 21st of January, 1879, Bradford paid to Hackett, the purchaser, $108.90 for the lot or for his bid, the bid being $99, Hackett's purchase having been made January 21, 1878.

Appellee also set up the fact that the trustees had sold machinery, etc., off the joint property of him and the other owners of the lot, for which he sought to recover.

Appellant Bradford claimed that he had expended $2,000 or more in improving the property. Day died pending the suit, and the appellant, Mrs. Day, was made a party as executrix of H. A. Day.

The court below adjudged a sale of the lot in contest, and adjudged one-third of the proceeds to appellee, and the residue to appellant Bradford, the costs to be paid in proportion to the interest of the parties, except the cost as to contest of law and fact, which Bradford must pay, and from that judgment appellants have appealed.

We deem it unnecessary to recite the evidence introduced. It is worthy of notice, however, that Bradford did not procure a sheriff's deed to the interest in dispute, nor even take a transfer from Hackett of his purchase; nor do we think that the settlement of September,

1888, passed the title of the lot to Bradford. It must, therefore, be held that appellee Clayton was in equity the owner of the property claimed. If in fact Bradford did not intend to redeem the property as trustee, yet his actions and proceedings have been such as to require that he should be held to have done so. It is, however, contended that Bradford has greatly improved the property, and that it is not equitable that Clayton should have the benefit of the improvement. It is true that Bradford had the right to improve the property to the extent of making such repairs as were necessary to prevent the property from going to waste, and charge the proper proportion thereof to the appellee, and in a case like this might be allowed pay for permanent improvements, to the extent that the same increased the vendible value of the land, especially where, as in this case, appellee stood by and saw the improvements made, and did not object. The proof fails to show to what extent the improvements increase the vendible value of the lot in question. It is in evidence that some of the machinery belonging to the property was sold after it went into Bradford's hands, and one-third of the same was paid to him before he purchased the other two-thirds interest in the lot and machinery. He has also had the use of the property during all the time since his purchase.

We are, therefore, of the opinion that the benefits aforesaid are sufficient compensation for the improvements. But appellant should be repaid the $108.90 paid by him to Hackett, with 6 per cent. per annum interest from the 10th of September, 1888, out of the one-third of the proceeds of sale, the adjudged interest of appellee. The judgment aforesaid appealed from is reversed and cause remanded, with directions to enter a judgment as hereinbefore indicated, and for proceedings consistent with this opinion.

On the 10th of September, 1891, the appellee, Clayton, instituted the second-named suit against these appellants for settlement of the trust aforesaid, alleging that the trustees had received by virtue of said deed more than $3,600, and had only paid out less than $1,800, and seeking judgment against Bradford for the difference between the two sums. He also alleged that by fraud and promises he was induced to sign a receipt or paper, which reads as follows:

"Whereas, P. H. Clayton made an assignment to S. W. Bradford, H. A. Day and George B. Poage of certain property for the benefit of his creditors, and the matters of assignment having been settled between them, and the conveyance of property having been made, and a release of homestead of the said P. H. Clayton, now the said S. W. Bradford, H. A. Day and George B. Poage are released and exonerated from all the liabilities of said assignment as aforesaid.

"Given under my hand this the 10th day of September, 1888.

"(Signed) P. H. CLAYTON.

"except the carding factory."

The appellants (defendants below) answered and denied all the allegations of appellees showing any right to recover against them, as well pleading and relying on the receipt and settlement. It was also claimed by appellants that the addition of, except the carding factory, was added by appellee after the settlement was made and after the appellants had released their mortgage lien on appellee's homestead.

After the taking of much testimony the court referred the case to the master commissioner for report and settlement, who reported $524.77, with interest, in biennial rests—that is, compounding interest every two years from September 11, 1888, to September 11, 1894—

and defendant's exceptions to the report were overruled and judgment rendered in accordance with the report, and from that judgment appellants have also appealed.

The proof taken is, to some extent, conflicting. It, however, appears that appellee is now a deputy clerk, and was once sheriff of the county, and the fact that he was careful to add an addition to his signature to protect what he deemed to be his rights and interest tend to show that he was quite capable of taking care of his interests, and not likely to be deceived or overreached; and, besides, the proof fails to satisfactorily show that there was either fraud or mistake in the settlement or in procuring the receipt, and, inasmuch as the settlement as made was accepted and acted on for years, all parties should be held to abide by it.

It results from the foregoing that the court below erred in referring the cause to the master commissioner, and also in confirming his report and rendering judgment against the appellants. The judgment is, therefore, reversed and cause remanded, with directions to dismiss the petition of plaintiff, P. H. Clayton, filed in 1891, at his cost.

COYNE, &C. V. FOLEY, &C.

(Filed February 17, 1897—Not to be reported.)

Weight given court's findings of fact—Where the law and facts in an ordinary action are submitted to the court, the court's findings of fact are entitled upon appeal to the weight that attaches to the verdict of a well-instructed jury.

D. B. Logan for appellants.

Wm. Low for appellees.

Appeal from Bell Circuit Court.

Opinion of the court by Judge Burnam.

The appellees instituted their suit in the Bell Circuit Court, claiming that they were regular physicians and surgeons; that Joseph Coyne & Co. was a firm composed of Joseph Coyne and L. T. Bradford, and that their business was to construct railroads and do work of like character; that during the months of September and October, 1893, they were employed by the appellants, who were at that time engaged in constructing the Log Mountain branch of the Louisville & Nashville railroad, to attend as physicians one Willie Nelson, who was in the employ of appellants and who had been seriously injured by being run over by a train, and that whilst so employed by the appellants they rendered medical services in visiting the said Willie Nelson, and in amputating the left leg of said Nelson, and that their services were reasonably worth $166.

The appellants denied that the $166 charged was reasonable, and they denied that they employed the appellees to render the services sued for. They claim that they had employed a large number of men to construct the Log Mountain branch of the Louisville & Nashville railroad, and had in their regular employ one Dr. Hodges to attend on any of the men who might need a doctor, for which services the men paid a certain specified sum of money per man, which was retained out of the wages of the employes and paid over to said

doctor monthly; that this Dr. Hodges was absent from the county and could not render the services required for said Nelson; that appellees were employed by him to render any services they might be called upon to render while he was absent, and that under said arrangement appellees rendered the services set up in their petition; that said Hodges had received, in the final settlement with these appellants under their said arrangement, the pay for such services, and that same had been paid in full. And they also claimed that Willie Nelson was not in their employ at the time he was hurt, and that the services were not rendered at their instance; that they had never promised to pay for said services, and that they had received no consideration for same.

All these allegations were denied by appellees' reply. The appellant, Bradford, filed a separate answer, in which he denied that there was any partnership between Joseph Coyne and himself; denied that Nelson was employed by Coyne & Co., or that he was injured while in their employ; but he says that on September 27, 1893, whilst riding up Clark creek along the line of the Log Mountain branch of the Louisville & Nashville railroad, which was then in process of construction, he found that Willie Nelson had been struck by a train; that he rode back to Pineville with the intention of getting Dr. Hodges to give attention to the person injured; that he found Hodges absent, and that he called on appellees and told them about the injury, and that two doctors would be needed; that appellees visited said Nelson and rendered the services sued for in this action; that he did not mention the name of Coyne in connection with said call, and did not agree or promise that Joseph Coyne & Co. would pay appellees therefor, and that he had no authority to promise or agree with appellees, or either of them, that Joseph Coyne & Co. would pay for the services rendered said Nelson.

Coyne also filed his separate answer, in which he denied that Bradford was a member of the firm of Joseph Coyne & Co., or that Nelson was in the employ of the company at the time he was injured, or that the appellees ever performed the medical or surgical services at his request or by his authority, or that the claim was reasonable.

By agreement of parties the law and facts in the case were submitted to the judge of the Bell Circuit Court, and he was required to make a finding, both of facts and conclusions of law, separately. A number of witnesses were introduced on the trial of the case, and at the close of the trial the court found as the facts of the case that Joseph Coyne & Co. was the name under which Joseph Coyne did business; that said defendant, during the months of September and October, 1893, was engaged in building a railroad known as the Log Mountain branch; that he had many men engaged in said work; that he had an arrangement with the men so employed whereby he deducted from the men's wages a stated sum per month with which he was to employ a physician to give medical attention to any of the men in need of it during the progress of the work; that under this arrangement he did employ Dr. Hodges to render such services as the men required; that the contract with Hodges was made by defendant Bradford for defendant Coyne, and that he approved and recognized the contract; that Bradford was the bookkeeper and paymaster of the defendant, Coyne; that on the 27th day of September, 1893, Willie Nelson, while in the employ of the defendant on the railroad, was struck by an engine, his leg crushed, and that the said Bradford went to the town of Pineville, called on appellees and asked them if they attended to Hodges' business when he was absent; that plaintiffs answered that they did so, and that

Bradford then said, "We need both of you; a man is badly hurt;" that the plaintiffs thereupon went to the camp of the defendant, where they amputated the leg of Nelson and afterwards paid him eleven visits at said camp, about five miles from their office; that plaintiffs made out their account for services rendered, but did not put on it the name of any person as the debtor; that they presented the account to Bradford and asked him who to charge it to; that he told them Dr. Hodges should pay it, but put in the blank space left for the name of the person to be charged thereby the name of the defendants, Joseph Coyne & Co.; that the services were reasonably worth $155, and that no part of it had been paid; and the court also found that Bradford, as agent for Coyne & Co., had contracted with the plaintiffs to render the services performed by them for Nelson, and thereupon entered up judgment for the amount found due.

The appellant filed his motion and grounds for a new trial, and prayed an appeal to this court, asking a reversal because, first, the court erred in refusing to find for the defendant; second, because the findings of fact by the court were not supported by sufficient evidence and were contrary to law; third because the court erred in its conclusions of law, and because the court erred in refusing to make more specific its conclusions of law and the finding of the facts.

This court has frequently held that where the law and facts are submitted to a common-law court, and is required to make a finding both of law and facts, its finding of facts has all the weight that attaches to the verdict of a well-instructed jury.

In this case there was undoubted evidence to support the findings of the court; nor do we see any substantial error to the prejudice of appellant in his conclusions as to the law.

Wherefore the case is affirmed.

The Kentucky Law Reporter.

EDITOR:
WALTER G. CHAPMAN, ... Frankfort, Ky.

VOL. 18. JUNE 15, 1897. No. 24

KENTUCKY COURT OF APPEALS.

COLLINS V. WILSON, BY, &C.

(Filed February 17, 1897—Not to be reported.)

1. *Excessive verdict*—In this suit by a girl by her father as next friend to recover damages for an assault, a verdict in favor of plaintiff for $1,000 is not excessive upon the facts shown by her.

2. *Evidence*—It was competent for the father and mother of the girl to testify that she told them of the occurrence an hour or so after it happened.

3. *Same*—Although the father as next friend was liable for the costs of the action his wife was a competent witness; for, besides the fact that he was only a nominal party in interest, the provision of the Civil Code that as against a wrongdoer either husband or wife or both may testify refers not only to wrongs against the husband or wife, but to wrongs against the infant members of the family.

4. *It was competent for plaintiff to prove* the admission of defendant, voluntarily made in the presence of the grand jurors when they were not in session, that he was at the girl's house on the evening of the alleged wrong.

L. C. Willis for appellant.

P. J. Foree and Peak & Shindler for appellees.

Appeal from Spencer Circuit Court.

Opinion of the court by Judge Hazelrigg.

The facts found by the jury to have been established in this case are that on or about March 25, 1893, the appellant went to the home of Mattie Wilson, a girl some seventeen years of age, and finding her parents away solicited her to have sexual intercourse with him, accompanying his request with the forcible seizure of the girl about the waist and other improper conduct not necessary to mention.

At the suit of the girl by her father as next friend a verdict of $1,000 was awarded her. On the appeal of Collins it is now insisted that the verdict is against the evidence, it being his contention that the proof clearly establishes the falsity of the charges. It may be admitted that the proof is not entirely satisfactory. Evidence

is introduced by the appellant which makes it impossible for him to have been at the girl's house at the time she alleges. It is a case, however, where there might have been a finding either way with no authority in this court to disturb it.

There is clearly sufficient evidence to support the verdict, and it is not flagrantly against the evidence. Nor is it excessive upon the facts shown by the plaintiff.

It is urged that the proof of the father and mother of the girl to the effect that an hour or so later on she told them of the occurrence was incompetent. It appears that when the father reached home on the evening of the occurrence he first learned of it from his wife in the presence of the girl, the girl having first told her mother. The witnesses were not allowed to repeat what the girl told them, but testified simply that they were informed of the occurrence. Certainly if the girl had not made complaint of her treatment at the first opportunity, or had failed to prove she had, the circumstance would have afforded strong reason for doubting her story. It is said, however, that the husband being a party in interest as the next friend of the girl and liable for cost, the wife was not a competent witness, as under the guise of testifying for the girl she was in fact testifying for the husband. But in fact the father was only a nominal party in interest, the girl's husband having been made a party plaintiff, she having married pending the action.

It is contended further that the admission of appellant in the presence of the grand jurors that he was at the girl's house on the evening of the alleged wrong was incompetent. We think otherwise. He was not sent for as a witness and the grand jury was not in session. He went into their room when drinking and voluntarily made a statement, though cautioned that it might be used against him. He protested that the charge was trumped up as a blackmailing scheme, and this statement he got the benefit of, along with the admission supposed now to be injurious.

We see nothing to take these statements from the class of voluntary statements always held to be competent against the party making them when against his interest.

The instructions are free from any error prejudicial to the substantial rights of the appellant.

Judgment affirmed.

BANNON V. ST. BERNARD COAL CO.

(Filed February 23, 1897—Not to be reported.)

Sales—Acceptance of goods after opportunity to discover defects—Where the buyer of coal of a certain kind and quality accepted and used the coal delivered by the seller after having an opportunity to discover its quality, he could not then claim a deduction from the contract price upon the ground that the coal was not of the required grade.

Lane & Burnett for appellant.

Gibson & Marshall for appellee.

Appeal from Jefferson Circuit Court, Law and Equity division.

Opinion of the court by Judge Paynter.

On October 1, 1891, the appellee, St. Bernard Coal Co., proposed to the appellant, Pat Bannon, that if he would use its coal exclusively it would furnish him lump coal in carload lots for one year from that date, delivered at a place named, at 5¼ cents per bushel. The coal was to be same as sample cars furnished in September. Bannon accepted the proposition. Under this contract the appellee furnished Bannon coal in October, November and December, 1891, and in January, 1892, and for the coal furnished in October and November he paid. This action is for coal furnished in December and January, amounting at the contract price to $951.47. The appellant filed an answer in which he denied that the coal delivered was of the character and grade which the contract required it to furnish, and that the material referred to in the petitition as coal was any other than slack and dirt.

It is alleged in the answer that appeliant is and was a manufacturer of terra cotta, tile goods, vitrified brick, etc.; that he used large quantities of coal; that he required the best quality of coal; that he employed many men; that appellee failed to "supply him with coal of the kind and quality as said sample, or in quantities as required by his said business, and in consequence thereof the business of the defendant was delayed and arrested and became irregular, and in consequence of which plaintiff suffered and sustained loss in the sum of $5,000; * * * that his average daily expense in operating his business from the 1st day of October, 1891, to February 1, 1892, was from $125 to $150 per day; * * * that in consequence of the failure of the plaintiff to furnish and deliver to him coal of the kind and quality agreed the operations of his business * * * was suspended for at least forty days, during which time he was under an average expense of $125 per day." He pleaded his alleged damages of $5,000 as a counterclaim. In January, 1892, Bannon declined to take any more coal from the appellee.

The foregoing language of the answer and counterclaim constitutes appellant's allegations as to the damages sustained. He does not allege or prove that he could not have procured coal of the kind which appellee agreed to furnish him at the price named in the contract. He could not suspend his business because appellee failed to furnish coal under the contract and recover from the appellee the average daily cost of running his plant. He offered evidence to show that the quality of the coal was such that it required more time and men to produce his goods, and that they were of an inferior quality, and that he made a contract with another for coal at 6 cents per bushel, but he failed to show that he had bought any at that price during the period the contract was to run except 3,360 bushels. This evidence was on an issue not raised by the answer and counterclaim.

It is insisted that the instructions are erroneous and in conflict with each other, and, therefore, the case should be reversed. At the instance of the defendant the court in an instruction told the jury that if they believed the plaintff failed to deliver the defendant coal of the kind, grade and quality called for and required by the contract, and in consequence of such failure the defendant sustained a loss in the qualities of the wares produced by him, and was put to additional expense and was delayed in the production of his wares, and was compelled to pay a higher price for coal of the kind required by the contract, then the jury should allow defendant an amount to compensate him for the losses thus occasioned.

The court on plaintiff's motion told the jury that if they believed from the evidence that the defendant accepted and used such coal

after inspecting the same, or after having an opportunity to inspect the same, then they should find for the plaintiff the value of such coal at the contract price.

It was certainly proper to give the instructions last mentioned. The evidence in the case conduces to prove that the defendant not only had an opportunity to inspect the coal but did in fact know the kind and quality of coal the plaintiff was delivering him. When one has bought personal property, to be delivered at a future day, and receives it with the knowledge that it is not of the kind and quality sold, or could at the time of its delivery by inspection discover, or had a fair opportunity to inspect and discover, the quality, he can not accept the property and afterwards claim a deduction from the contract price on the ground that it was not of the required grade or quality. (Jones Bros. v. McEwan, 91 Ky., 373; O'Bannon & Co. v. Relf & Bledso, 7 Dana, 320; Kerr v. Smith, 5 B. M., 552.)

Under the pleadings and proof in the case it is clear that the instruction given by the court on the motion of the defendant was erroneous, but of this defendant can not complain. The instructions are not in conflict with each other. The court substantially told the jury to find the amount of plaintiff's claim if the defendant accepted and used the coal after inspecting the same, or after having an opportunity to inspect the same, although the jury might have believed from the evidence that the coal was not of the character and quality required by the contract, and that the defendant may have sustained a loss by the use thereof. It follows that when Bannon knew the character and quality of the coal when he received it he could not use it and then assert a claim for losses which resulted from its use in his factory.

The judgment is affirmed.

COLLINS V. FAWCETT, &C.

(Filed February 23, 1897—Not to be reported.)

Settlement of judgment—The evidence in this case is sufficient to support the finding of the chancellor that the judgment sought to be enforced had, by agreement of the parties, been satisfied and settled before the filing of the suit.

W. E. and S. A. Russell for appellant.

J. M. Wood and Samuel Avritt for appellees.

Appeal from Marion Circuit Court.

Opinion of the court by Judge Burnam.

Rowntree & Fogle, executors of Fogle, deceased, held a lien on certain property—consisting of a mill and forty acres of land, with a dwelling house on it, in Marion county—belonging to Fawcett & Chandler, and brought suit to enforce their lien, and for a sale of the property in the Marion Circuit Court on the 15th day of August, 1877. They obtained a judgment and an order of sale, and on the same day this judgment was assigned to T. D. Collins by the plaintiffs therein. This assignee, Collins, had the property sold to satisfy said judgment in September, 1878, and the appellant, John L. Collins, became the purchaser. On the 7th day of January, 1879, T. D. Collins assigned his judgment to the appellant. Report of sale was

made on the 21st day of January, and was confirmed on the 30th day of January. The defendants, Fawcett & Chandler, excepted to the confirmation of the sale on several grounds, chief of which were that the property was sold at a gross sacrifice, and that judgment was erroneous in directing that the mill should not be appraised, and that immediate possession should be given to the purchaser.

While these exceptions were pending the appellant—who was the owner of the judgment and the purchaser of the property at the decretal sale—proposed to the defendants, Fawcett & Chandler, that if they would abandon any further legal steps, and take no appeal from the judgment and let him have immediate possession of the property, he would cancel the unpaid balance due upon the judgment, the property at said sale having failed to pay said judgment by several hundred dollars, and having sold for greatly less than the amount the defendants had contracted to pay to their vendor, Davis.

This proposition of appellant was made to Chandler and was by him, in a letter dated January 15, 1879, communicated to Fawcett, Chandler and appellant living at that time in Taylor county, and Fawcett living in Marion county, where the property was located. Appellant got possession of the mill property at the date of the sale, and in a very short time got possession of the house.

The testimony of Chandler and Sanders, we think, clearly establishes that the proposition was made by appellant to the then defendants, Chandler & Fawcett, and that same was accepted and relied on, and no appeal was ever taken from the judgment confirming the report of sale. This agreement was made in 1879, and no steps were ever taken to enforce the collection of the balance of the judgment until in October, 1891, twelve years after the confirmation of the report of sale, when appellant caused execution to issue on the aforesaid judgment, and, upon the return of *nulla bona*, instituted this attachment suit to subject an interest of William Fawcett in a tract of land lying in Taylor county, Ky., to the payment of the balance due on the judgment assigned by the executors of Fogle, and Fawcett resists same and sets up the aforesaid facts, and pleads that by the agreement entered into by appellant that judgment had been satisfied, and that appellant was estopped from taking any further steps to collect said balance.

A good deal of proof was taken on the trial of this issue in the lower court, and whilst in his testimony appellant claims that he was released from his proposition by the filing of exceptions to the confirmation of the sale of the property aforesaid by the defendants subsequently thereto, it seems to us that there was a substantial compliance with the agreement entered into between the parties in reference to this matter. Appellant got possession of the mill immediately, and he got possession of the house and the forty acres of land as soon as the appellee could have reasonably been expected to surrender same. No appeal was ever taken from the judgment confirming the report of sale, and we think that the entire evidence in the case supports the conclusion arrived at by the chancellor in the court below, in which he holds that the judgment which is sought to be enforced had, by agreement of the parties, been satisfied and settled before the filing of the suit, and adjudging that plaintiff's petition be dismissed.

Wherefore, the judgment is affirmed.

BICKEL, &C. v. KRAUS.

(Filed February 24, 1897.)

1. *Verdict signed by one whose name did not appear as juror*—Where one of the nine names signed to the verdict of a jury did not appear in the list of the jury given in the record as having come to try the case, that fact did not render the judgment upon the verdict void, the right to object to the verdict upon that ground being waived by failure to make it at the proper time, no objection being made for more than six months. Moreover, the presumption of regularity must be applied in such a proceeding.

2. *Objection to juror waived*—It was too late after the verdict was rendered for defendant to object that one of the jurors was hostile to him, as he waived the objection by failing to make a motion to discharge the jury as soon as he discovered that the hostile juror was on the jury.

John Barret for appellants.

O'Neal & Pryor, Alfred Selligman, Phelps & Thum and Isaac T. Woodson for appellee.

Appeal from Jefferson Circuit Court, Common Pleas division.

Opinion of the court by Judge DuRelle.

This was an action for damages, alleged to have been caused by the gross neglect of Jacob and Henry Bickel, the appellants, in making an excavation for a cellar on Market street in Louisville, extending into or near the sidewalk of the street by leaving it exposed without a proper barrier or lights to prevent persons passing on the street from falling into it.

It was alleged that the appellee, in passing down Market street, fell into this excavation, whereby he received injuriers which resulted in permanent impairment of his mind. The averments of appellee were denied, and contributory negligence was pleaded.

In the trial of the case the record recites, in the usual form, "wherefore, to try the issues joined comes a jury, to wit," following with a list of twelve names, in which was included the name of Joseph Gegg. The record shows that on the day following, the jury, after retiring to consult, returned into court the following verdict: "We, of the jury, find for the plaintiff in the sum of $1,000," signed with nine names, eight of which appear in the list of the jury given in the record as having come to try the case, and one of the names being John Gallagher, whose name does not appear in the record list of the jury. This fact does not appear to have been discovered until the following November, the verdict having been rendered on April 5, 1894. In November a motion was made to set aside the judgment entered upon that verdict upon the ground that the judgment was void because the verdict was signed and returned by one John Gallagher, who was never sworn as a juror in the case, and was signed and returned by only eight of the jurors who were sworn to try the case.

No affidavit of any person is filed to show that Gallagher was not in fact sworn as a juror; on the contrary, upon motion and grounds for a new trial, filed immediately after the verdict was rendered, it appeared by the joint affidavit of Gallagher and three others who signed the verdict that "they were sworn as jurors in the above-styled action, which jury returned a verdict herein on the 5th day of April, 1894, and were present at all the deliberations of said jury."

It seems probable that the insertion of the name of Joseph Gegg

in the record as a member of the jury which came to try the case was a mistake of the clerk, and that Gallagher was the juror who was in fact sworn. However that may be, the objection, even if sustained by the facts—and it does not by this record appear to be so sustained—must be deemed to have been waived by failure to object at the proper time. Moreover, the presumption of regularity in the proceedings must be applied in a case like this.

Thompson on Trials, volume 1, edition of 1889, page 6, says: "When the entries of the record are contradictory as to the number of jurors who sat at the trial, so much of the record as states that the jury consisted of twelve men will be regarded as stating the truth, and the contradictory statement will be rejected as a clerical error, the legal presumption being that the portion of the record is true which answers the requirements of the law unless the contrary be made to appear by the bill of exceptions."

We conclude, therefore, that the trial court did not err in overruling the motion to vacate the judgment as void upon this ground.

The only other ground upon which much stress is laid in argument is the ground, set up in a motion for a new trial, of malice or prejudice on the part of the jury, amounting to actual bias. By the affidavits filed on the motion it appears that a few days before the trial Walter Stone and Jacob Bickel, one of the appellants, had become very hostile on account of charges and countercharges of official corruption; that E. M. Stone, who was one of the jurors who signed the verdict, was the father of Walter Stone, and that he had, before the trial, exhibited a hostile feeling toward Jacob Bickel, and had refused to recognize him. The defendant's affidavits charged that Stone in the jury room took a very prominent part in inducing the other jurors to return the verdict against appellants. It appears, however, from the affidavit of Jacob Bickel himself that while he was not in the courtroom when the jury was empaneled he was there during the trial; that he had known Stone for thirty-five years, and no objection was made by him or his counsel to the service of Stone as a juror until after the verdict was rendered. On the other hand the affidavit of Stone and of most of the other jurors, including those who did not concur in the verdict, are distinctly and emphatically to the effect that Stone took no prominent part in inducing the rendition of the verdict and committed no improper act.

Upon the evidence introduced by the affidavits we concur with the lower court that a case for setting aside the verdict on the ground of malice, amounting to actual bias, was not made out. So far as regards the appellant, Jacob Bickel, whatever objection existed to Stone on account of the alleged hostility exhibited by him toward Bickel, should have been taken advantage of as soon as Bickel discovered the fact that he was on the jury, by motion to discharge the jury upon affidavit stating the fact, or the objection must be considered as waived. (Thompson & Merriam on Juries, paragraph 302, *et seq.*)

The further objection that the verdict was contrary to the evidence, and that the weight of the evidence showed that there was a sufficient barrier protecting the excavation was properly overruled by the trial court. There was sufficient evidence to warrant the jury in finding the verdict which they did, and the fact that the court might possibly not have given the same finding would not justify it in invading the province of the jury and setting aside the verdict.

Wherefore, the judgment is affirmed with damages.

CORNETT, &C. v. BRASHEARS.

(Filed February 26, 1897.)

Title bond—Agreement to abandon contract—The appellee executed a bond in the penal sum of $1,000 that he would make a good and sufficient title to a certain tract of land unto one John Cornett, and his heirs, the appellants, bring this action on the bond. But it appearing that the instrument was merely a proposition to sell the land on specified terms on the part of the appellee, that the terms were never complied with by the decedent, the notes which he executed not being paid, and that both parties, upon the failure of decedent to pay the notes when due, abandoned the contract, the finding of the court below in favor of the appellee will not be disturbed.

R. A. Hurst and J. J. C. Bach for appellants.

Thomas H. Hines, Edward W. Hines, D. D. Fields and S. B. Dishman for appellee.

Appeal from Perry Circuit Court.

Opinion of the court by Judge White.

The appellants, as widow and heirs of John Cornett, sued the appellee, H. B. Brashears, in the Circuit Court of Perry county, asking a specific execution of the following contract: "That H. B. Brashears binds himself, my heirs, executors, administrators or assigns, in the penal sum of one thousand dollars, to be levied out of my lands, goods, chattels, tenements, etc. The condition of the above obligation is such that I make unto John Cornett a good and sufficient title to a certain tract or parcel of land lying and in the county of Perry and State of Kentucky, on Owens' Branch of Big Leatherwood, a fork of the north fork of the Kentucky river, and bounded as follows, to wit: On the east by John Lodsey, on the north by James Brashears, on the south by James H. Singleton. John Cornett pays $25 down, the remainder when due. If he, John Cornett, fails to pay when due, the first payment is to be void and contract forfeited. Then this obligation shall be null and void; otherwise in full force and virtue. H. B. BRASHEARS.

"Witness: E. C. CAMPBELL and
"N. CORNETT."

And on this contract plaintiffs ask judgment requiring defendant to convey the land by deed to them as the heirs of John Cornett, deceased, who had died after the execution of the said bond. The defendant answered and admitted the execution of the paper sued on, and stated the amount of the purchase money that Cornett was to pay for said land, and setting out that Cornett had executed two notes, one of $275, to be paid within thirty days after a tide in the north fork of the Kentucky river sufficient to float timber, and $200 in eight months from the 5th day of April, 1888, and averring that said bond was only given as an option, and that said Cornett had failed to pay any part of said purchase, though it had been due since about the 5th of December, 1888, and averring that a tide did come up in said river or stream sufficient to float timber in October, 1888, and thereby said note became due, and that he called on John Cornett on the 25th of December, 1888, for payment, and the said John Cornett, not being able to pay the same, informed appellee that he would have to lose the $25 already paid on said contract; alleges that said contract was but an offer to sell and so understood by John Cornett, and alleges that the contract or paper sued on was placed in

the hands of E. C. Campbell to hold, and if the said John Cornett failed to make the payment when due Campbell was to give up the paper to appellant.

Upon the hearing of the case on the evidence the court canceled the notes and dismissed plaintiff's petition, and adjudged that the paper sued on was only a proposition of appellee to sell to John Cornett the land on specified terms, and that Cornett had failed to comply with the terms of the proposition, and adjudged the cost against appellants, and from that judgment this appeal is prosecuted by appellants.

We are inclined to the opinion that the contract sued on. is void for the want of certainty, but the court below adjudged the paper to be a mere proposition of appellee to sell the land on specified terms, which were never complied with, and it appears from the evidence that both parties, upon the failure of Cornett to pay the money when due, abandoned the contract and regarded it as no longer binding on either.

We are of the opinion the judgment of the court below was right.

The judgment of the circuit court is affirmed.

BENNETT V. LAMBERT, &C.

(Filed February 26, 1897.)

Damages on injunction bond—Attorneys' fees—No recovery can be had on an injunction bond for attorneys' fees expended in defense of the proceeding for an injunction, where the injunction is the relief sought.

The appellant was proceeded against by appellees for violation of a temporary injunction which they had obtained pending a suit for a perpetual injunction; and the proceedings for contempt, as well as the injunction, having been dismissed with judgment for costs in favor of appellant, the appellant instituted action on the injunction bond to recover counsel fees and expenses incurred in defending the motion to have him punished for violation of the temporary injunction. *Held*—That the counsel fees and expenses were incurred in defense of the attempt to obtain the perpetual injunction, and that appellant is not entitled to recover on the injunction bond, the injunction being the relief sought.

G. G. Gilbert for appellant.

Pryor J. Foree and L. C. Willis for appellees.

Appeal from Spencer Circuit Court.

Opinion of the court by Judge Guffy.

The appellees, Lambert and others, instituted suit in the Spencer Circuit Court against the appellant and others, the object of which was to perpetually enjoin the defendants in that suit from opening a certain road and removing fencing of the plaintiffs named in this suit. A temporary injunction was obtained, and pending the suit the plaintiffs therein moved to have Bennett punished for violation of the injunction. The motion was postponed several times, it being called in different counties. Upon final hearing, the court adjudged that Bennett had not been guilty of contempt, and the proceedings seeking to have him fined for contempt were dismissed and said Bennett discharged, and judgment given in his favor against the plaintiffs for his cost arising upon this branch of the proceed-

ings. It was further adjudged that the injunction obtained be dismissed, and Howard and the Spencer County Court were given a judgment for their cost. The other cost arising in and about the injunction were adjudged to be paid by the parties respectively, each party to pay his own cost, but it was also provided that this order adjudging that Bennett shall pay his part of the costs herein is not to be construed so as to include his attorney's fees nor any expenses incurred by him in the employment of counsel to defend the injunction herein.

On the 20th of November, 1894, appellant instituted this action against appellees to recover on the injunction bond executed in the suit above stated, and claiming judgment for $100 damages on account of the said injunction. The answer denied appellant's right to recover for the items or claims set out, and alleged that an injunction was the only remedy sought in the action, and that the attorney's fees and cost were incurred in the defense of the action and not in defense of the injunction.

Appellant's demurrer to the second paragraph of the answer was properly overruled. The reply of appellant alleged that all the costs and damages sued for were incurred and paid by him in attending sessions of this court held in Anderson and Shelby counties in response to motions of said plaintiffs in the former suit to appear therein and show cause why this plaintiff should not be fined and imprisoned for contempt of this court for alleged violations of said temporary injunction charged by the plaintiff in said suit, and before the judge of this court sitting at Shelbyville and Lawrenceburg.

The appellees filed a demurrer to the reply, which were sustained by the court; and appellant, failing to plead further, his action was dismissed, and from this judgment this appeal is prosecuted.

The contention of appellant is that the damages sued for were the result of the temporary injunction, and cites a number of cases to support his contention, but we are unable to see that any of the cases cited sustain appellant's views.

The cost and expense sued for was not incurred in defeating the temporary injunction, but in fact incurred in defense of a motion to have him punished for the violation of the injunction, and the court adjudged him not guilty, and rendered a judgment in his favor for cost. It often happens that a party may be put to cost and expense in defense of an unfounded or unjust suit or motion, and yet a judgment for legal cost be all that he can obtain.

There may be cases where a suit for malicious prosecution might be maintained, but no such case is now presented.

It seems to us that the injunction was the remedy sought; and the counsel fees and expense were incurred in defense of the attempt to obtain the perpetual injunction, if they can be considered as expended in the suit at all.

The decision of this court in New National Turnpike Co. v. Dulaney, &c., 86 Ky., 518, seems to conclusively settle that appellant was not entitled to recover.

In the case *supra* the turnpike company had instituted proceedings in the county court to condemn a right of way for a turnpike road through land owned by Dulaney, etc., who filed a petition in the Louisville Law and Equity Court enjoining that proceeding.

The demurrer of the turnpike company to the petition was sustained and injunction dissolved and petition dismissed, and the company sued to recover on the bond for attorney's fees expended. The court below held that no recovery could be had, and this court

affirmed the judgment for the reason that the injunction was the relief sought; in fact, gives the relief if sustained, and that in such cases no recovery could be had on the bond for counsel fees, quoting Bergin v. Sharer, 14 B. M., 497.

Judgment affirmed.

CUNDIFF V. CUNDIFF, &C.

(Filed February 27, 1897—Not to be reported.)

1. Breach of contract—Measure of damages—Conjectural profits—In this action by appellees to recover of appellant damages arising from the failure of the latter to roll the logs from land rented to appellee, to build fencing to keep out stock, and to dig a well according to the terms of the contract of rental, the appellees were not entitled to recover as damages the value of the crop which they might have produced upon such of the land as they did not cultivate by reason of the failure of appellant to remove the logs, conjectural profits not being a criterion of damages. And the appellees having failed to state the amount of damages sustained by reason of appellant's failure to build the fencing and to dig the well, they are without proof of actual damages sustained on that branch of the case.

2. Same—Instructions—There was no attempt on the part of the appellees to show the "reasonable value of the use of the land," of which they claim to have been deprived, and an instruction to the jury that "the measure of damages is the reasonable value of the use of the land of which he was deprived, considering his force of work hands," etc., was erroneous.

Birkhead & Clement for appellant.

Noe & Massie for appellees.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Paynter.

This is an action by appellees against appellant sounding in damages for the alleged violation of a contract by which appellant leased to appellees about twenty acres of land to be planted in corn, tobacco, sorghum, etc. It is alleged that appellant was to roll the logs on the land, and fence it in time for the appellees to plant it in a seasonable time, and that appellant was to have a well dug on the rented premises for the use of the appellees; that the appellant failed to roll all the logs and fence it in time for appellees to put in their crop on all the land rented of appellant; that he failed to have the well dug in a suitable time, which required them to carry water some distance, and that the fence was not sufficient to turn stock; that stock broke into his fields and damaged his crop, and in consequence of these several violations of the contract the appellees were damaged in the sum of $325. The several breaches of the contract were denied.

The appellee, W. H. Cundiff, testified that he was damaged $325 "by the failure of defendant to comply with his contract." This was an estimate by a witness who, in reaching the conclusion, determined in his mind the rule for measuring damages; they may have been proximate or remote. On cross-examination he said: "The items that go to make up the damages of $325 is what tobacco I could and would have raised on the land, judging by the crop of the previous years, which tobacco would have brought me about $260, and the corn I could and would have raised on the land would have been worth $60 or $70.

The witness said: "Before I brought this suit I drove the defendant's mule out of my crop once or twice, and his cattle about the same number of times." He also said: "I carried water for domestic purposes a distance of about one-half mile for about one month prior to the digging of the well, about an average of three buckets per day." He did not state whether or not the mule or cattle damaged his crop, nor the value of his services in carrying the water.

Geo. Cundiff, the other plaintiff, testified as follows: "My father carried water about one month before the well was dug. I think I could have made about $100 out of the tobacco I could have raised on the land we were to cultivate if we had got the crop planted."

Campbell Cundiff, in giving his testimony for the plaintiff, said: "I made the contract with the defendant to dig the well. * * * I was to get $4 for digging the well. My father carried water about one-half mile for a month before it was dug."

This constitutes the plaintiff's testimony on the subject of damages. The verdict was for $155.

There being no proof as to the damages as to crop, or in the matter of failing to dig the well for a time, the plaintiff is without any proof as to the amount of damage actually sustained, except that which relates to value of the crop which the land would have produced, or profits on it. The court should have told the jury, in estimating damages, not to take in consideration the value of the crop which the plaintiff might have produced upon such of the land as he did not cultivate by reason of defendant's failure to roll the logs or build the fence; and further, that they could not take into consideration any profits which the plaintiff might have made on land which he failed to cultivate for the reasons indicated. When the witness gave an estimate of the value of the crop he could have produced, it was but a method of estimating what his profits would have been under the contract.

The court held, in Smith v. Phillips, jr., 16 KY. LAW REP., 616, that conjectural profits can not be recovered, and were not the criterion of damages, but that the lessee could recover the *actual* damages which proximately flowed from the breach of the contract.

The court in instruction No. 2 told the jury that "the measure of damages *is the reasonable value of the use of the land of which he was deprived, considering his force of work hands*, the trouble and expense of obtaining water up to the time the well was dug, and the damages to their (plaintiff's) crops by reason of the insufficiency of the fence."

This instruction was erroneous. There was no attempt to show the "reasonable value of the use of the land," of which plaintiffs claim they were deprived, except by showing conjectural profits; neither does it appear to us that such value can be shown in any other way. It, therefore, follows that plaintiff's damages can not be measured in that way. It can be seen how a lessor might recover of a lessee the reasonable rental value of land which he rented to the lessee to be cultivated, and which the lessee failed to do.

If the plaintiff's contention is correct that the fence is not the kind which defendant's contract required him to build, and in consequence of it the mule and cattle injured his crop, then he is entitled to recover the actual damages resulting therefrom. If the defendant did not dig the well as soon as required by the contract, then the plaintiffs are entitled to recover the actual damages resulting from such failure. There was no attempt to show that damages other than we have mentioned resulted from the alleged breach of the

contract; hence, the question is not before the court as to whether any damages were recoverable other than indicated.

The judgment is reversed, with directions that further proceedings conform to this opinion.

BEARD, &C. V. BANK OF HARDINSBURG.

(Filed March 10, 1897—Not to be reported.)

Individual note—Where partners signed an obligation as individuals, the fact that there was a suit pending to settle the partnership does not postpone the right of the creditor to recover judgment on the note against the obligors, and proceed to collect same from any of them individually.

N. McC. Mercer and David R. Murray for appellants.

M. Eakins for appellee.

Appeal from Breckinridge Circuit Court.

Opinion of the court by Chief Justice Lewis.

The note sued on in this case was executed to appellee by Taylor Beard, Dudley Miller, J .S. DeJarnett and J. D. Beeler, and none of the payers have made defense denying their individual liability except appellant Beeler, who alleges that it was a debt of the firm of Beard & Beeler, and accepted as such, but the lower court, to which the law and facts were submitted, jury being waived, found that appellee refused to accept the note when offered and attempted to be executed by and in the name of Beard & Beeler, and insisted that it be signed by the obligors as individuals, which was done.

It does not, therefore, seem to us material that there was a suit pending to settle the partnership of Beard & Beeler when this action was commenced, because that fact did not postpone the right of appellee to recover judgment on the note against the obligors and collect the amount of it from them or any one of them individually.

Judgment affirmed.

COLLOPY V. CLOHERTY.

(Filed March 5, 1897—Not to be reported.)

Election by board of councilmen—Quorum—Under a rule adopted by a city council that "a majority of a quorum of members elected and voting shall be necessary to choose any officer elected by this board," a quorum of the members elected should vote to enable a majority of that quorum to elect an officer. Hence where the number of councilmen was fourteen, eight constituting a quorum of that body, and the record showed that only seven members voted at an election, the party for whom they all voted was not legally elected.

Root & Root for appellant.

Appeal from Campbell Circuit Court.

Opinion of the court by Judge Paynter.

Cloherty was elected "foreman of street repairs and overseer of the poor," and was holding the position in the city of Newport. Collopy

claims that the council of the city elected him to the position, and this action was brought to establish his claim.

The charter (1874) provides that a majority of the board of councilmen shall constitute a quorum to transact all ordinary business.

A rule had been adopted by the council which reads as follows: "A majority of a quorum of members elected and voting shall be necessary to choose any officer elected by this board." As to the right of council to adopt it there can be no question. This rule was in force at the time Collopy claims he was elected. There were fourteen members of the board of council. Of course eight would constitute a quorum. The record of the proceedings of the council shows that when it convened at the meeting during which the voting was done for the election of the "foreman of street repairs and overseer of the poor" thirteen of the members were present.

The record of the council exhibited in this record is silent as to the number present when the voting took place. Only seven members voted at the election and all voted for Collopy. However, in our opinion the question to be determined is not as to whether, under the law ordinarily governing the action of boards of council of municipalities, those who may have been present and did not vote should be counted to make a quorum, nor as to whether under that law, if a majority of the council failed to attend, a majority of those present may act.

The question is whether the rule required that a quorum should vote in order that a majority of it should be enabled to elect an officer. If the contention of appellant be correct then five members could meet and elect such officers as the council were authorized to elect, regardless of whether a quorum was present or participated in the election. We are of the opinion that the meaning of it is that a "quorum of the members elected" should vote, and that a majority of that quorum could elect when the quorum was "voting." We will not elaborate our views, but quote from the opinion of the lower court as follows, to wit: "I have not the least doubt as to the purpose of the council in adopting that rule. It was to require at least a quorum to place itself on record in the important matter of electing city officials by that body. And this was the construction placed upon it by the board itself, to which we may look if there be any doubt about it. The presiding officer so construed it, and declared that no one was elected by reason of the failure of the *quorum* to vote, and the board quietly, without a dissenting voice, and for an entire year, so far as appears, acquiesced in that construction.

"Nor is this construction inconsistent with the language employed in the rule. It is certainly as easy to refer the words 'elected and voting' to the antecedent 'quorum' as it is to treat the words 'majority of a quorum' as an antecedent.

"If, as claimed by plaintiff, five be sufficient to a choice, regardless of the number of votes cast, then the words 'elected and voting' are wholly useless, and should *have* been omitted. They do no duty whatever, since it is irresistably implied that the successful candidate received as many as five legal votes. This means that he was voted for by five members entitled to vote. It is idle to talk about being elected by votes not cast at all. The words referred to ('elected and voting') are, therefore, upon plaintiff's theory, 'worse than useless;' they only tend to confuse what would be absolutely clear if they were omitted.

"On the other hand if the intent of the rule be to require a quorum to vote these words become intelligible and signify something. We have the idea of a quorum vote; not that any particular candidate

must receive it, but that it must be cast either for one or all of the candidates.

"Had the purpose been as claimed by plaintiff, how easy to have omitted the words 'elected and voting,' so that the rule would have read as follows: 'A majority of a quorum of members shall be necessary to choose any officer,' or thus: 'The candidate receiving the votes of a majority of a quorum shall be declared elected.' But it was not done, and it seems significant that it was not done. This construction seems well grounded in both reason and public policy, as well as in the rules of construction. It is, besides, in perfect harmony with *Morton v. Youngerman*, 89 Ky., 505.

"In that case it is strongly intimated that it would require a specific enactment to overcome the rule of plurality and make a majority of the entire board necessary to a choice.

* * * * * * * * * *

"That the city council had the power, however, to adopt the rule in question is not open to doubt. Indeed the old charter expressly conferred the power to pass any ordinance, resolution or by-law not in conflict with it or the Constitution. * * *

"In Morton v. Youngerman the record showed that council had amended one of its rules by *striking out* the requirement that a 'majority' of the members elected and voting shall be necessary to choose, etc.

"So that it was unnecessary to consider the question of a majority of the members elected, etc., in that case. The court, however, distinctly and very properly recognized the right of counsel to adopt rules regulating elections by it, as indeed it did in this case.

* * * * * * * * * *

"Insomuch, therefore, as the construction which I feel constrained to give rule 37 seems to me to give effect to the intent of the council; secondly, to every part of the rule as framed; thirdly, to the sensible, as required by the rules of construction; and fourthly, to be in accord with public policy, in that it gives effect to a most salutary rule."

The judgment is affirmed.

AYDELOTT V. MCWILLIAMS & CO.

(Filed March 17, 1897—Not to be reported.

Action on contract—Finding of chancellor supported by evidence—In this action by appellees against appellant to recover the agreed price for erecting a heater in the house of appellant under a written contract, the evidence being voluminous and conflicting, the finding of the chancellor below will not be disturbed.

Gibson & Marshall for appellant.

Burwell K. Marshall for appellees.

Appeal from Jefferson Circuit Court, Chancery division.

Opinion of the court by Judge Hazelrigg.

The appellee, under a written contract, undertook to erect a heating apparatus in the house of the appellant. In this suit, brought for the agreed price therefor, viz, $850, he avers that in all respects

he complied with his contract and has been paid no part of the sum agreed on. The appellant resists the collection of the demand on the ground that the appellee failed to comply with the contract; that while he put in the apparatus the work was done so imperfectly as to render it substantially useless. The testimony is voluminous and contradictory. If the appellee and his witnesses are to be credited the finding below should be approved. If we accept the statements of appellant, corroborated in some particulars by other witnesses, judgment ought to have gone only for the amount for which appellant offered to confess, viz, $150.

In suits of this character we can not adjust these discrepancies in the statements of witnesses so accurately as the trial court. We have examined the proof carefully, however, and while the annoyance of the appellant, growing out of the inefficiency of the apparatus at the start, was great, we are not satisfied it was the fault of the appellees.

The chief complaint of the appellant is that the flue back of the boiler connecting it with the chimney was defectively built, causing a lack of draft, and hence causing the furnace to smoke and become clogged with soot. These results, however, are attributed by the appellee to the defective flues in the appellant's chimney, and which were accepted, as appellee contends, upon the assurance of the appellant that they had been examined by other bidders for the work and pronounced sufficient. There is no lack of testimony in support of both contentions, and as already indicated we shall adopt the adjustment of the conflicting statement made by the chancellor.

Judgment affirmed.

COLDIRON'S ADM'R V. TREADWAY.

(Filed March 20, 1897—Not to be reported.)

1. *Appeals*—No bill of exception being filed upon appeal, the only question for this court to consider is whether the allegations of the petition are sufficient to support the judgment of the trial court.

2. *Pleading*—It was not necessary for the petition, in this action to recover of an administratrix a sum of money deposited with her intestate, to allege that the plaintiff was the owner of the money deposited, the fair inference being that he was the owner; and, besides, even if he was not the owner, he might be entitled to recover unless some third party intervened and set up claim to the deposit.

It was not necessary to state in the petition the avocation in which the intestate had been engaged.

A. K. Cook and W. H. Holt for appellant.

Edward W. Hines for appellee.

Appeal from Clay Circuit Court.

Opinion of the court by Judge Guffy.

The appellee, John Treadway, instituted suit in the Clay Circuit Court against the appellant seeking to recover judgment for the sum of $400, alleged to have been deposited with the intestate of appellant. The answer is a denial of the deposit claimed, and it is also denied that appellee ever had $400.

The law and facts were submitted to the court, and the court rendered a judgment in favor of appellee for the amount claimed. No

separate finding of law and facts was asked. A motion for a new trial was made, based upon the ground that the judgment was contrary to the law and facts in the case, which motion was overruled by the court, and appellant has appealed. There is no bill of exceptions filed, hence the only question for decision is whether the petition is sufficient to support the judgment. The material portions of the petition read as follows: "The plaintiff, John Treadway, says that on or about the first part of the month of May, 1892, he deposited with C. L. Coldiron, now deceased, the sum of four hundred dollars in cash, which the said C. L. Coldiron agreed and promised to return on demand; that afterwards, on or about the 7th day of July, 1892, the said C. L. Coldiron departed this life intestate, domiciled in Clay county, Kentucky; * * * that the said C. L. Coldiron or anyone for him never paid to plaintiff or anyone for him the said four hundred dollars deposited by him as aforesaid or any part thereof; that he has made demand of the said administratrix as required by law for the said four hundred dollars, which demand she refused to pay, or any part thereof, and still refuses to pay said account on which demand was made, together with affidavits verifying same, are herewith filed and made a part of this petition; that said account of four hundred dollars is just, due and wholly unpaid; that there is no offset or discount against same or usury embraced therein."

It seems to us that the petition states a cause of action. It was not necessarily incumbent upon plaintiff to aver specifically that he was the owner of the money deposited, but the fair influence from the petition is that he was the owner, and if he was not such owner still he might be entitled to recover, unless some third party intervened and asserted a claim to the deposit. It was not necessary to state in the petition what avocation C. L. Coldiron was engaged in.

The answer put in issue the truth of the petition, and the presumption is that the proof was directed to the issue raised, and the court, having heard the evidence, rendered judgment, and no bill of exceptions being filed there are no grounds for reversal.

Judgment affirmed.

CULLETON, &C. V. KEUNE, &C.

(Filed March 11, 1897—Not to be reported.)

1. Deed set aside because of grantor's mental incapacity—The chancellor properly set aside a deed from husband and wife to a son of the wife by a former marriage because of the mental incapacity of the husband, who has, by the death of the wife, under the terms of the deed under which they held, become entitled as survivor to the whole of the property owned by them jointly.

2. Estoppel—Although the grantee agreed to hold the property in trust for the grantors, he is not estopped, the deed being set aside, to claim a lot included in the deed, the title to which, subject to his mother's life estate, was in him prior to the execution of the deed.

3. The step-son has no interest in the estate of his step-father by reason of the fact that it was largely the result of the business sagacity and industry and economy of his mother.

4. Improvements—Improvements made by the mother and the step-father upon the lot to which the son was entitled in remainder must be regarded as having been made for his benefit.

Thomas F. Hargis, Wright & McElroy and Hargis & Turner, jr., for appellants.

Thomas H. Hines, B. F. Procter and Sims & Covington for appellees.

Appeal from Warren Circuit Court.

Opinion of the court by Judge Paynter.

Wm. Culleton died intestate leaving a widow, Catherine, and an only son, the appellant, John Culleton. The widow married John Burke, and appellee, Mary Keune, is the only issue of the marriage.

Culleton at his death owned a lot in Bowling Green which the son inherited subject to such uses as the law gave his mother. Subsequent to the marriage of Burke and wife, by the industry and thrift of both, certain parcels of real estate were acquired, which were conveyed to the husband, John Burke. On the 25th day of December, 1886, John Burke and his wife made a deed purporting to convey to appellee, Frederick Keune, the husband of their daughter, the real estate which Burke had, and also the Culleton lot. On the same day Keune, by deed, conveyed the property described in the deed to him to John Burke and Catherine Burke, with this provision, to wit: "To Catherine Burke for her life, and, if she should survive John Burke, to her and her assigns forever; but if she should die before John Burke, then at her death the title to all the foregoing-described property shall vest absolutely in the said John Burke and his heirs and assigns forever."

John Culleton was no party to these deeds. On the first day of May, 1890, John Burke and Catherine Burke made a deed to John Culleton, conveying to him the property mentioned in the foregoing deeds.

This action was instituted by Keune and wife to have the deed to John Culletin set aside—first, because John Burke was mentally disqualified from making the deed; second, that while the deed was absolute on its face, in fact it was made with an understanding of all concerned that Culleton was to hold the title in trust for Mrs. Keune. Catherine Burke died before the suit was brought.

The facts with reference to the execution of the deed are substantially these: John Burke had acquired such habits, or such business habits, as made his family feel that he was imperiling his estate, and the conclusion was reached that it was best to have him and his wife convey the property to John Culleton, as the witnesses express it, for "safety." It was not intended by any of them to injure Burke, or in anyway to deprive him of the enjoyment of a comfortable support out of the property. The record shows that he was incapable of managing his estate and incapable of entering into the contract. John Culleton was a priest in the Catholic Church when the deed was made. Afterwards he abandoned his priestly calling, withdrew from the church and married. When this occurred the trouble began. It is but just to Culleton to say that he never claimed that he was the exclusive owner of the property. He claimed that he held one-half of it for himself and the other half for his sister. While Culleton thought it would, at the death of the father and mother, become the property of himself and sister, and as he would die without issue, it would go to his sister, and as that would be the result, the sister concluded that the brother held it in trust for her, yet we are of the opinion had the deed been valid that he would

have held it in trust for the father and mother. The court, we think, properly adjudged that the deed should be set aside. When this was done their ownership of the property existed as it did at the time the deed was made.

We find that John Burke, in his own right, and as survivor of his wife, owned all the property except the Culleton lot. The title to this remained in John Culleton because he had never parted with it, nor had he done any act which estops him from asserting claim thereto.

As we understand the judgment of the court, the Culleton lot is adjudged to appellant, including the improvements on it. If it did not do so we would reverse the case, with directions that the lot be adjudged to him, with the improvements thereon.

We think it is perfectly clear that it was largely through his mother's business sagacity, her industry and economy, that the estate of her husband was created and the improvement in the Culleton lot made. She was entitled to the use of part if not all of the lot during her life, and if she invested her money and earnings in placing an improvement on it, and if her husband aided her by his means in doing so thirty years ago, they did so knowing that John Culleton would at her death own the property, and it is conclusively presumed from the facts of this cause that such improvements were made for his benefit.

The fact that the appellant's mother contributed so largely in the manner stated to create the estate of her husband, John Burke, would not entitle the appellant to any part of it.

If John Burke's property had not been conveyed to Keune it follows that at the death of Catherine Burke the appellant would not have had any interest in it, nor would he have on the death of Burke.

Under the deed which Keune made to John Burke and Catherine Burke, at her death, Burke became the owner of the property which he formerly owned and conveyed to Keune. The debts which Keune paid were owed by Burke, and if Keune has any claim for debts paid it is against the property of Burke, not that of appellant. But we are not passing upon the question as to the validity of Keune's claim against Burke's property, but are simply stating, if any exists, Culleton's lot is not liable therefor.

The judgment is affirmed on the original and cross appeal.

WILLS V. EVANS.

(Filed February 9, 1897—Not to be reported.)

1. Guardian's bond—Infancy of one surety does not release others—The fact that one of several sureties in a guardian bond is not bound because of his infancy does not release the other sureties.

2. Validity of bond—Although neither an order entered May 3, 1884, appointing a guardian and reciting the due execution of bond, nor any of the orders entered thereafter, were signed by the county judge until June 9, 1884, the bond was at least good as a common-law obligation, being properly attested by the clerk and recorded in the bond book, thus showing its acceptance.

Grant E. Lilly for appellant.

Riddell & Riddell for appellee.

Appeal from Estill Circuit Court.

Opinion of the court by Judge Hazelrigg.

The testimony establishes that E. L. Cockrell was a minor when he signed the guardian's bond sued on; and while he was doing business and trading as if of full age, that fact did not make him any older. Since reaching his majority he has done nothing to ratify his former act, and is, therefore, not bound on the bond.

It does not follow, however, as seems to have been held by the trial court, that the other sureties are thereby released. In some cases, notably in taking sheriffs' bonds, the county judge has been held to a strict adherence to the methods provided by law for the execution of the obligation by the sureties, and on his failure to have the bond signed in such way as to bind all, the other sureties have been discharged.

This rule has not been adopted in other States, and will not be extended here to the disadvantage of infants, for whose protection such bonds are executed. Each surety, without any fraud or misrepresentation practiced on him by the officer taking the bond or by the ward, signed the bond in question, and undertook that the principal should faithfully perform his duties.

It appears that an order in the usual form, appointing the guardian and reciting the due execution of the bond by the guardian and his sureties, is entered on the order book of the county court on May 3, 1884, but that order nor any of the orders thereafter made in the court seem to have been signed by the county judge until on June 9, 1884.

The bond which is signed by the sureties, however, recites that their principal had been appointed guardian by the Estill County Court, and had qualified as such with the appellees and their representatives as sureties. This bond was properly attested by the clerk and recorded in the bond book, showing its due acceptance. In any event the bond is good as a common-law obligation. This seems to have been the view taken by the trial court, but the sureties were held to be discharged because of E. L. Cockrell's want of age.

Judgment reversed for proceedings consistent herewith.

HIXON, &C. v. BRIDGES.

(Filed February 9, 1897—Not to be reported.)

Partition—Lien upon land by one joint tenant—The evidence in this case shows that plaintiffs and defendant own the land in controversy jointly, to the exclusion of their brothers and sisters, the land having been bought by their mother, now deceased, with their money which she held as their guardian, and the lower court properly rejected defendant's claim to the whole of the land upon the ground that his mother had given it to him by parol to indemnify him for expenditures made by him for her benefit. And it was error to give defendant a lien upon the land for the amount claimed to have been paid out by him for his mother, as there was no testimony to support his claim except his own, which was incompetent, and, besides, he had been reimbursed by the use of the land.

J. E. Kelly for appellants.

Robert Crenshaw for appellee.

Appeal from Trigg Circuit Court.

Opinion of the court by Judge Burnam.

These consolidated suits were instituted in the Trigg Circuit Court on the 15th day of December, 1892, by M. A. Hixon and her husband, J. T. Hixon, and Charity Battoe against C. T. Bridges and the other children and heirs at law of Mary Bridges, deceased, the plaintiffs, M. A. Hixon and Charity Battoe, and the defendant, C. T. Bridges, being the youngest children of said Mary Bridges, deceased. They allege that their father, William Bridges, the husband of Mary Bridges, their mother, died many years before their mother's death; that in December, 1853, Mary Bridges qualified as guardian of her three infant children, M. A. Hixon, Charity Battoe and C. T. Bridges, and executed bond as guardian; that she collected $158.24, which was due and owing to each of said minor children from the estate of their grandfather, the interests of all the older children being paid to them direct; that in August, 1854, she purchased at a decretal sale, made by the master commissioner of the Trigg Circuit Court, a tract of land containing 42 acres, situate in Trigg county; that by the advice of her older children she used in this purchase $474.72 which belonged to her three infant children, and for whom she was guardian, she at that time having no other funds with which to make said purchase, and that said purchase was made with the understanding and agreement on the part of all the children that the land purchased was to belong to and be for the benefit of herself and her said infant children, who were at that time residing with her.

The evidence in the record shows that she lived on this land until her death, in July, 1876. Her two daughters married and left the premises, one of them (Charity Battoe) afterwards returning and living with her mother up to the time of her mother's death. Some six or seven years before her death, when she had become old and infirm, she invited the defendant, C. T. Bridges, who was her youngest child, to make his home with her, and the evidence shows that he moved to the farm and lived there from 1869 until her death in 1876. She died intestate; no administration was ever granted upon her estate, and no claims were ever legally asserted against same.

After the death of his mother defendant, C. T. Bridges, continued to use and occupy the land, his sister, Mrs. Battoe, living with him for some time. Finally the plaintiff, Mrs. Hixon, demanded a division of the land, or that he should pay her for her interest in same, and in December, 1877, defendant, C. T. Bridges, entered into an agreement with the husband of plaintiff, M. A. Hixon, by which he selected arbitrators, who, on the same day, returned an award to the effect that Bridges was to pay over to Hixon and wife $200, and that they were to make Bridges a deed to their part of said land, and this was to be a full settlement. This agreement was never carried out because Hixon did not want to make a warranty deed.

The evidence shows also that John Logan recovered a judgment against S. M. Bridges, one of the older children of Mary Bridges, deceased, and an execution issued upon his judgment was levied upon the supposed interest of S. M. Bridges in the tract of land to which his mother held title at her death, the same in dispute in this action, and he also instituted suit to have said interest ascertained and subjected to his debt. The defendant, C. T. Bridges, resisted this proceeding on the part of Logan, and set out the facts in his answer that the property was paid for by money of the three younger

children; that it belonged to them at their mother's death, and could not be taken to pay a debt of one of the older children. This answer was filed in 1878.

The defendant continued to occupy said land without accounting to plaintiffs, Hixon and Battoe, for any part of the rents until the institution of this suit in December, 1892. Then the defendant, C. T. Bridges, comes into court and claims, for the first time, that the property really belonged to his mother, and that she had given it to him by parol to indemnify him for moneys expended by him for her use and for services in taking care of her; and he also relies upon the statute of limitation to defeat plaintiffs' recovery.

A good deal of testimony was taken in the case. It all tends to show substantially the truth of plaintiffs' contention that the land was paid for with their money, and that it was recognized by the whole family as belonging to the three youngest children at the time of their mother's death.

The judgment of the court below in effect finds this to be true, holding that the plaintiffs and the defendant are the only heirs of Mary Bridges, to whom the land in controversy belonged at her death, and that the other children of Mary Bridges were not entitled to any part of same, but giving to the said C. T. Bridges a lien on said land for $300 for moneys paid out for the necessaries, doctors' bills, etc., for the benefit of his mother, and directing a sale of the property, first, to pay this $300, and then for a division of the overplus among the other two children.

From a careful examination of the record we are of the opinion that the alleged improvements put upon the land by defendant added little, if anything, to its saleable value, and were put there for the benefit of the defendant alone. We are further of the opinion that his plea of limitation is not supported by the evidence, as it all tends to show that he knew that the property in reality belonged to his sisters and himself jointly, as it was paid for with their money, and he repeatedly recognized this right by his words and acts.

There is no competent evidence to support the claim of defendant as to the moneys paid out for his mother's use and benefit. Said claims were never proven as required by law. His own testimony is wholly incompetent, and is practically the only evidence on that point; and in view of the fact that he has had the use of this property presumably, with the assent of the plaintiffs, since the death of his mother in 1876, and the evidence all shows that it is reasonably worth from $30 to $40 a year on rent, we are of the opinion that he has been fully re-imbursed for any expenditures made by him for the benefit of his mother during her lifetime, and that he should not now, at this late day, be permitted to gobble up this entire property by the assertion of these claims so many years after their alleged creation.

We think that the whole of said claims ought to have been disallowed; but in view of the fact that the plaintiffs acquiesced in his occupancy of the land, we do not think that he should be charged for the rents, except from the date of the institution of this suit, from which time he should be required to account for reasonable rent.

We hold that the land in contest belongs to the plaintiffs, M. A. Hixon and Charity Battoe, and the defendant, C. T. Bridges, jointly, and that same should be divided, if it is susceptible of division, into three equal parts, quality and quantity considered; and, if not, that said land should be adjudged to be sold, and the proceeds applied to

the payment, first, of the costs of this suit, and then to be divided equally between the parties.

Wherefore this case is reversed and remanded for proceedings consistent with this opinion.

PFAFFINGER V. GILMAN.

(Filed February 10, 1897—Not to be reported.)

Joint verdict—Judgment against only one of several defendants—In an action against several defendants to recover damages for injuries inflicted upon plaintiff by a wild and vicious bull which it was alleged had been turned loose by defendants upon the streets of the city, a verdict having been returned "for the plaintiff," and assessing the damages, one of the defendants against whom alone judgment was rendered upon that verdict can not complain that judgment was not rendered against the other defendants also, as it was agreed in writing that she alone was the owner of the business for which the bull was purchased, and she was the one who, in law and justice, ought to pay, and would have to pay the judgment; and, besides, counsel for defendants had asked, after the testimony was heard, that the jury be instructed to find for the other defendants.

M. A., D. A. & J. G. Sachs for appellant.

A. A. Stoll and J. W. S. Clements for appellee.

Appeal from Jefferson Circuit Court, Common Pleas division.

Opinion of the court by Judge Guffy.

The appellee, Gilman, instituted this action in the Jefferson Circuit Court, Common Pleas division, against Margaretha Pfaffinger, Wm. Pfaffinger, John Schwartz, executor of Jacob Pfaffinger, doing business under the firm name of Pfaffinger & Co., and P. C. Kennett to recover damages for injuries inflicted upon him by a wild and vicious bull, which bull was, as alleged, turned loose by defendants upon the streets of Louisville, which bull was known by the defendants to be vicious, or they could, by ordinary diligence, have known the fact.

The defendant Kennett, by separate answer, denied all the averments of the petition, so far as he was concerned, and a motion was finally sustained to instruct the jury to find for him and judgment entered dismissing the action as to him, although no formal verdict was in fact returned as to him.

The other defendants, for joint and separate answer, denied that they were doing business as a firm under any name; also denied the allegations of the petition as to appellee's injuries, as well as the averment that the bull was under their control or that they knew or could, by ordinary diligence, have known the bull was wild or vicious, and pleaded contributory negligence on the part of appellee.

A trial resulted in a verdict and judgment against appellant for $750.

Appellant moved for a new trial upon the following grounds, viz: Excessive damages, given under the influence of passion or prejudice; verdict contrary to law and not supported by the evidence; error in giving and refusing instructions, and error in refusing a peremptory instruction to find for defendants.

Appellant also moved to correct the judgment rendered upon the

verdict, all of which was overruled by the court, and from that judgment this appeal is prosecuted.

Before the case was submitted to the jury the defendant moved the court to instruct the jury to find for the defendants other than the appellant, which was overruled.

The verdict of the jury was simply, "We, of the jury, find for the plaintiff, and assess the damages at ($750) seven hundred and fifty," signed by eleven of the jury.

The judgment was rendered only against the appellant, who now contends that it was error not to render it against the other defendants; but, as it was agreed, in writing, that appellant alone was the sole owner of the business, for which it seems the bull was purchased, it is difficult to see how she was injured by the judgment being rendered against her alone. And it further appears that it was the contention of counsel before submission, and after the testimony was all heard, that the case should be dismissed as to the other defendants. If any of the defendants were liable for the damage claimed, it is clear that appellant was the one in law and justice that ought to pay, and would have to pay the judgment. The defendants did not introduce any testimony.

It is also contended by appellant that the parties driving the bull were independent contractors, hence appellant is, in no event, liable for the damages suffered by appellee.

It is pretty evident that Kennett had bought the five bulls, one of which inflicted the injury complained of, for appellant, and that it was his business to receive the same at the stock yard, and that she paid the parties for driving the stock from the stock yards to her place of business or to her stock pens. It is pretty clear that it was negligence to turn these bulls loose in the streets of Louisville. Perhaps one was roped and led, the others were loose. Taking the facts and circumstances as proven, and without any explanations on the part of appellant, the jury was authorized to believe that the parties attempting to drive the bulls were the servants or agents of appellant, and that they were guilty of negligence in turning such a bull loose in the street.

It is manifest from the evidence that appellee was not guilty of any contributory negligence. He was engaged in attending to business requiring his attention when the bull came up behind him and inflicted the injury.

We perceive no error in the instructions given, nor error in refusing those offered, prejudicial to the substantial rights of the appellant. The verdict is not excessive according to the proof.

Judgment affirmed with damages.

DUERRIGAN V. BEWE & CO.

(Filed February 11, 1897—Not to be reported.)

In a contest between appellant and other attaching creditors of a nonresident firm, appellants' claim being for wages, the evidence was sufficient to support the chancellor's finding that appellant was a partner and not an employe of the firm, the burden being upon him, in view of his relation to the firm, to explain every circumstance casting suspicion on his conduct and on his claim, and especially the delay in collecting his wages.

Boggs, Auxier & Harkins and Walter S. Harkins for appellant.

Appeal from Pike Circuit Court.

Opinion of the court by Judge Hazelrigg.

There were three suits filed in the Pike Circuit Court against Bewe & Co., who were alleged to be nonresidents of the State, and attachments were procured and levied on large quantities of timber and other property.

The first attachment was issued and levied in the suit of the appellant, Duerrigan, but, upon the trial of all the actions, after consolidation, the court gave preference to the subsequent attachments and levies of Bartley & Saunders and of H. Ratcliff & Co., and of this appellant complains.

In their answer to his petition these subsequent attaching creditors controvert the debt of appellant on the ground that he was, in fact, a partner in the firm of Bewe & Co. and not entitled to wages, for which he had sued, as an employe of the firm. They charge that the claim is not a just one, but was invented to cover up the property of the firm and to defeat its creditors.

There is some proof conducing to show this, and, while it is not altogether satisfactory, there are circumstances which strongly support the chancellor's finding.

The nonresidents, Bewe & Co., who seem to have lived at Baltimore, do not appear to have transacted in person the business of buying, gathering up and shipping the logs purchased in Kentucky, but left their business to Duerrigan, who held himself out as their "representative, agent or partner." For five years before engaging in the work in Pike county he had been the "shipping clerk, inspector and purchasing agent of Bewe & Co., at Baltimore," and he appears to have bought and paid for large quantities of timber, etc., in Pike county. It is fairly to be inferred from the proof that the debts created in that section were made by him and on his promises.

He testifies that he was working for $75 per month for a part of the time and $100 per month for the latter part of his service. When he learned that Bewe & Co. were about to quit the business, he brought his suit for $1,867 on an account beginning on March 1, 1883, and ending June 1, 1885, the total being $2,625, and credits the claim in a lump as "amount paid on account" $757, and has his attachments issued and levied on substantially all the property belonging to Bewe & Co. in Kentucky.

Just why, with the funds of his debtors constantly passing through his hands, he let his wages remain unpaid for so long a period we are not told. It seems to us, considering the relations existing between himself and the firm, and his attitude toward those with whom he was dealing, that the burden was on him to explain every circumstance casting suspicion on his conduct and on his claim, and especially the delay in collecting his wages. If he fully disclosed the extent of his agency, when buying, he would not be responsible; but even this he did not do, the proof being that he held himself out as the "representative" of the firm of Bewe & Co.; and, according to another witness, he was held out by the firm as its "agent or partner."

On the whole case, we see no good reason for disturbing the judgment of the chancellor, and it is, therefore, affirmed.

BRAMEL, &C. V. BRAMEL, &C.

(Filed March 12, 1897.)

1. *Will contest*—The testator having by his will disposed of his property in an apparently rational manner for the benefit of those with whom he had lived the greater part of his life, who had cared for him in his declining years and with whom his relations were necessarily closer and more intimate than with any one else, a verdict of a jury sustaining the will should not be disturbed unless manifestly against the evidence. It appearing that the will itself was a rational one, that under the circumstances there seems to have been no undue influence exerted over the testator, and that the fact of his testamentary capacity was supported by disinterested witnesses, the verdict can not be said to be against the evidence.

2. *Same—Instructions—Prejudicial error*—Although an instruction that "if the jury believe from all the evidence that the instrument of writing read in evidence was subscribed by John Bramel in the presence of two credible witnesses, who subscribed it with their names in his presence, and that said John Bramel, at that time, was of sound mind, they will find said instrument to be his will," is objectionable on the ground that it put to the jury the question of whether the paper was properly executed, which is a question for the court, it was not prejudicial to the rights of the appellants, for the jury found that it was so subscribed, which conclusion the court must have reached as a matter of law.

3. *Same*—The submission to the jury by the instruction the question of the credibility of the attesting witnesses, although erroneous, was not prejudicial to the appellants.

4. *Same*—The fact that one instruction told the jury to find for the propounders of the will if they believed from the evidence that the testator was of sound mind, while another told them to find against the propounders if they believed the testator was unduly influenced, was not misleading to the jury, since the instructions are to be considered as a whole, and the omissions in one may be supplied by reference to another.

5. *Burden of Proof*—The instruction that "if the jury believe from all the evidence that said instrument of writing is consistent in its provisions and rational on its face, the presumption is that John Bramel was of sound mind at the time of its execution, and the burden shifts to contestants to show that he was not of sound mind at that time," was not reversible error under the established rule in this State as to the shifting of the burden of proof.

6. *An objection to an instruction as misleading* because a statement of a mere abstract proposition upon the subject of testamentary capacity can not be sustained where the instruction proceeded to give a correct definition of the capacity required to render a man mentally competent to make a will according to the decisions of this court.

7. *The instruction which stated that the capacity required to render a man competent to make a will* was "to know his property and the natural objects of bounty and his duty to them," was not objectionable as stating by implication that the testator owed duties to the devisees named in the paper.

8. *The words "settled purpose of his own,"* as used in the instruction, are not materially different in meaning from the approved language, "fixed purpose of his own."

9. *Evidence*—The objection urged to the refusal of the court to permit appellants to prove by appellee that on a former trial a devisee testified to a certain conversation between the appellee and the testator can not be sustained, since it is not an admission against the devisee.

E. L. Worthington, W. H. Wadsworth, J. N. Kehoe, A. D. Cole and C. D. Newell for appellants.

Cochran & Son and L. W. Robertson for appellees.

Appeal from Mason Circuit Court.

Opinion of the court by Judge DuRelle.

This is an appeal from a judgment from the Mason Circuit Court establishing a paper executed by John Bramel as his last will. He died in March, 1891, in the seventy-ninth year of his age. Although illiterate, he appears, from the evidence in the case, to have been a strong-minded, active and successful man of business, and at the time of his death he and his brother, Turner Bramel, had accumulated a considerable fortune. He had never been married, but for the last forty years of his life had lived with his brother, Turner, whose wife, Martha, attended to the housekeeping duties. The appellants contested the will upon grounds of want of testamentary capacity and undue influence. By his will he left his estate to the wife and four children of his brother Turner, with the exception of an insignificant legacy to a colored boy living on the place, and a legacy of $1,000 to a favorite grandniece. His surviving brothers, and the children of his deceased brother and sisters, were entirely omitted in the will. The testimony in the case is quite conflicting, and shows that he had been in failing health for some time prior to the making of the will, which was followed by his death about seven weeks later. He had grown feebler, and was disposed to make little physical exertion, and showed a tendency to doze at intervals, the symptoms being those which usually accompany old age.

The will was drawn by W. W. Ball and attested by Ball and Thomas Wells, who came to his place for the purpose, having been sent for, according to the testimony, by him. It appears by their testimony that he dictated the terms of the instrument to Ball; that after being written out it was read over to him; he expressed his satisfaction with it, and signed it by mark in the presence of the attesting witnesses.

The contest was not instituted in the county court, nor, indeed, until some twelve months after probate.

Under the circumstances of this case—this will disposing of his estate in an apparently rational manner for the benefit of those with whom he had lived the greater part of his life, who had cared for him in his declining years, and with whom his relations necessarily were closer and more intimate than with anyone else—we should be slow to disturb the verdict of the jury sustaining the will, unless it was manifestly against the evidence, or unless for errors of law to the prejudice of appellant's substantial rights. We cannot say that the verdict was manifestly against the weight of the evidence. On the contrary, the will itself was a rational one, such as a man in his circumstances might naturally be expected to make; and the circumstances proven in the case do not seem to us to show that any undue influence was exerted over the testator. So far as his testamentary capacity is concerned, the fact of his dictation of the will without, so far as appears from the evidence, any suggestion whatever by those present as to the disposition which he should make of his estate, is, of itself, evidence of a disposing mind, which would seem to require direct and specific evidence to the contrary to rebut it. Such evidence is not wholly lacking, but it is offset by much evidence, not only of parties directly interested in the result of the contest, but by disinterested witnesses. We are of the opinion that the verdict was not against the evidence, and we will, therefore, consider the errors of law claimed to have been committed upon the trial.

Numerous instructions were given and refused on both sides, and, to those given, the court, of its own motion, added two.

Instruction 1 is as follows: "If the jury believe from all the evidence that the instrument of writing read in evidence was subscribed by John Bramel in the presence of two credible witnesses, who subscribed it with their names in his presence, and that said John Bramel, at that time, was of sound mind, they will find said instrument to be his will."

To this instruction the objection is urged that it was calculated to confuse the jury by requiring them to decide issues which should have been decided by the court; that it put to them, first, the question whether John Bramel signed the paper, and the further question whether the two witnesses were present when he signed it, and signed it as witnesses in his presence. There being no dispute about these matters, it is argued that the court, and not the jury, ought to say whether the paper was properly executed. This contention is sound, upon the authority of Word v. Whipps, 16 KY. LAW REP., 403. But in this case, as in the case cited, the error was not prejudicial to the rights of appellants, for the jury, by their verdict, found that it was so subscribed, a conclusion to which the court must have come as matter of law. A further objection to this instruction is that it required the jury to pass upon the question of whether the attesting witnesses were credible witnesses or not, and that, by coupling the question of the credibility of these two witnesses with the testamentary capacity of the testator, an advantage was given to the propounders of the will by giving undue weight and prominence to their testimony.

It is true that in the case of Fuller v. Fuller, 83 Ky., 345, this court held that the word "credible" was used in the statute in the sense of competent, and that it was for the court and not for the jury to determine the question of the competency of the attesting witnesses. In that case the propounders of the will complained of the submission of the question to the jury as requiring the jury to decide in their favor a question which, in that case, should have been decided in their favor by the court as matter of law. We can conceive that the jury might in some cases have been misled to the prejudice of the propounders by such an instruction, as it required them to satisfy the jury that the witnesses were credible; but we do not think that this error was prejudicial to the appellants. In the Fuller case the court refused to reverse, although the error in that case was against the propounders.

It is further urged that instruction 7 was erroneous as being inconsistent with instruction 1. That instruction was as follows: "If the jury believe from the evidence that the paper in contest was obtained by undue influence exerted on John Bramel, either by any of the beneficiaries named in the paper, or by any other person, then they will find that the paper in question is not the last will of John Bramel," following with the definition of undue influence.

Appellants claim that these instructions are contradictory; that in one they were instructed to find for the propounders, if they believed Bramel to be of sound mind, and in the other to find against them, if they believed he was unduly influenced. This court has often held that instructions given to a jury are to be considered as a whole, and that omissions in one instruction can be supplied by reference to another; and, while it would have been perhaps better to have added to instruction No. 1 the words "Unless they believe as indicated in Instruction No. 7," we do not think they could have misled the jury, even if we assume that the record discloses sufficient evidence of undue influence to form a basis for an instruction upon that subject.

Instruction No. 2, also complained of, is as follows: "If the jury believe from all the evidence that said instrument of writing is consistent in its provisions and rational on its face, the presumption is that said John Bramel was of sound mind at the time of its execution, and the burden shifts to contestants to show that he was not of sound mind at that time."

It is earnestly contended that the burden of proof does not shift, and, while this court has, in various cases, objected to the use of such phrases as "burden of proof" and "preponderance of evidence" in instructions to juries, their use is not necessarily reversible error.

Judge Marshall, in the case of Hawkins v. Grimes, 13 Ben. Monroe, 257, decided that "If upon the whole evidence, pro and con, it be doubtful whether the party be sane or not, then the presumption in favor of sanity may operate to decide the question otherwise in equipoise."

In the case of Milton v. Hunter, 13 Bush, 163, Chief Justice Lindsay condemned an instruction which placed the burden of proof as to testamentary capacity upon the propounders, in an opinion in which he used almost the exact phrase used in the instruction complained of, saying: "When the propounders of a will have proved the due execution of a paper not irrational in its provisions, nor inconsistent in its structure, language or details with the sanity of the testator, the presumption of law makes out for them a *prima facie* case, and the burden of showing that the testator was not in fact of sound and disposing mind and memory at the time of the execution of the will is shifted upon the contestants."

Judge Lindsay there held that the instructions under consideration in effect took from the propounders the benefit of the presumption of sanity. So in the case of Flood v. Pragoff, 79 Ky., 612. Judge Hines, delivering the opinion of the court, said: "In fact it is not ordinarily necessary that the propounders should show, as they did by attesting witnesses, that the testator was of sound mind, provided the statutory requirements were complied with, and there is nothing in the paper when presented which is irrational and inconsistent. Then the burden shifts to the contestants."

And in the case of Fee v. Taylor, 83 Ky., 259, Judge Holt stated the law as follows: "When, however, the due execution of a paper, rational in its provisions and consistent in its details of language and structure, has been proven the propounder had made out a *prima facie* case, and the burden of showing that the testator was not of a sound and disposing mind when the writing was executed, shifts to the contestant. The third instruction given by the court conformed to this rule."

The exact question raised in the case at bar was made in the case cited, and decided contrary to the contention of appellants.

It is claimed, however, that in Johnson v. Stivers, 95 Ky., 128, in an opinion by Judge Hazelrigg, the doctrine we have stated was modified by saying: "The burden was on the propounders to show, by a preponderance of evidence, that the testatrix was of testamentary capacity, and on the contestants to show by a preponderance of testimony that she was unduly influenced or coerced, as defined in the instructions," referring to the case of Fee v. Taylor, above cited, and other cases.

The reference to Fee v. Taylor, in support of the opinion, would clearly indicate that it was not intended to modify the doctrine there laid down, and that the statement that the burden as to testamentary capacity was on the propounders referred to the establishment of a *prima facie* case.

And in Barlow v. Waters, 16 KY. LAW REP., 426, this court, in another opinion by Judge Hazelrigg, confirms our conclusion as to what was meant by the opinion in Johnson v. Stivers by saying: "No. 7 places the burden of proof, as to the execution of the paper in the manner defined in No. 1, on the propounders, and the burden of showing undue influence or unsoundness of mind on the contestants. This conforms to the rule laid down by this court in Fee v. Taylor, 83 Ky., 259, and Johnson v. Stivers, 95 Ky., 128.

While we think it better practice to instruct the jury that if they believe from all the evidence the testator was of sound and disposing mind, etc., they should find accordingly, with, perhaps, a statement of the presumption of sanity, yet the instruction given in this case is, by the established rule in the State, not reversible error.

Instruction No. 3, which begins by stating to the jury, almost in the language used by Judge Simpson in Howard v. Coke, 7 Ben. Monroe, 658, that "the soundness of mind referred to in the instructions is not necessarily such strength of mind as will enable a man to fairly contract with another at arms length, or of trafficing in property and managing it advantageously," is also objected to as misleading, because a statement of a mere abstract proposition. The instruction, however, proceeds with a correct definition of the capacity required to render a man mentally competent to make a will.

And in Wise v. Foote, 81 Ky., 10, a case frequently referred to in later opinions of this court upon this subject, almost the exact language of the instruction was used as a correct statement of the law. The latter part of this instruction is also complained of as by implication, stating to the jury that the testator owed duties to the devisees named in the paper. That part of the instruction is as follows: "But the capacity required to render a man mentally competent to make a will exists when the testator has will, mind and memory to sufficiently understand that he is selecting the person or persons whom he wishes to have his property, and to know his property and the natural objects of his bounty, and his duties to them and to the persons upon whom his property is bestowed by the testamentary paper which he signs, and to make such disposition in accordance with a then settled purpose of his own."

We do not think that this instruction was an instruction that he owed duties either to the natural objects of his bounty or to the persons upon whom he bestowed his property, but that it left the jury to decide the question of mental capacity to know whether or not he owed them duties, and must have been so understood by the jury. This part of the instruction is also in great part a quotation from Wise v. Foote, *supra*, to which this court referred with approval in Johnson v. Stivers, 95 Ky., 128, saying: "The other instructions conformed to the law as laid down in Wise, &c. v. Foote, 81 Ky., 15."

The remaining objection to this instruction is that it uses the words "in accordance with a then settled purpose of his own" as carrying with them the idea of less permanence and stability than the words "fixed purpose." The words "fixed purpose of his own" have been often approved by this court in this connection, but we do not think that the words used were or could have been understood by the jury to have a materially different meaning from the language which is more commonly made use of.

The objection is not well taken which is urged to the refusal of the court to permit appellants to prove by appellee, Martha Bramel that on a former trial William Coleman, a devisee, testified to a

certain conversation between the appellees, Martha and John W. Bramel. We can see no ground for the admission of such testimony. It was not an admission against interest by Coleman, but hearsay as to an admission against interest by Martha and John Bramel, nor do we think the other refusals to admit testimony were material.

Wherefore, the judgment is affirmed.

CHESAPEAKE & OHIO RY. CO. V. SMITH.

(Filed March 19, 1897.)

1. Fire caused by sparks from railroad locomotive—Contributory negligence—Pleading—In this action to recover damages for the destruction of a barn and its contents, alleged to have been caused by sparks from a locomotive on appellant's railroad, the plea of contributory negligence was properly set up in these words, that the appellee, "on the occasion in question, was guilty of negligence on his part, and that said negligence contributed to the injury complained of by him, and that but for such negligence on his part the injury would not have happened," a specific allegation of the facts constituting such negligence not being necessary.

2. Principal and agent—Evidence—Res gestæ—A statement made by the claim-agent of the railway company to the appellee that he would pay the claim within sixty days was not admissible in evidence either as an admission of liability on the part of the company or as part of the *res gestæ*.

Wadsworth & Cochran for appellant.

Thomas R. Phister and L. W. Robertson for appellee.

Appeal from Mason Circuit Court.

Opinion of the Court by Judge Burnam.

This case was brought by appellee to recover damages for the destruction of his barn and contents by fire, alleged to have originated from sparks from a locomotive on the appellant's railroad, and resulted in a judgment in favor of appellee for the sum of $800. Appellant seeks a reversal for several alleged errors occurring on the trial.

First, appellant plead as a part of its defense in the action that the appellee, Smith, "on the occasion in question was guilty of negligence on his part, and that said negligence contributed to the injury complained of by him, and that but for such negligence on his part the injury would not have happened."

The plaintiff moved the court to require the defendant to set out the facts in full and specially on which he relied to support this plea of contributory negligence.

Against the contention of the appellant the court sustained this motion, and, upon his refusal to amend as indicated, this defense was striken from the pleadings.

This question as to whether defense can be made under a plea of general denial, as in this case, or whether the facts must be specially alleged, is not entirely free from difficulties. In fact, it has been ruled both ways in the United States. Generally it may be said that in those States "where it is incumbent on the defendant to plead contributory negligence specially, and where the defense can not be made under a general denial, the trend of authorities is that a general averment that the plaintiff was guilty of negligence which

contributed to the injury, and that he could have avoided all damage by the exercise of proper care, is not good; the acts and the facts constituting such contributory negligence should be averred." (See Encyclopedia of Pleading and Practice, volume 5, page 12.)

In the case of the Tennessee Coal Co. v. Herndon (100 Ala., 451), the defendant pleaded contributory negligence in these words: "That the plaintiff's intestate was himself guilty of negligence which approximately contributed to his alleged injury." The court said: "A demurrer was sustained to this plea on the ground that the plea did not definitely state in what the contributory negligence consisted, but merely averred contributory negligence generally."

We have held that under our system of pleadings damage suits consist of but little more than averments of conclusions. Many pleas, in form like the one under consideration, have passed this court, but there had been no objection raised against the plea in the trial court, and it would be regarded by us as a plea, in short, by consent.

So in the case of the Phœnix Insurance Company v. Mogg (78 Ala., 301, the court held: "A plea by defendant, which consisted wholly of a conclusion of law, is not sufficient," holding that there should be a succinct statement of the facts relied on as a cause of action.

In the case of Harrison v. the Missouri Railway Company (74 Missouri, 364), after speaking of the duty of defendant to state the specific facts of the negligence complained of, says: "If necessary to state the particular facts constituting negligence before a railroad company can be made liable for the consequences of negligence, it follows necessarily that, when such company seeks exemption from liability to the party complaining on the ground that the injury complained of was occasioned by the negligence of the other party, it should also set up the facts constituting such negligence."

So it has been held in a number of other cases, but the general practice in this State seems to have been to allow the plea of contributory negligence in the general form in which it is relied on here, and seems to rest largely upon the authority of Mr. Bliss in his work on Code Pleading. In section 211 of that work, in pointing out the distinction in pleading fraud and negligence, he says: "To charge fraud it is not enough to say that the party fraudulently procured, or fraudulently did this or that, or committed a fraud; they are but conclusions of law. The facts constituting the fraud must be stated. On the other hand, a general allegation of negligence is allowed. Negligence is the ultimate fact to be pleaded, and is not a legal conclusion, as the defendant did run and manage one of their cars in such a careless, reckless and negligent manner that death was caused. The law draws the conclusion in both cases, yet we have seen that negligence possesses more the element of fact than fraud. In fraud the facts are misrepresentation and deceit; the term 'fraud' is a legal epithet applied to such facts. Fraud is not an act; not a thing in itself any more than murder. We say that one is guilty of fraud because he has done so and so; it is the legal conclusion of these facts. But, on the other hand, negligence is not a term given by law to certain conduct, but forms part of the act from which the injury has arisen. Specific acts constituting negligence can seldom be directly shown, but is presumed from injuries which ordinarily result only from negligence. For instance, the driver upsets a coach and breaks a passenger's arm. Careful driving will hardly have such a result; the passenger knows there has been negligence, but he will not be likely to know in what it con-

sisted. So, where a locomotive sets fire to fields and buildings along the track, the sufferer can not state in what the negligence consists—whether there is a defect in the furnace or carelessness in the management—some negligence is presumed, and it must of necessity be alleged generally. And the same rules apply to an answer which sets up contributory negligence."

This court took this view in the case of the L. & N. R. R. Co. v. Wolf (80 Ky., 82). The court, in deciding that case, used this language: "It is contended by counsel that the reply fails to deny the substantive facts constituting contributory negligence, and only traverses the averment of negligence, which is by denying a legal conclusion. The error in this position lies in the assumption that the allegation of negligence is a mere legal conclusion, and that the supposed substantive facts constitute contributory negligence, neither of which is true. The absence of care in the performance of an act is not merely the result of such absence, but the absence itself, and it is not, therefore, a mere conclusion of law, and may be pleaded generally" in an answer, the facts having been specifically set out in the petition. And in many other cases which have been decided in this court, the plea of contributory negligence was set out substantially as in the amended answer of defendant, and have been held good. There are many ways in cases such as this, in which landholders may be guilty of such contributory negligence as may defeat recovery for losses sustained. (See Sherman and Redfield on Negligence, sections 679 to 682, and Wood on Railways, Minor's edition, 1575 to 1600.

We are, therefore, of the opinion that the court erred in striking this plea from the amended answer. Another ground of error complained of was the admission by court of a statement made by appellee in his testimony before the jury that Patton, the claim agent of appellant, had said that he would settle the claim and would pay it in sixty days; and also in permitting his son-in-law to testify that Patton had said (at the time he came to ascertain the causes of the injury complained of that, in his conversation with appellee), "you will likely hear from it in thirty or sixty days; he said that we would be paid for it, and that we would hear from it in sixty days." This testimony was excepted to at the time, and the court allowed it to go to the jury over the appellant's objection.

This is not an action upon a contract or agreement entered into by the company through its claim agent, Patton. It is a suit for injuries resulting from negligently allowing sparks to escape from the locomotive. And whilst it is very plausibly contended by appellee that this evidence was not introduced to show admission of liability on the part of the railroad; that no instruction was predicated upon it, and that the jury were alone directed to find upon the evidence that the spark-arrester was out of order, and that the testimony was competent because it was part of a conversation which had been called out by plaintiff, being a part of the *res gestæ* of the conversation, it is well settled that "the admissions or declarations of an agent are received in evidence against a principal but as parts of the *res gestæ;* hence, only such as accompany the acts which are relied on for recovery can be proven. Thus, it is not true that where an agency is established, the declarations of agents are admitted merely because they are his declarations. They are only evidence when they form a part of the contract entered into by the agent on behalf of a principal, and in that case they become admissible. The cases on the subject draw this distinction between the declarations of the agent accompanying the making of an agreement, and, therefore,

forming part of an agreement, and those made either at a subsequent or antecedent period. The basis of such admissions is the legal identity of principal and an agent, and the fact that his declarations are a part of the *res gestæ*." (See McDermott v. Hannibal and St. Joe R. R. Co., 73 Missouri, 516; 39 American Reports, 526; Moore v. Meecham, 10 N. Y., 207.)

"This is now the well-established doctrine, and its application to other acts of an agent, besides that of making contracts, is equally well settled that the declarations of an agent are received, not as admissions, but as part of the *res gestæ*."

In the case of the Virginia & Tennessee R. R. Co. v. Sayers (26 Grattan, 328), the court said: "It is true that where the acts of the agent will bind the principal, his declarations, representations and admissions respecting the subject-matter will also bind him if made at the same time, and constitute a part of the *res gestæ*. They are of the nature of original evidence, and not hearsay—representations and statement in such cases being the ultimate facts to be proven, and not mere admissions of some other fact."

In this case the agent knew nothing whatever of the burning. He was simply seeking information on that point, and the extent of appellee's injuries, therefore, declarations on his part relating to the facts of negligence sued on can not be competent, as they were certainly not a part of the *res gestæ* of the negligence which occasioned the loss, and it would be very difficult for juries to draw the nice distinctions suggested by the counsel as to the purposes for which such evidence was admitted. They would be very likely to regard such declarations as an admission of liability for negligence on the part of appellant, and a promise to pay, and consequently highly prejudicial to the railroad company.

We think it was error to have admitted this testimony, and for the reasons named this case is reversed and remanded for proceedings consistent herewith.

CLARKE'S ADM'R V. LOUISVILLE & NASHVILLE R. R. CO.

(Filed March 9, 1897.)

1. Injury from putting arm outside car window—Willful neglect—Election—In an action by a personal representative under section 6 of Kentucky Statutes to recover damages for the death of his intestate, the petition alleging in one paragraph that the death was caused by the willful neglect of the defendant, and in another paragraph that it was caused by the gross negligence of defendant, but one cause of action was stated, and the way to correct the petition was not by a motion to compel plaintiff to elect which cause of action he would prosecute.

2. Same—Punitive damages—Under section 241 of the Constitution, which provides that "whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then in every such case damages may be recovered for such death from the corporations or persons causing same, the legislature has the power to fix the degree of negligence for which punitive damages may be awarded, and to provide, as it has done, by section 6, Kentucky Statutes, that such damages may be awarded where the "negligence is gross."

3. Contributory negligence—The word "willful," as descriptive of a degree of negligence, is now eliminated from the statute, the provision of section 6, Kentucky Statutes, that punitive damages may be awarded where the "act is willful" having no reference to acts of negligence; and, therefore, the rule that contributory negligence could not be pleaded as a defense to an action for

willful neglect, which applied under section 3, chapter 57, General Statutes, does not apply to an action under section 6, Kentucky Statutes, although willful neglect be alleged.

4. *Where a passenger on a railroad train in passing through a tunnel* voluntarily though inadvertently placed a part of his arm outside the car window in placing his eye-glasses in his pocket, and while his arm thus protruded it came in contact with an upright timber in the tunnel causing an injury which resulted in his death, the passenger was guilty of such contributory negligence as to preclude a recovery from the railroad company.

5. *Where there is no controversy as to the facts or they are admitted*, and but one inference can be drawn from them, then it is the duty of the court to declare their effect in law. And as the facts alleged in the petition in this case showed that plaintiff's intestate was guilty of such contributory negligence as to preclude a recovery, it was proper to sustain a demurrer to the petition.

Hanson Kennedy and G. W. Cassidy for appellant.

G. C. Lockhart, W. H. Wadsworth and W. G. Dearing for appellee.

Appeal from Fleming Circuit Court.

Opinion of the court by Judge Paynter.

Decedent, S. D. Clarke, in July, 1894, was a passenger on defendant's passenger train, and whilst going from Carlisle, Ky., to Helena Station, Ky., in passing through a tunnel his arm protruded through a window in the coach, struck an upright timber in the tunnel, which had been placed there by the defendant, and the collision of the arm with the timber inflicted an injury from which he died in a few days thereafter.

I is averred that the accident occurred in the manner as follows: That the intestate was sitting on the left side of the car by a window that was hoisted; that he took hold of the left lappel of his coat with his left hand for the purpose of raising same so as to enable him to put his eyeglasses in his vest pocket on the left side with his right hand; that as he raised the left lappel of his coat with his left hand for the purpose stated he, without intending to do so, protruded the elbow of his left arm through the open window, not more than three inches beyond the place where the sash would be when the window is shut, and not more than one and one-half inches beyond the outer surface of the side of the car; that when his elbow was thus protruded the upright timbers in the tunnel were in such close proximity to the side of the car that they struck his arm near the elbow. It is also averred that the width of the tunnel had been reduced in repairing it; that at the time the injury occurred and for months previous thereto the tunnel was in a dangerous condition, and the upright timbers in the side of the tunnel were in such close proximity to the iron rails therein that when cars passed through the natural and usual oscillations of the cars were sufficient to cause them to strike against the timbers; that the sides of the passenger cars did often strike against the timbers, and that the condition of the tunnel as described existed when the accident occurred.

The petition as originally filed was in two paragraphs. In the first it was charged that the accident was the result of *willful neglect;* in the second it was charged that it resulted from *gross negligence.* The court compelled the plaintiff to elect which *cause* of action she would prosecute. She elected to prosecute the cause stated in the first paragraph. Although the plaintiff had two paragraphs in the petition there was in fact but one cause of action (if any existed) stated. The

way to correct the petition was not by a motion to compel plaintiff to elect which cause of action she would prosecute. The plaintiff elected to prosecute the action under the first paragraph of the petition, charging the injury resulted from *willful neglect*. In our opinion, as hereinafter stated, there is not, under the present statute (the one in force when the accident occurred), a cause of action for "willful neglect."

We will consider the case as if the petition contained appropriate averments under the statute as to negligence. Section 241 of the Constitution is as follows: "Whenever the death of a person shall result from an injury inflicted by negligence or wrongful act then in every such case damages may be recovered for such death from the corporations or persons causing same."

As the constitutional provision relating to the liability for producing death by wrongful act or negligence, and as the general assembly has a law (section 6, Kentucky Statutes) under the constitutional provision (section 241), we have very much desired to arrive at the intention of those who made the organic and statutory laws, the construction of which is involved in this case.

This court held (Henderson's adm'r v. K. C. R. R. Co., 86 Ky., 389; Jordan's adm'r v. C., N. O. & T. P. Ry. Co., 89 Ky., 40), no one could maintain an action (under section 3, chapter 57, General Statutes), when death was caused by "willful neglect" unless the deceased left a widow or child. The general assembly had failed to amend the statute so as to allow a recovery in cases where the decedent left neither widow or child.

These were the conditions which suggested to the Constitutional Convention the incorporation of section 241 of the present Constitution.

When the Constitution was adopted, under the statute, punitive damages could be awarded if the life was destroyed by willful neglect.

Section 6, Kentucky Statutes, reads as follows: "Whenever the death of a person shall result from an injury inflicted by negligence or wrongful act then in every such case damages may be recovered for such death from the person or persons, company or companies, corporation or corporations, their agents or servants causing the same, and when the act is willful or the negligence is gross punitive damages may be recovered, and the action to recover such damages shall be prosecuted by the personal representative of the deceased."

There is omitted from this section the words "willful neglect," which were in the former statute. Instead of the present statute authorizing the recovery of punitive damages when the life is destroyed by *willful neglect* it authorizes a recovery of punitive damages when the "act is willful" or the "negligence is gross."

Punitive damages may be recovered under the present statute when the "negligence is gross."

This court had held that the words "willful" and "gross" were not synonymous, and from the definition given by the court of these words "willful," as applied to negligence, meant a higher degree of negligence than "gross." The word "willful," as descriptive of a degree of negligence, is eliminated from our statute. "Willful" and "gross" are not used in the present statute as synonymous words. The word "willful" is descriptive of the "act," whilst the word "gross" is descriptive of a degree of negligence.

Under "Lord Campbell's Act" an action was maintainable against a person who, by his "wrongful act, neglect or default," may have

caused the death of another person. Most, if not all, the American States enacted statutes substantially similar to "Lord Campbell's Act."

These various statutes differ widely in language in which they are expressed, both from the English act and from each other. The words "wrongful act" had no place in our statute relating to actions for the destruction of life. It first appeared in section 241 of the Constitution. It is a more comprehensive term than the word "negligence." Necessarily in every case of negligence there must be a "wrongful act," either of omission or of commission. There may be an actionable "wrongful act" which is not the result of negligence, neither is there an element of negligence in it. It may be willfully or intentionally done. The words "wrongful act" denote or embrace all acts other than those constituting *mere* negligence, which are wrong, and inflict an injury resulting in death.

Our conclusion is supported by the language of the statute, which allows a recovery of punitive damages if the "act is willful" or the "negligence is gross." If the general assembly was enacting a statute on negligence alone why did it not say punitive damages could be recovered when the negligence is gross or willful. If the Constitution and statute did not provide for a recovery for an injury by *negligence*, but used the words "wrongful act," then we would adjudge that *wrongful acts* embraced or included *negligent acts*.

Section 241 of the Constitution did not repeal section 3, chapter 57, General Statutes. (Wright, &c. v. Wood, 96 Ky., 56.)

Section 6 of the present statute did repeal section 3, chapter 57, General Statutes.

If section 241 of the Constitution did not repeal section 3, chapter 57, General Statutes, as adjudged in Wright v. Wood, thus recognizing the validity of an act of the general assembly to fixing a "degree" of negligence for which punitive damages may be recovered, it follows that the general assembly can change or designate the "degree" for which it may authorize a recovery of punitive damages. Gross is a degree of negligence at the common law. We do not think it any longer an open question as to the authority of the general assembly to pass the statute in question.

This court held in Passamaneck's adm'r v. Louisville Ry. Co., 17 KY. LAW REP., 763, that section 241 is not intended to deprive a defendant of the right to rely on contributory negligence as a defense. Had Clark survived the injury which produced his death, in an action by him for damages for the injury, in which he alleged the injury was the result of gross negligence, contributory negligence would have been available as a defense. We can perceive no reason why it should not be equally as available in an action by his personal representative. Plaintiff seeks to avoid the defense of contributory negligence by alleging that the death resulted from *willful neglect*. As we said, the present statute does not provide that punitive damages may he recovered by showing willful neglect. It follows that the former adjudications of this court, that contributory negligence was not a defense when willful neglect was shown, are not applicable to actions for *negligence* or *gross* negligence under the present statute.

We will further but briefly consider the case in the light of the rules of law stated and such others as are applicable to it.

In Morel v. Miss. Valley Life Ins. Co., 4 Bush, 537, it was alleged that the plaintiff "inadvertently" put his arm a short distance out of the window of the car, when his hand came in contact with a post while the train was running with its usual velocity, without the

slightest necessity for doing so, and the court said it was *needlessly* and *negligently* done, and he was not entitled to recover.

In the Sickings case, 5 Bush, 7, the arm was placed out of the window *unthoughtedly* and *unnecessarily*, and the court held that when one places his arm out of a car window voluntarily and without any qualifying circumstances impelling him to, it must be regarded as negligence *in se*, and when that is the state of the evidence it is the duty of the court to declare the negligence in law.

In the Favre case, 91 Ky., 544, it was alleged that the plaintiff allowed his hand to protrude eight or ten inches out of the window; that the train was running at a dangerous and unusual rate of speed; that there were dangerous obstructions in immediate proximity to the track unknown to him, whereby his arm was broken.

The court said the "rule of law that a party is precluded from recovering for an injury, to which he so far contributed as that but for his own negligence and want of ordinary care it would not have happened, can, upon neither principle nor public policy, be relaxed or qualified in this character of case, even if the conduct of the other party could be logically considered in any case."

The cases are in accord with the current of authority. In fact no cases have been cited in which a contrary view is expressed, nor do any of them militate against them except in a case or two in jurisdictions where the doctrine of comparative negligence prevails. This doctrine is generally denied in the courts of this country. Whilst the timber was in close proximity to the car, and a slight protrusion of the arm caused the injury, and whilst the facts of this case differ somewhat from the Morel, Sickings and Favre cases, yet we are unable to distinguish it from them so as to hold the doctrine of those cases will not apply to this one. We can not furnish any rule by which to measure the distance a passenger may protrude his arm before it can be said he is guilty of negligence. It is the fact that he does so, without any qualifying circumstances impelling him, not the distance so protruded, that constitutes the negligence.

Clarke *inadvertantly, unthoughtedly and unnecessarily*, if not purposely, allowed his arm to protrude out of the window and this was negligence *in se;* although he did so in placing his eyeglasses in his pocket, nevertheless it was his own act.

The necessity for adjudging what are the "qualifying circumstances impelling him to it" (to which the courts refer), which render the act of putting an arm outside of the window non-negligent, does not arise in this case. It is not alleged that the arm protruded in consequence of the oscillations or swerving of the cars, or from any act of those in charge of the train, but it is alleged that the deceased put his arm outside of the window of the car.

The facts alleged in the petition, and which are admitted as true on demurrer, show that but for the decedent's own negligence and want of ordinary care the accident would not have happened. When there is no controversy as to the facts or they are admitted, and but one inference can be drawn from them, then it is the duty of the court to declare their effect in law.

Under the doctrine of the Favre case, it was proper to sustain a demurrer to the petition.

The judgment is affirmed.

RUSSELL & CO. V. COX, &C.

(Filed February 9, 1897—Not to be reported.)

Principal and agent—Parties to actions—Where an agent, in selling goods subject to the approval of his principals, agreed with the buyer to take from him a horse at a certain price, to be credited on the last of three notes executed for the purchase price of the goods, that agreement is not binding on the principals, no reference being made to it in an order for the goods, signed by the buyer, to be forwarded to them, and the agent is not a necessary or proper party to an action upon the note upon which the price of the horse was to be credited.

Vaughan & Howes for appellants.

John P. Wells for appellees.

Appeal from Johnson Circuit Court.

Opinion of the court by Judge Paynter.

James Lyon was authorized by the appellants, Russell & Co., who were manufacturers of machinery to sell certain of their products subject to its approval within certain territorial limits. Under a special arrangement with it Lyon was authorized to sell one second-hand six-horse power engine and boiler and certain attachments. He solicited the appellees to become purchasers of the property described, and they informed him that they would not take the property unless he would take a horse at $125. They finally agreed on a sale at $350, for which appellees were to give their notes for the respective sums of $100, payable June 1, 1892; one for $100, payable December 12, 1892, and one for $150, payable June 1, 1893, all of which were to bear interest. Lyon agreed to credit the note for $150 with the price of the horse, he representing to the purchasers that he had commissions for making the sale to come out of the last note, therefore, he would take the horse and credit them therewith on the $150 note. The purchasers understood that Lyon could not make the sale except on the approval of Russell & Co. Thereupon they signed an order, to be forwarded to Russell & Co., for the property, in which there appears language as follows, to wit: "We, the undersigned, agree to receive the above, subject to the conditions named below, to pay the freight and charges thereon from factory, and further agree to pay to *your order*, on arrival of the goods at the above-named place, the sum of three hundred and fifty dollars, as follows: Cash, $——; one note, due December 12, 1892, $100; one note, due June 1, 1892, $100; one note, due June 1, 1893, $150; notes to be dated as herein specified; to bear interest from date at 6 per cent., to be given on your blanks, payable at Catlettsburg National Bank of Catlettsburg, Ky."

When the order was forwarded to Russell & Co. no notice was given by Lyon or appellees that Lyon had agreed to take a horse and credit it on the note. Instead of the proposed purchasers informing Russell & Co. that they had an agreement to pay $125 in a horse they proposed to pay the entire amount to them in cash as evidenced by the notes. They did this, notwithstanding they knew that Lyon had no authority to make a contract with reference to the property without the approval of Russell & Co.

It was said in Craycraft, &c. v. Selvage, &c., 10 Bush, 709, "the rule is that one dealing with an agent, whose powers he knows are limited, deals at his peril, whether the limitation be as to the extent of the agent's powers or the mode of their execution."

The facts of this case remove it from the class where the principal is bound for the exercise of the apparent authority of the agent. The sale of the horse to Lyon does not entitle appellees to a credit on the note for his value. They must look to him for the agreed value of the horse, as Russell & Co. are not bound therefor. Lyon was not a proper party to the action. If the delivery of the horse to Lyon was a payment on the note then it is unnecessary for him to be made a party to the action, as he was simply an agent in the transaction. If he is bound individually to appellees for the agreed value of the horse, as we think he is, then he should not be made a party to the action. If Russell & Co. owe him then he is not entitled to litigate the matter in this action, which is to determine the controversy between Russell & Co. and appellees.

The judgment is reversed, with directions that further proceedings conform to this opinion.

DULANEY, &C. V. LOUISVILLE & NASHVILLE R. R. CO.

NORTON V. SAME.

ERDMAN V. SAME.

(Filed February 9, 1897.)

1. *Construction of railroads in streets of city—Injunction*—Prior to the enactment of the present statute (section 768, Kentucky Statutes), which does not apply to these cases, the construction of a railroad through the streets of a city, although without legislative or municipal authority, could not be enjoined by abutting lot owners.

2. *Same*—An act of the legislature requiring a railroad company to make a certain connection which necessitated the use of the streets of the city was sufficient to authorize the use of the streets for that purpose.

3. *Same*—Under the charter of the Louisville Railway Transfer Company, which authorized that company to acquire the right of way, construct and operate any branch roads connecting with other railroads terminating at Louisville or connecting therewith by bridge or ferry "for the accommodation of the commercial and manufacturing business of the city of Louisville, said city consenting thereto," the company had the right, with the consent of the city, to use the streets of the city to make such connections as the business interests of the city demanded, and it seems that another corporation which owns all the stock of that company may exercise that right.

4. *Nunc pro tunc order—Appeals*—Where an opinion of the chancellor made a part of the record by order of court was regarded by all the parties as final and as an end of the litigation, a *nunc pro tunc* order entered ten years thereafter dismissing the petition in accordance with the opinion was proper, and it was then too late to prosecute an appeal.

Pirtle & Trabue, Simrall, Bodley & Doolin, Humphrey & Davie and John W. Barr, jr., for appellants.

Helm & Bruce and H. W. Bruce for appellees.

Appeal from Jefferson Circuit Court, Chancery division.

Opinion of the court by Judge Hazelrigg.

In 1882 the general council of the city of Louisville adopted an ordinance permitting the appellee, the Chesapeake, Ohio and South Western Railroad Company to construct and operate a railroad, with

single or double track, along and over "A" street, through the city limits, and provided that all other railroads so desiring might use such tracks upon making proper arrangements therefor with that company. Thereupon the Louisville & Nashville Railroad Co. under a contract with the C., O & S. W. Co. was about to construct such tracks when the two companies were sued and sought to be enjoined by Dulaney, Downs & Marks, joint owners of lots abutting on "A" street, and who set up that the council had no power to adopt the ordinance; that the construction of the tracks and operation of the road would greatly impair the value of their property and would interfere with the reasonable use of the street. The case was at once prepared, and on final hearing in March, 1883, the chancellor handed down an elaborate opinion, signed officially and made part of the record by an order in which the relief asked was denied. Legislative authority for the ordinance was held to exist, and, moreover, if no such authority in fact existed, it was held that the construction and operation of the road would be a public nuisance, to be abated by the public authorities unless private rights were invaded, which state of case did not exist in the opinion of the chancellor. This ended the litigation, as the plaintiffs determined to prosecute no appeal. According to Dulaney's statement they abandoned the fight. The track was, thereafter, laid on the street, and was there and in use in 1887, when appellants, Norton & Erdman, bought lots abutting thereon, Erdman buying wholly from Dulaney, and Norton buying in large part from him.

In 1893 it was discovered that no formal entry of an order dismissing the petition of Dulaney, Downs & Marks had been made in accordance with the opinion of the chancellor in 1883. After notice to the attorneys of the plaintiffs in that suit, counsel for the railroad companies procured a *nunc pro tunc* order carrying into effect the opinion of 1883. From that order an appeal is now being prosecuted with Dulaney's consent for the benefit of his vendees, Norton & Erdman. This is the appeal first named above. The other appeals are from judgments against Erdman & Norton, who brought suits against the two railroad companies in 1893, seeking to enjoin them from the further use and occupancy of street "A," and from laying a double track thereon, which it was alleged was about to be done. These actions met the same fate, though at the hands of a different chancellor, as the old Dulaney suit. Hence the appeals of Norton & Erdman.

Passing by for the present the contention of the appellees that no appeal lies from the judgment in the Dulaney case, that the vendees of the plaintiffs in the old suit are bound by the old judgment, and that in any event the laches and delay of the appellants must deprive them of the right by injunction to thus seriously affect the rights of the appellees acquired under the old judgment after the expenditure of large sums in constructing not only the tracks but the union depot at a cost of many thousand dollars, and which they allege and prove was built chiefly, if not solely, because of their supposed right to connect their southern with their eastern lines by the short route afforded by the street in dispute, we come at once to the controlling question in the cases, and that is what are the rights of the abutting owners in and to this public street? It is to be marked in the first place that the property involved is wholly unimproved and vacant. It is substantially out in the commons on the southern limits of the city, and, therefore, we are not called on to consider any alleged injury arising from the jarring of walls by passing trains, or damage from smoke or cinders. These questions are for

the future and may never arise. At present they are purely speculative. Nevertheless, the street may not be so appropriated as to unreasonably obstruct or seriously impair the owner's usual mode of ingress or egress to and from the lots when they may be improved. It is upon the expected enjoyment of the right by the owner to freely use the street that the value of the abutting lots largely depends.

The proof discloses and the maps so show that the street is to be sixty feet in width. What width the sidewalk may be when made is unknown, but from the proof and in the nature of things we should think eight feet would be ample. This would leave some thirteen or fourteen feet on either side of the double track for the usual travel, and would seem to be sufficient.

When the conclusion is reached that no private right, such as we have indicated, is invaded, it is the contention of the appellees that the plaintiff's case is at an end, and that for any invasion of the rights of the public, or any encroachment on the public streets by any unauthorized entry on the possession of the public, the right to interfere and abate the nuisance is in the public authorities. And this contention we shall briefly examine.

It is well settled in many of the States, though in some of them by statutory enactment, that the construction of a railroad, to be operated by steam on a public street, is a new servitude or burden on the use to which the street was originally dedicated; that, therefore, the abutting owner may resist such construction and occupancy until he shall receive adequate compensation for this new use. An exhaustive discussion of this question, with full compilation of the authorities, is found in the recent work of Elliott on Railroads, section 1085, *et seq.*

In Kentucky, however, the rule was settled otherwise, as far back as the Applegate case, decided in 1854 (8 Dana, 301.) It was there said: "But even though some persons owning property on the railroad street may be subjected to some inconvenience and even loss by the construction and use of the road, yet if the use made of the road be consistent with the purpose for which the street was established, and also consistent with the just rights of all, such persons have no right either to damages or to an injunction," and the use of the street for such a purpose was recognized as entirely consistent with the purposes for which a street may be properly used. This doctrine was fully recognized and followed in Wolfe v. Cov. & Lex. R. R. Co., 15 B. M., 409; Lou. & Frank. R. R. Co. v. Brown, 17 B. M., 763, and Newport & Cincinnati Bridge Co. v. Foote, &c., 9 Bush, 264.)

In the case last cited it was said: "There is no rule of law which gives to the owners of property adjacent to an improvement consequential damages by reason of such improvement when constructed with skill and care, and in such manner as not to interfere with any private right, such as the right to light, air or passway, or by destroying the use or enjoyment of the buildings erected on adjacent land by leaving such a small intervening space between the building and the improvement as to prevent ingress and egress."

In Cosby, &c. v. Owensboro & Russellville R. R. Co., 10 Bush, 291, it was held to be a result of these well settled principles that the construction and operation of a railroad through the streets of a city or town was not *per se* an encroachment upon the property rights of abutting lot owners. "For if it was," said the court, "it is plain that neither the municipal authorities nor the legislature nor both could confer upon a railroad corporation any such right. It would be the

taking of private property for public use without compensation, and, therefore, the grant would be violative of the Constitution." And it was further said that "private individuals seeking relief against a public nuisance must show that they suffer an injury distinct from that suffered by the general public, and that said injury is one that the public in the promotion of the general interest has not the right to inflict upon them without compensation."

In Fulton, &c. v. Short Route, &c., 85 Ky., 640, the cases were all reviewed, and it was announced as the settled law of the State that an abutting lot owner could not complain of the existence of the railroad on the public street fronting his property, but his complaint was confined to the manner of its construction and operation. See also the case of Hyland v. Short Route Transfer Co., 10 KY. LAW REP., 900, where this doctrine was said to be too well settled in this State to require the citation of authority. We have cited them, however, though hurriedly, because it is insisted by the appellants that the Cosby case is the only one which considered the question of the lot owner's rights, without reference to whether or not there was legislative warrant for the construction of the railroad; and this may be true, but it follows, from the doctrine announced in all the cases, that an encroachment on the street without warrant is an entry on the possession of the public, and is a public nuisance, to be abated by the public authorities. Confessedly if such an entry was an invasion of a private right, however slight the interference, the legislature could not authorize it.

The cases supposed to be in conflict with the Cosby case are those in which the street was sought to be wholly appropriated, and where confessedly private rights were about to be invaded, or where the original use of the highway had been abandoned by the public and the fee reverted to the owner. (Cornwall v. L. & N. R. R. Co., 87 Ky., 77; Ruttle v. City of Covington, 10 KY. LAW REP., 766; Kreiger v. K. & I. B. Co., 93 Ky., 213; L. & N. R. R. Co. v. Hess, 92 Ky., 410; Green v. Asher, 10 KY. LAW REP., 1006; Corey v. Lancaster, 81 Ky., 174.)

Certainly no case in this State has been held to entitle an abutting owner on vacant and unimproved lots to recover for not merely consequential damages, but those which are wholly speculative and uncertain. However, we are inclined to the opinion that there was legislative as well as municipal warrant for the occupancy of the street in controversy by the railroads.

By the legislative act of 1873 (volume 1, acts 1873, pages 248–253) the Elizabethtown & Paducah Road, now the appellee, the C., O. & S. W., on entering the city of Louisville from the southwest was required to receive freight at East Louisville, and also at the depot at Second and Water streets, to be transported from either of those depots by way of the Louisville Railway Transfer Co. to the Elizabethtown & Paducah company's line. A railway connection was thus required through the city, and it is conceded that the line along A street is the most direct and natural line of connection between the points indicated.

It is true that the connection has not been extended beyond the L. & N. tracks to the C., O. & S. W.'s line, but the authority to make the connection was clearly intended to be conferred; indeed it was required, and it has been so far made under the supervision and control of the C., O. & S. W. Moreover, the charter of the Louisville Railway Transfer Co. (the stock in which is alleged to be owned by the L. & N. R. R. Co.) authorized that company to acquire the right of way, construct and operate any *branch roads* connecting with

other railroads terminating at Louisville, or connecting therewith by bridge or ferry, "for the accommodation of the commercial and manufacturing business of the city of Louisville, *said city consenting thereto*," and might condemn rights of way for such purpose, etc. We think it altogether consistent with the purpose in view in chartering this connecting road, for such was the sole object of its creation, to so construe the language of its charter as to give the right to make such connections as the business interests of the city demanded, using no line of connection, however, except with the consent of the city.

If the present statutes (section 768, Kentucky Statutes) change the rule as to damages to abutting owners, as it seems to do, these cases are not affected thereby.

Upon the principles announced the judgments below dismissing the petitions are to be approved, but it is proper to say that in the Dulaney appeal it seems clear to us that as all the parties to the old suit regarded the opinion of the chancellor as final and as the end of the litigation, the *nunc pro tunc* order was properly entered, and it was no longer possible, in 1893, to prosecute an appeal from the judgment of 1883.

The Dulaney appeal is, therefore, dismissed. In the other cases the judgments are affirmed.

SHIELDS, &C. V. YELLMAN, &C.

(Filed February 11, 1897.)

1. *Venue of action—Liens*—Subsection 3 of section 62 of the Civil Code, providing that actions for the sale of real property under a mortgage must be brought in the county in which the subject of the action is situated, "except for debts of a decedent," does not require that an action to enforce a mortgage lien upon the land of a decedent shall be brought in a county other than that in which the land is situated, unless there is a suit to settle the estate, which must be brought in the county in which the personal representative was qualified.

2. *Husband and wife—Curtesy*—Where husband and wife, to secure the husband's debt, execute a mortgage upon the wife's land, in which the husband had curtesy, in a suit to enforce the mortgage lien after the wife's death it was error to the prejudice of an infant child to allow the husband the value of his curtesy out of the proceeds, as his interest should be subjected to the payment of his debt and the surplus left for the child.

Geo. R. Pryor for guardian *ad litem*.

Ben P. Campbell for appellants.

W. S. Pryor for appellees.

Appeal from Jessamine Circuit Court.

Opinion of the court by Judge Hazelrigg.

Appellees, Yellman and wife, executed a mortgage to Shields on certain lands of the wife in Jessamine county to secure a debt of the husband.

The wife died intestate in Fayette county, leaving one child. She had no personal estate and there was no administration. This suit was then brought by the mortgagees in the Jessamine Circuit Court for a sale of the land to satisfy the debt. After its sale, at which the

plaintiffs became the purchasers, they became doubtful of the jurisdiction of the court, and raised that issue by an amended petition and by exceptions to the commissioner's report of sale. The chancellor overruled the exceptions and upheld the jurisdiction of the Jessamine court. We think this ruling correct. This was not an action to settle the estate of a deceased person, and for that reason required by section 65 of the Civil Code to be brought in the county in which the personal representative was qualified. Nor in our opinion does subsection 3 of section 62 of the Code apply to an action of this kind.

There it is provided that actions for the sale of real property under a mortgage must be brought in the county in which the subject of the action is situated except for debts of a decedent. It seems to us that this exception had reference to and was made in view of the provisions of section 65.

It is manifest that if an action was pending to settle the estate of a deceased person, and mortgage liens were set up, the court, where the personal representative was qualified, alone having jurisdiction of such action, must also have jurisdiction to decree a sale of the mortgaged property, although it may be situated in another county. Hence the necessity for an exception to the general rule.

In this case there was no personal representative and no suit to settle the estate. Moreover, it was a suit to sell the husband's interest as well as that of his wife's, and for his debt, and we do not see how in a suit in Fayette county his interest could have been sold, the action as to him being clearly local. But in distributing the surplus proceeds of the sale the husband was given his full share as tenant by the curtesy in the whole tract over the objection of the guardian *ad litem* and his child. It seems to us that, as from the averments of the petition this debt was that of the husband, the value of his interest ought to have gone to pay his debt, which would seem to leave the entire surplus for the child. This being true it is unnecessary to pass upon the question at to whether the husband's interest is to be fixed under the old or new law regulating his interest in his wife's estate. Upon the return of the case the court should adjudge the surplus proceeds to the child unless the husband should make it appear that it was in fact the wife's debt in whole or in part.

This he should be allowed to show if he desires, as there has in fact been no issue made on that behalf or plea to which he was called on to respond.

The judgment as to the Shields is affirmed, and, as the collection of the surplus after satisfaction of the plaintiff's debt was suspended by supersedeas, damages will be awarded.

On the appeal of the guardian *ad litem* the judgment is reversed for proceedings consistent herewith.

GRAY, &C. V. COMMONWEALTH.

(Filed February 11, 1897.)

Change of venue—Power to set aside order—Liability of sureties in bail bond —The court had the power without notice to set aside a consent order granting a change of venue in a criminal case at any time during the term at which it was entered, having erroneously granted the order before the defendant, who was under bond, had given a new bond for his appearance at the proper court or been surrendered to the court or proper officers. And the sureties in the

existing bond having failed to see that either of these things was done, they remained bound on the bond after the order granting the change of venue was set aside. The fact that the defendant was in court at the time the order granting the change of venue was entered was not sufficient to release the sureties, either a formal surrender of the defendant to the court or the execution of a new bond being necessary for that purpose.

Eli H. Brown and Wilfred Carrico for appellants.

Guy H. Briggs and Wm. J. Hendrick for appellee.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Burnam.

One Scott Gray, being in custody, charged with the offense of murder in the killing of J. H. Borders, was admitted to bail in the sum of $3,000, whereupon the appellants in this action executed the following bond: "Now, we, Scott Gray, N. A. Gray, John Gray, Reuben Gray and W. H. Gray, of the county of Daviess and State of Kentucky, hereby undertake that the above-named Scott Gray shall appear in the Daviess Circuit Court on the 2d day of April term, 1894, to answer charge, and shall at all times render himself amenable to the orders and process of said court in the prosecution of said charge, and if convicted shall render himself in execution thereof, or if he fail to perform any of these conditions we will pay to the Commonwealth of Kentucky the sum of $3,000. This 9th day of April, 1894."

Thereupon the defendant was discharged from the custody of the jailer. On the 10th day of April, at the same term of the Daviess Circuit Court, the grand jury of Daviess county indicted said Scott Gray for the crime of murder for the killing of said J. H. Borders, which indictment was signed and reported into court, and on the same day the defendant filed his petition, supported by divers affidavits, and moved the court to grant him a change of venue in said case. Thereupon the following order was entered: "By consent, and the court advised, it is ordered that the defendant is awarded a change of venue to the Ohio Circuit Court and set for trial the 7th day of the May term of said court."

At the same time a large number of witnesses for the Commonwealth and for the defendant were recognized by the court in the penal sum of $100 each for their appearance in the Ohio Circuit Court on the 7th day of its next term to testify in the case of the Commonwealth against said Gray. Afterwards, viz, on the 20th day of April, 1895, and during the same term of court, the Commonwealth's attorney moved the court to set aside the order awarding the change of venue to the defendant and set the case for trial, and the court, having considered said motion, on the 22d day of April, and during the same term of court, entered this order: "The defendant having failed to appear and execute bond for his appearance in the Ohio Circuit Court, the order awarding the change of venue to the Ohio Circuit Court is now set aside, and this prosecution is now set for trial on the 16th day of the present term." On the 16th day of the term this order was entered: "This day came the Commonwealth's attorney, and the defendant, although solemnly called, came not, but failed to appear in discharge of his bond, it is now ordered that said bond be forfeited and summons awarded thereon."

Summons was issued on the foregoing order directed to the sheriff of Daviess county, commanding him to summon the securities in

the aforesaid bond to appear in the court on the 1st day of its August term, 1895, to show cause why judgment should not be entered against them for $3,000 on account of the forfeiture of the bond executed by them for the appearance of said Scott Gray in said court to answer the indictment found against him for murder. At the August term the appellants in this action filed answer to the summons on the forfeiture and resisted judgment, because, they say, that the condition of their bond was that Scott Gray should appear in the Daviess Circuit Court on the 2d day of its April term, 1895, and to render himself amenable to the orders of the court in the prosecution of the charge against him, and that the same had not been broken or forfeited; that they caused the said Scott Gray to appear in said court at the time indicated, and at all other times when required by the orders of the court and the prosecution up to and including the 12th day of April, 1895, on which last-named day they caused said Scott Gray to appear and submit himself to the custody and orders of the prosecution; that he was present in the court during that day; that on the said 12th day of April, 1895, same being the day of the April term for which the prosecution was set for trial, the said Scott Gray appeared in court and obtained an order, which was entered of record and made by consent of the plaintiff, the Commonwealth, changing the venue of said prosecution to the Ohio Circuit Court, and that by reason of the making and entering of said order and the change of venue granted in said prosecution the defendants were released and discharged from further obligation for the appearance of said Scott Gray to answer said prosecution and were discharged from all liability for or on account of their undertaking on said bond, claiming that he was then and there surrendered by them to the custody of the Daviess Circuit Court, and that he was not thereafter in the custody or under the control of the respondents, but was subject to the orders of the court, whose power, custody and control of Gray was supreme and exclusive, and that the failure of the said court to commit said Gray to jail or to the custody of the court's officers or to be conveyed to the Ohio county jail or to require him to execute a new bond for his appearance in the Ohio Circuit Court for trial, and permitting him to depart after making said change of venue, were each and all the acts and omissions of said court, for which they were in nowise responsible, and asked that they be dismissed, which answer was demurred to by the Commonwealth's attorney, which demurrer was sustained by the court, and a judgment was entered in favor of the Commonwealth against said defendants for the sum of $3,000 and costs, to which defendants excepted and prayed an appeal to this court.

The only question presented on the appeal is whether the order granting the change of venue from Daviess to Ohio county released the securities from their liability on the bail bond.

Section 1118 of the Kentucky Statutes provides that "if the applicant or defendant is in custody the order for the change of venue shall be accompanied by an order for his removal by the sheriff or jailer of the county, with such sufficient guard as the judge may direct, and his delivery to the jailer of the county where the trial is to be had. If the applicant or the defendant is under recognizance or bond for his appearance he shall, before the order is granted, give sufficient bail for his appearance at the proper court, or be surrendered into the custody of the proper officers."

By the provisions of this section of the statutes the obligation is imposed upon the defendant, and upon his securities in his bail bond, to see to it that a sufficient bail bond is given for his appearance at

the court to which the venue is taken, or that he be surrendered to the custody of the proper officers; that they may see to his proper delivery to the jailer of the county to which the venue is given, and they must see to this before the order for the change is granted.

The record in this case does not show that the defendant or his securities ever executed the new bond required by the statute; nor did the securities ever at any time surrender the custody of the defendant to the court or the proper officer, or indicate to the court in any way that they desired to be released from their obligation on the bail bond of defendant. Their obligation required that the defendant should at all times render himself amenable to the orders and process of the court in the prosecution of said charge, and they could have exonerated themselves on said bond only by a formal surrender of the defendant to the court or its officers, or by the execution of a new bond for his appearance to answer the charge in Ohio county.

The order granting the change of venue before the execution of the necessary bond was an error on the part of the court, which it was the duty of the court to correct by setting aside the order, and it had ample power and authority to do this at any time during the term of court at which said order was entered; and it was not at all incumbent upon it to have given notice to the defendant of such action on the part of the court, as these defendants had entirely failed to perform or comply with the necessary conditions upon which said order could have been legally made under the statutes.

The defendants assumed to answer for the appearance of said Gray, and to see that he complied with all orders of the court, and it was their duty to see that he executed the proper bail for his appearance in the Ohio Circuit Court, or to have surrendered him back to the custody of the court; and the failure to take these necessary steps leaves these defendants bound upon the bond which they executed.

It is not enough for them to say that they caused the said Scott Gray to appear in court at the time of the making of the order changing the venue, or that he remained in court during the entire day; their obligation required more than this—that he "should at all times render himself amenable to the orders and process of the court in the prosecution of the charge; and, if convicted, to render himself in execution thereof, and if he failed to perform any of these conditions that they would pay to the Commonwealth the sum of $3,000."

Having failed to see to the execution of the bail bond for the appearance of the defendant in the Ohio Circuit Court, and having also failed to surrender him to the court, it was undoubtedly their duty to see that he was ready to answer when called upon in the Daviess Circuit Court, in which he stood indicted.

For the reasons indicated in this opinion the judgment of the lower court is affirmed.

HARLAN, &C. V. EILKE, &C.

(Filed February 11, 1897.)

Resulting trusts—Where a father who undertook to invest money for his son used it in buying property which he procured to be conveyed to himself without the son's consent, an enforcible trust was thereby created in favor of the son, there being nothing in section 19 of article 1, chapter 63, General

Statutes (section 2353, Kentucky Statutes), which prevents the enforcement of such a trust.

C. B. Seymour for appellants.

Phelps & Thum and Dodd & Dodd for appellees.

Appeal from Jefferson Circuit Court, Chancery division.

Opinion of the court by Judge Paynter.

It appears from satisfactory testimony that in 1882 Ellie Eilke, the eleven-year-old son of William Eilke, sr., desired to become a jockey. His father reluctantly consented to it, but finally did so, and emancipated his son, saying to him: "My boy, if you think you can make a living, you can go." He admonished his son to save his money; send it to him and he would invest it for him.

Under these circumstances the son entered upon his career as a jockey, and in the prosecution of his business traveled over the country for several years, earning a yearly salary of some $3,000 or $4,000. The father seems to have been afflicted and thriftless. The son sent him several thousand dollars, and he invested it in the real estate in controversy. The father, without the knowledge of the son, had the deeds made to himself. In 1893 the father died, and this action was instituted by Ellie Eilke to have the trust declared, and to recover the property.

Section 19, article 1, chapter 63, General Statutes, reads as follows: "When a deed shall be made to one person and the consideration shall be paid by another, no use or trust shall result in favor of the latter, but this shall not extend to any case in which the grantee shall have taken a deed in his own name without the consent of the person paying the consideration, or where the grantee, in violation of said trust, shall have purchased the land deeded with the effects of another person."

We agree with the learned counsel for appellants that no claim like that of the appellee should be sustained except upon the fullest and clearest proof. After the examination of the proof in this case we can not escape the conclusion that the money with which the property was bought was that of the appellee, which he sent to his father to invest for him.

Appellee introduced several witnesses to sustain his claim. They appear to be worthy of credit; besides no effort was made to impeach them or to contradict their statements. In addition to the facts which they prove with reference to the son sending home his money to the father and its investment in the real estate, they also prove that the father had no source from which he obtained the money with which to purchase property except through the son.

There is nothing in the statute quoted which prevents the trust from being enforced. On the other hand the saving clauses in the statute recognize the equitable doctrine that an enforcible trust exists where one takes a deed in his own name without the consent of the person paying the consideration, or where the grantee, in violation of such trust, shall have purchased the lands deeded with the effects of another person.

We are of the opinion that the land was held in trust for Ellie Eilke, and that he is entitled to recover it. (Grayham v. King, 96 Ky., 339; Faris v. Dunn, 7 Bush, 276; Miller v. Edwards, 7 Bush, 394.)

The judgment is affirmed.

LOUISVILLE & NASHVILLE R. R. CO. v. BRAYMER.

(Filed February 11, 1897—Not to be reported.)

Weight given expert testimony—In this action against a railroad company to recover damages for injuries received by plaintiff in a collision of two of defendant's trains upon one of which he was a passenger, a verdict for plaintiff for $250 was not flagrantly against the evidence, the jury having the right to credit plaintiff's statement as to his internal injuries and his pain and suffering in preference to the testimony of medical experts that he was not injured, and also to credit his statement that a tumor on his stomach was caused by the sudden shock in preference to the testimony of medical experts that the tumor must have existed prior to the accident.

Boyd & Craft and J. W. Alcorn for appellant.

Appeal from Laurel Circuit Court.

Opinion of the court by Judge Paynter.

The appellee was a passenger on the regular passenger train of the appellant when it collided with one of appellant's freight trains near Hazel Patch, which resulted, as appellee claims, from the gross negligence of the agents and servants in charge of the trains. He claims that by the force of the collision he was thrown out of his seat and against the seat in front of him, thence to the floor, with great force, thereby injuring his hand, back, side, breast, and also that he had received internal injuries, from which he suffered great pain.

On the trial he testified that he had not recovered from his injuries, and which affected his capacity to work, and prevented him from doing one-half the work which he could do before he received them; that his stomach was still swollen. He exhibited a tumor thereon, which he claimed was produced by the accident.

Some expert testimony was offered as to the extent of appellee's injuries, and as to whether the tumor on the stomach could have been produced by a sudden shock, or had existed prior to the accident.

On the day following the injury Dr. Pennington found the tumor, but no recent injuries on his body. He said he could not tell what produced it, but his opinion, when he made the examination and now, was that it was not caused by recent injuries. He also said appellee complained of internal injuries, and that he examined him but could not find any.

Another medical gentleman testified that the tumor seemed to be tender to the touch and soft; that a sudden blow could produce a tumor like it in an hour or two, or it might be produced by other causes.

The jury heard the testimony of two gentlemen learned in the medical profession. They also heard the testimony of the appellee, and, if they believed him a credible witness, his evidence that the tumor did not exist before the accident was properly of more weight than the testimony of a multitude of surgeons who testified that it was not of recent date; likewise was his evidence as to his sufferings from pains in the stomach, back and breast. He knew whether or not they existed, and the jury may have well doubted whether or not the surgeon could, from the external examination which was made, tell whether or not there existed a *cause* which might or might not produce a pain. The presumption is that the jury were of fair average intelligence, and their intelligence would not be impeached if they concluded that the surgeon, from the examination,

could not know whether a cause existed to produce pain or tell whether or not appellee felt it; therefore, his testimony was of little value on the question as to whether appellee received or suffered from internal injury.

The principal reason urged for a reversal is that the verdict of the jury was *flagrantly* against the evidence. We can not agree with counsel on this question. The verdict was for $250, and counsel say "the action of the jury in assessing the damages at this sum is of itself the strongest argument that we could present in favor of our contention that the verdict is palpably against the weight of the evidence, and that in making the verdict the jury was influenced by prejudice."

As faulty as we deem this reasoning to be, we agree with counsel that no greater reason has been suggested why a new trial should be granted. It is urged that the jury did not believe the testimony of the appellant, and that the jury was influenced by prejudice because the verdict was only for $250. We are unable to understand how counsel reached this conclusion. The jury must have believed his testimony or they would not have found a verdict for him. They certainly can not be said to have been influenced by prejudice against the appellant, or they would not have found a verdict for that amount when one for a greater sum might have been found.

It seems to us that the jury was not influenced by prejudice against the appellant in returning the verdict. We have failed to find any error in the instructions which the court gave the jury.

The judgment is affirmed.

LOUISVILLE & NASHVILLE R. R. CO. V. BOWEN.

(Filed February 11, 1897—Not to be reported.)

1. Limitation—Mistake in summons—An action was begun and limitation ceased to run upon the filing of petition and issuing of summons, notwithstanding a mistake in the summons as to the name of the plaintiff. In fact it was not incumbent upon the plaintiff, in order to stop the running of the statute upon the filing of the petition, to show that summons was issued, as he had the right to rely upon the clerk to perform that duty.

2. Pleading of private statute—Where a plea of limitation by a corporation is based upon a special provision in its charter the pleader must specially refer to the charter, stating its title and the day on which it became a law, it being a private statute.

3. Evidence—In an action against a railroad company in which the failure to give a signal of the approach of a train to a crossing was relied upon as negligence it was not competent for the plaintiff to show that sign boards had been put up and that all trains had blown for this crossing since the date of the accident.

4. Same—It was not proper to permit a witness to express an opinion as to what would have been proper for the engineer to have done under the circumstances, the witness not being an expert and having no better means of forming an opinion than the jury itself.

5. Injury by railroad train to stock grazing near track—Failure to give signal—The failure to give a signal of the approach of a train to a public crossing does not render the company liable for injury to a horse which as the train approached was grazing on the right of way near the crossing, the company being under no obligation to give the signal as a warning to the horse which stood eighteen feet from the track, with its head turned in the opposite direction, and which there was no reason to believe would come upon the track.

W. H. Marriott for appellant.

Sprigg & Chelf for appellee.

Appeal from Hardin Circuit Court.

Opinion of the court by Judge Burnam.

This action was brought by the appellee to recover the value of a horse which he claims was killed by one of appellant's trains by the negligence of its agents and servants on the 24th day of May, 1893. The petition was filed on the 23d of October, 1893, and summons issued thereon on the day of filing, but in the name of D. C. *Brown* as plaintiff, which was served on defendant. The return on this summons was, on the motion of plaintiff, quashed, and on the 6th day of January, 1894, another summons was issued giving the name of the plaintiff as D. C. Bowen. This summons was served on the defendant on the 6th day of March, 1894.

The defendant filed answer, denying negligence and pleading the six months statute of limitation. The plaintiff filed a reply in which he denied that the cause of action had not accrued within six months before the commencement of the suit, and denying that same was barred by the statute of limitation. To this plea the defendant demurred, which was overruled. The case was then called for trial, and, after the hearing of the proof and the giving of instructions, all of which were excepted to at the time by the appellant, the jury reported a verdict in favor of the appellee for $125, and judgment was entered accordingly. From that judgment this appeal is prosecuted on a number of errors which have been assigned.

First. The appellant insists that one of the provisions of its charter is that actions of this character must be instituted within six months, and that the plaintiff failed to file his suit and have summons issued thereon within that time. We are of the opinion that in this case the plaintiff had filed his petition setting out a cause of action and had caused summons to issue thereon in time; that he had done all the law required of him. It was the duty of the clerk to issue summons in accordance with law, and it was not incumbent upon the plaintiff to show that he had issued it; on the contrary, he had the right to repose confidence in the clerk not only knowing his duty, but on his performing it. This was the language of the court in the case of the L. & N. R. R. v. Smith, 87 Ky., 501, and we think is conclusive of the question of limitation.

Upon the trial of the case, we think it was error on the part of the court to permit witnesses for appellee to testify that signboards had been put up at the crossing and that all trains had blown for this crossing since the date of the accident. "Whilst there seems to be some diversity of opinion on the question of the admissibility of evidence of this character as a means of showing neglect on the part of the defendant, the decided weight of authority is against same." (Standard Oil Co. v. Tierney, 13 KY. LAW REP., 626, and authorities there cited.) Nor was the testimony given by Williams in this case, in so far as he expressed an opinion as to what would have been proper for the engineer to have done under the circumstances, competent evidence. "Opinions of nonexpert witnesses are never received as evidence when all the facts upon which such opinions are founded are made clear to the court and the jury." It is the province of the jury to determine from the facts what was proper to have been done, and the opinion of a witness solely upon the facts so demonstrated was inadmissible. (Clark v. Fisher, 19 Am. Dec.,

102.) It is not a witness' province to give opinions on such matters, as he could have had, in general, no better means of forming an opinion than the jury itself.

By instruction No. 6 the court told the jury that "it is the duty of the defendant's servants in approaching a public crossing to blow its whistle and ring its bell, and if the jury believe that it failed to perform these duties, and that by reason of such failure the plaintiff's horse was killed, the jury should find for the plaintiff." We think that this instruction was erroneous and prejudicial to the rights of the appellant.

The testimony of Joe Neighbors shows the horse of appellee was grazing upon the right of way of appellant fifteen or eighteen feet from the track, and that when he saw him, just before the collision, he had his head turned from the track and the train was about eighty yards from the horse. He states on cross-examination that the horse was between the telegraph pole and the fence, and the train was between his house and that of Jerry Bland, when the horse first began to move, and it was about a hundred feet from his front gate to Jerry Bland's house. The horse was not upon the public crossing, although he was grazing upon the right of way near it. The appellant was under no obligation to blow its whistle or to ring its bell as a warning to a horse, which stood eighteen feet from the track on the right of way, with its head turned in the opposite direction from the track, and not upon a crossing or roadbed of defendant.

The testimony of the engineer in this case clearly shows that he did not see the plaintiff's horse until just about the time it was struck by the locomotive, and that owing to a curve in the track of the railroad the smokestack and the boiler of the engine would have prevented him from seeing a horse standing at the exact spot where this one was proven to have been after they came in sight. The fireman, Thomas Millenix, testified that he saw the horse before it was struck; that it was standing over by the fence eating grass, about sixty yards from the engine; that it whirled around, made a couple of jumps and jumped on the track, and that it just had time to wheel around and jump on the track by the time the train arrived at that point. The testimony of the engineer also showed that he blew the whistle for the station and for the crossing, and that at the station the whistle could be heard from where it was blown for the crossing near where the horse was killed; and he also testifies that he rang the bell as he approached this crossing.

It seems to us from the facts as proven that the appellant did all the law imposed upon it.

In the case of the C., N. O. & T. P. R. R. v. Bagby, 13 Ky. Law Rep., 533, the court said: "Those in charge of a railroad train owe the first duty to persons on it, and to assure their safety it is necessary that the engineer should not lose sight of the track ahead of him; nor can the company be held liable for injury to animals unless those in charge could have avoided it, having due care for the safety of those on the train.

It would, therefore, seem to follow that an engineer can not be reasonably expected or required to lookout for or to see animals at all distances on each side of the railway track, nor to give the danger signal and stop the train to prevent injury to those straying, unless such animal is actually on the track or else so near or in such attitude as would induce a peason of ordinary care and prudence to believe that there was danger of a collision."

In this case it seems to us that no amount of care or prudence could have prevented the accident by which the appellee's horse was killed

by the railroad train; and it further appears to us that the employes of appellant were not in this case guilty of any actionable negligence, and that the court erred in giving a judgment for appellee.

The cause is, therefore, reversed for a new trial consistent with this opinion.

BALDWIN & CO. V. WARREN, &C.

(Filed February 12, 1897—Not to be reported.)

Conditional sales—Purchaser at execution sale with notice—A sale of personal property upon condition that it shall remain the property of the seller until paid for gives the seller a lien for the unpaid purchase price, and his right is superior to that of one who, with notice of that lien, purchases the property at a sale made under execution against the buyer. And notice of the lien given by the officer making the sale is sufficient to charge the purchaser.

D. T. Fowles for appellants.

Jeff Henry for appellees.

Appeal from Green Circuit Court.

Opinion of the court by Judge Guffy.

The appellants had sold to Luther Town an organ on credit, and had taken notes for the deferred payments. The notes contained a stipulation that the organ should remain the property of appellants until paid for. It also appears that some payments had been made by Town, and the contract renewed more than once.

An execution was issued in favor of A. D. Scott against Town and the appellee, W. F. Warren, and placed in the hands of the coroner, Jones, for collection, who proceeded to levy on the organ, and was by Town informed of the lien and contract aforesaid. Jones then required an indemnifying bond before sale, which was given by said W. F. Warren, with the other appellee as surety, and the officer then sold the organ and appellee W. F. Warren bought it.

It was clearly proven on the trial that Jones informed Warren before the sale of the statements made by Town; also that Town notified said Warren and others on the day of sale, but before the sale, that appellant had a lien on the organ, and he (Town) disclaimed the ownership of the organ. The jury found for defendants, and appellants' motion for a new trial having been overruled, they have appealed.

Appellants complain of the instructions given by the court, and also insist that the court should have given the instruction asked by appellants.

The instruction refused in substance asked the court to tell the jury that "if Town notified the officer or the purchaser, Warren, before the sale of appellant's lien, then the jury should find for plaintiff."

The effect of the instruction given was to tell the jury that unless the appellants or their agent had notified the officer or said Warren of appellants' lien, that the jury should find for defendants.

This court, in Baldwin & Co. v. Crow, &c., 86 Ky., 679, expressly held that such contracts as the one under consideration in the case at bar gave appellants a lien on the property, and that the same was valid against all purchasers with notice.

It is manifest in this case that appellees had full notice of the lien from a trustworthy source—from one who knew the truth of the matter—hence it is immaterial whether Town be regarded as appellants' agent or not; the notice was sufficient. The court, therefore, erred in refusing the instruction asked, and erred in giving instructions 1 and 2.

The judgment appealed from is, therefore, reversed and cause remanded, with directions to set aside the verdict and judgment and award appellants a new trial and for proceedings consistent with this opinion.

SLACK & PERKINS V. KOON & PERRY, &C.

(Filed February 12, 1897—Not to be reported.)

1. *Landlord's lien—Partnership*—Where one of two parties in the hotel and saloon business had only an interest in the profits and not in the furniture, etc., used in the business, the lien of the landlord for rent under a lease to the partner who owned the goods is superior to the lien of a partnership creditor.

2. *It was not necessary for the landlord to sue out his attachment* in order to preserve his landlord's lien, it being sufficient for him to assert it by petition in this suit by the attaching partnership creditors.

Bush & Worten and Hill & Hill for appellants.

J. C. Hodge for appellees.

Appeal from Livingston Circuit Court.

Opinion of the court by Judge White.

The appellants, Slack & Perkins, sued Koon & Perry, the appellees, in the Livingston Circuit Court on an account for $380.66, and at the same time sued out attachments against the property of Koon & Perry and had it levied on a lot of personal property then in the St. Clair Hotel and saloon, at Grand Rivers. This property consisted of furniture, bar-room fixtures, liquors and many other articles usually found in a hotel and bar room. Several other small executions were also sued out from the quarterly court of Livingston county, and levied on the same property, subject to appellants' attachment lien.

On notice and motion the county judge made an order of sale, and the attached property was sold, and brought the sum of $500, the appellee, Ross, claiming a landlord's lien on the attached property; also procured from a justice of the peace an attachment for rent due, and to become due, for the sum of $360, rent of the premises occupied by Koon, and also had the same levied on the property attached by appellants.

Appellee Ross filed his petition, asserting that he was the owner of the property known as the St. Clair Hotel property, in the town of Grand Rivers, and that the defendant, Koon, had rented said property from him for the period of twelve months from the 1st day of April, 1892, to the 31st day of March, 1893, at the agreed price of $360, to be paid monthly ($30 each month), and to be paid in advance, except the month of April, which was to be paid on May 1st, and claiming landlord's lien for his rent on the goods attached and on the money arising from sale of same.

To this petition appellants filed an answer, denying that the hotel

property was rented to Koon by the year, but the renting was by the month; and, if the renting was for a year, the contract was made in March, and for more than one year, and was not to be performed within a year and was by parol, and, therefore, was not an enforcible contract under the statutes of Kentucky; that Ross had taken possession of said hotel property a short time after the levy of the attachment, rented the same and received the rents; therefore, he was estopped from claiming rent except for one month.

To this answer appellee Ross filed reply, denying that he had taken possession of said leased property at any time since said leasing, and, by an amended petition, set up the fact that the contract of renting to Koon was made on the 20th day of April, 1892, instead of in March, as stated in his petition heretofore filed in this case.

The issue made by the pleadings was tried by the court, and judgment rendered in favor of appellee Ross for the rent of the hotel, amounting, with interest, to the sum of $394.58, and giving Ross a superior lien on the funds in court arising from the sale of the attached property. From that judgment appellants have appealed to this court, and ask a reversal.

The proof in the case shows that Koon & Perry had occupied this hotel property for some time before the renting set up by Ross; that a *hotel* and saloon business had been carried on by Koon & Perry, and the account sued on was for goods furnished by appellants to Koon & Perry as partnership debts. The appellants claim by reason thereof they have a superior lien to that of the landlord.

It appearing from the evidence that Perry had only an interest in the profits of the business, and not in the property itself, the partnership creditor had no lien on these goods, by reason of the partnership of Koon & Perry, superior to that of the landlord.

It is established by the testimony of Ross and Koon that Koon, on the 1st or 2d day of April, 1892, rented of Ross the hotel property from the 1st day of April, 1892, to 31st day of March, 1893, at the rental price of $360 for the year, payable monthly.

There is no evidence in this case contradicting this testimony as to the contract of renting, and there is no testimony whatever that Ross took possession in any manner of the leased premises during the term they were leased to Koon, or received rent for the same. It was not necessary for the appellee, Ross, to sue out his attachment in this case to preserve his landlord's lien—having the lien, he properly presented it by petition, claiming the funds upon which he had lien.

The judgment of the lower court being in accordance with these views, it is affirmed.

STORM & FLOYD V. CHESTNUT'S ADM'R.

(Filed February 12, 1897—Not to be reported.)

Assignment of note—Where the holder of a note transferred it by delivery in part payment for timber which he was to take from a certain tract of land represented by the assignee as belonging to him, it was error thereafter to permit the assignor to recover upon the note upon the ground that the assignee had no title to a part of the land from which the timber was to be taken, and that plaintiff had been required to pay as damages for taking timber from that part of the land belonging to another a sum equal to the amount of the note. Before the plaintiff can be allowed to recover upon the note the title to it must be restored to him by a rescission of the contract for

the sale of the timber. But he will be entitled under proper pleadings to recover the value of so much of the timber as was upon the land of the person to whom he was required to respond in damages.

H. C. Eversole for appellants.

Ewell & Smith for appellee.

Appeal from Laurel Circuit Court.

Opinion of the court by Judge White.

The appellee sued the appellants in the Laurel Circuit Court. The cause of action as set out in the petition states that some years ago appellee, Dorcus Chestnut, sold G. N. Chestnut, also appellee, two tracts of land by metes and bounds, but made no deed to G. N. Chestnut to the same. Afterwards G. N. Chestnut sold said land to appellants, Storm & Floyd, or to Isaac Storm. Storm executed the note sued on for $100 to G. N. Chestnut, it being the balance due as the purchase price for said land. Afterwards G. N. Chestnut sold and assigned said note to C. M. Chestnut for value received. C. M. Chestnut transferred said note by delivery to James C. Floyd, appellant, in part pay for railroad ties and timber to be made into railroad ties on a certain tract of land described by metes and bounds by a written contract filed as exhibit in this case, lying on Laurel river in Laurel county, containing about two hundred acres. C. M. Chestnut went upon said land and cut and made, or caused to be made, the tie timber thereon into ties, but before he finished one W. H. Jackson, claiming a portion of the land embraced in the contract by superior and paramount title to that of J. C. Floyd, C. M. Chestnut was forced to pay and did pay W. H. Jackson $100 for damages done him in cutting his timber, so that instead of C. M. Chestnut realizing $175 on said purchase of timber from Floyd he only realized about $75, setting up lien in favor of C. M. Chestnut for $100 with interest on the two tracts of land sold to Storm & Floyd or to Storm, and that after these transactions C. M. Chestnut departed this life and W. B. Sutton was appointed his administrator; that when the contract was executed for the sale of the timber to C. M. Chestnut he surrendered the note to Floyd and can not file the same, asking the court to compel defendant to file the note.

The contract filed with the petition recites that Floyd had sold to Chestnut the tie timber and the ties then made on a certain tract of land containing two hundred acres, described by metes and bounds, for the consideration of $175, cash in hand paid, binding Floyd to deliver the same to said Chestnut, and granting to said Chestnut the right of way over said land to remove said timber. Appellants answered and admitted that G. N. Chestnut sold the land to J. N. Storm as alleged in the petition, and that J. N. Storm executed the note sued on, and that it was the last payment on the land described in the petition, averring that J. N. Storm had fully paid off and taken up the said note, and that said note is now in his possession, denying that J. N. Storm had any connection with the trade between Floyd and Chestnut for the sale of said tie timber, and denied that they or either of them ever authorized or agreed for C. M. Chestnut to pay W. H. Jackson the $100, or that they or either of them are responsible for any sum of money C. M. Chestnut paid to W. H. Jackson; denies that Chestnut has any lien on the two tracts of land for said $100; denies that appellees have any cause of action against appellants, and prayed to be dismissed. Appellants filed reply, averring among other things that it was true that C. M. Chestnut

delivered the note to J. C. Floyd, but that Floyd had paid for the note in the sale of land (meaning timber) that did not belong to him; that it belonged to W. H. Jackson; that the $100 paid by Chestnut to Jackson was paid for timber cut on the land sold to Chestnut by Floyd, for which Floyd had no title, and for which Jackson had title, and that Chestnut paid Jackson the $100 to avoid law suits and indictment.

Appellants rejoined, denying all the allegations in the reply, and denying that Jackson had any title to the land that he (Floyd) had sold the timber off of to Chestnut to pay off the note, averring that Storm had fully paid off the note to Floyd, denying the right to bring and prosecute suit on said note. After all these pleadings had been filed defendants withdrew their pleadings and demurred to plaintiff's petition, but the court overruled the demurrer, to which ruling appellants excepted. Appellants then refiled their pleadings, and a trial being had the court gave appellees judgment for the amount of the note and interest, with lien on the two tracts of land, and ordered sale of same to satisfy the judgment. From this judgment appellants have appealed to this court and ask a reversal. The evidence in the case shows that Chestnut paid the $100 to Jackson without the knowledge or consent of appellants. It also shows that there was a conflict between the land of Jackson and Floyd of about thirteen acres, but neither the pleadings nor evidence show what amount of tie timber was on this thirteen acres of land claimed by Jackson. The note having been given up to Floyd in payment for the timber, before plaintiff can recover on the note the contract of sale of the timber must be rescinded and the title to the note recovered by appellees. But plaintiff had the right to recover under proper pleading the value of the timber embraced in the contract that was on the land of Jackson, and on the return of this case the parties should be allowed to amend (if they so desire) and show the proportion of the timber sold by Floyd that was in the boundary of any land owned by Jackson.

Wherefore, the judgment is reversed and cause remanded for further proceedings consistent with this opinion.

M. I. SOWLE MFG. CO. v. BERNARD.

(Filed February 12, 1897.)

1. *Discharge of insolvent debtors—Liability*—Where judgment has been rendered sustaining an order of arrest in a civil action the circuit court has no jurisdiction to discharge the defendant as an insolvent debtor, and its order to that effect does not exonerate the bail. Nor has the defendant the right to apply to any court to be released or discharged unless he has been surrendered by the bail or taken under an execution.

2. *The right of an insolvent debtor to obtain such a discharge* being a right created by statute, it can be enforced only in the manner prescribed by the statute.

J. A. Craft and William Jarvis for appellant.

Stone & Sudduth and D. M. Rodman for appellee.

Appeal from Jefferson Circuit Court, Law and Equity division.

Opinion of the court by Judge Guffy.

The appellant instituted suit in the law and equity court of Jefferson county, in 1892, against Sitwell Harris, and procured the arrest of said Harris as provided by law. Said Harris then executed bond as provided by the Code of Practice, with the appellee, S. M. Bernard, as surety.

On December 2, 1892, judgment was obtained by appellant against Harris for the debt, and the order of arrest was sustained, and on the same day said Harris asked to be discharged as an insolvent debtor, which discharge was then denied. On December 12th said Harris went before the judge of the Jefferson Circuit Court, Law and Equity division, and said judge permitted said Harris to take the insolvent debtor's oath, assumed to exonerate him from all obligation to surrender himself under the judgment, in spite of the exception of appellant's counsel.

At that time no *capias ad satisfaciendum* or *ca. sa.* had been issued against Harris. On the 19th of December a *ca. sa.* was issued against Harris, and on the following day was by the sheriff returned not found. Afterwards suit was instituted on the bond against appellee Bernard. Bernard pleaded the judgment of discharge or release aforesaid in bar of appellant's claim, and the appellant in his reply denied the jurisdiction of the law and equity court to grant the release or discharge, and also denied the jurisdiction of the court to exonerate the bail or surety. Appellee's demurrer to the reply was sustained and cause dismissed, and to reverse that judgment this appeal is prosecuted.

The sole question presented for decision is as to the jurisdiction of the law and equity court to render the judgment and make the orders relied on by appellee.

The right to take the insolvent debtor's oath, and be discharged in such cases as this, is a statutory right, and it will be found that the various statutes enacted conferring such right and regulating the proceedings confer the power to discharge insolvent debtors upon justices of the peace or county judges or police judge of the county seat.

It is provided in the General Statutes, page 782, that a person taken or charged in execution in any civil case may by petition apply for a discharge to two justices of the peace, or the judge of the county court, or the police judge of the county town, who shall, by warrant, command the keeper of the jail to bring the body of the petitioner before them or him, at the courthouse, on a day fixed, and a list of the several executions with which he may stand charged.

It is further provided that ten days' notice shall be given by the applicant to the adverse party, and a list of the property he intends to surrender. Some other requirements are made, and it is also provided that the appellant, after compliance with all requirements, shall be discharged unless it be made to appear that he has acted fraudulently. The scheduling warrant and petition shall be returned to and safely kept on file by the clerk of the county court.

The foregoing statute was in force at the time of the attempted discharge of said Harris.

Section 171 of the Civil Code provides: "A return of not found upon an execution against the body of the defendant, placed in the hands of the sheriff within twenty days after it might have issued upon the judgment, shall be necessary to fix the liability of the bail, which shall be to pay the amount of the judgment and costs."

Section 170 of the Code provides that the bail may, at any time or place, arrest the defendant for the purpose of surrendering him.

Section 172 provides that the bail can be proceeded against in a separate action only.

Section 173 specifies the causes or means by which the bail is exonerated, none of which are applicable to this case unless the attempted discharge of Harris by the law and equity judge is valid.

It is suggested that section 168 confers jurisdiction upon the circuit court. We quote as follows from said section: "Upon judgments in actions in which the defendant has been arrested and held to bail, and in which the order of arrest has not been vacated, an execution against the body of the defendant may be issued, upon which the same proceedings shall be had, and the defendant shall be dealt with in the same manner as is provided by law in the civil actions in which executions may be issued against the body of the defendant, except that the oath of insolvency, upon reasonable notice, may be taken at any time after the arrest by delivering to the plaintiff, his agent or attorney, a schedule of the property intended to be surrendered, although said schedule may not have been delivered ten days before the taking of such oath."

It will be seen that the only change made in the section *supra* is to dispense with the ten days' notice and the delivery of the schedule ten days before taking the oath, and perhaps allowing notice to be served on the agent or attorney.

The arrest referred to evidently means the arrest under the execution, for the reason that such execution had been authorized; but if the section even meant that the discharge could be obtained before the arrest under the *ca. sa.*, still the statute before quoted, specifying the officers who could grant the discharge, is left in full force.

If the *ca. sa.* be not issued within twenty days from the time the plaintiff is entitled thereto the bail is exonerated, or he may become released by surrendering the defendant to the sheriff of the county on or before the return day of the summons in the action against the bail, or within such further time as the court in which the action is pending may allow.

"When a statute has created a new right, he who claims the right must pursue the statute remedy." (Smith v. Drew, 5 Mass., 576.) Quoted with approval in 13 Bush, 310, *et seq.*

In Johnston v. Louisville, 11 Bush, 533, the court says: "It is a rule when a statute gives a new right or a new power, and at the same time provides a specific, full and adequate mode of executing the power or enforcing the right given, the fact that a particular mode is prescribed will be regarded as excluding by implication the right to resort to any other mode of executing the power or of enforcing the right." (Dillon on Municipal Corporations, section 653; 2 Barrows, 1157; 6 Mass., 286; 1 Blackford, 39; 1 Mo., 147, 428; 2 McCord, 117; 36 Mo., 543; 11 Mass., 363; 12 Mass., 482; 4 Wend., 667; 4 Ind., 431; 1 Ind., 285.)

The right of an insolvent debtor to obtain the discharge in question being, as before stated, a right given or created by statute, it follows that it can be enforced only in the manner prescribed by the statute. Moreover, Harris was not in the custody of the court at the time of the alleged discharge, but in law in the amicable custody of the bail. It might have been that within twenty days the bail would have been exonerated by the delay of plaintiff to have the *ca. sa.* issued, in which event the bail would have had no further interest in the case, in which event Harris would not be in confinement, and never could be imprisoned unless plaintiff elected to have the *ca. sa.* issued.

Harris had not been surrendered by the bail nor arrested under a

ca. sa., hence he had no right to apply to any court for a release or discharge, for he was not restrained of his liberty by any one.

In the numerous cases decided by this court involving the responsibility of bail, or discharge of insolvent debtors, we have not found a case in which the circuit court or a circuit judge had ordered the discharge of an insolvent debtor, nor have counsel referred to any such case.

We think it manifest that the circuit court had no jurisdiction nor authority to entertain the motion of Harris to be allowed to take the oath to be discharged, nor to receive the schedule of property, and the orders and judgment in that regard are null and void, and are no defense to this action.

The judgment appealed from is, therefore, reversed and cause remanded, with directions to overrule the demurrer and for proceedings consistent with this opinion.

If, however, the appellee has any valid defense he should be allowed to plead it.

FRAZIER, &C. v. DOWLING, &C.

(Filed February 13, 1897—Not to be reported.)

Trade-marks—The purchasers of a distillery known as the "Waterfill & Frazier" distillery, and of the exclusive privilege to use the brand "Waterfill & Frazier" in the manufacture of whisky, are entitled to protection in the use of that brand as against the firm of Waterfill & Frazier, composed of one of the original owners of the brand and a son of the other. And the fact that the defendants sought to be enjoined from using the brand purchased by plaintiffs discarded the brands with which they commenced business, and which were unobjectionable, and imitated the plaintiffs' system of making their goods, is evidence of fraudulent intent. Nor is the use of the word "Distillers" by plaintiffs after the words of the old brand calculated to deceive the trade or the public, and hence this fact does not operate to prevent plaintiffs from obtaining relief.

Thomas F. Hargis and Phelps & Thum for appellants.

Humphrey & Davie for appellees.

Appeal from Jefferson Circuit Court, Chancery division.

Opinion of the court by Judge Hazelrigg.

Beginning in 1870 the firm of Waterfill & Frazier, composed of W. J. Waterfill and R. H. Frazier, built up in the course of several years a widespread reputation for a brand of whisky manufactured by them in Anderson county, consisting of the words "Waterfill & Frazier, distillers, hand-made sour-mash whisky, Anderson county, Kentucky," the particular words composing the brand being "Waterfill & Frazier," coupled, however, with the other words as arranged above.

In 1882 Waterfill sold his interest in the distillery and in the brand to his partner, Frazier, who continued the business as before.

In 1885 Waterfill again became the owner of a half interest in the property and business in connection with John and Edward Dowling, Frazier conveying to them the "Waterfill & Frazier distillery," so known throughout the entire country and so named in the government records, together with the exclusive privilege to use the brand of "Waterfill & Frazier" in the manufacture of whisky. The

business was continued as before and the same brand used, their trade and distilling name being "Waterfill & Frazier." In the meantime R. H. Frazier had died, leaving a son, G. G. Frazier, and who, in about 1890, with J. M. Waterfill, a cousin of W. J. Waterfill, decided, to erect a distillery at McBrayer, in Anderson county, and manufacture "Waterfill & Frazier" whisky. This came to the ears of Levy & Bros., the Cincinnati brokers, who were handling the Waterfill & Frazier product, and to their inquiry of Waterfill & Dowling about it W. J. Waterfill wrote to the brokers saying, among other things, "we have no apprehension of their attempting to make the W. & F. brand. In the first place they can not do so, as we are the sole owners of that brand, having paid one of the gentlemen's father a good price for it, and we have no fear but that any court of jurisdiction will protect us in the right of property in that brand."

The new concern made inquiries as to their rights, and decided to advertise their whiskies thus: "McBrayer, Anderson county, Kentucky, Waterfill & Frazier, distillers of the G. G. Frazier & Co. and J. M. Waterfill & Co." They branded their barrels "J. M. Waterfill & Co. Distillers, Hand-Made Sour Mash Whisky, Anderson County, 8th District Kentucky."

In the meantime W. J. Waterfill sold out his interest in the old Waterfill & Frazier distillery, together with the brand "Waterfill & Frazier," and we next find him in partnership with the new "Waterfill & Frazier" company. The new concern made a considerable quantity of whiskey, but had found no sale for it until they made a contract with one Wolf, of Chicago, for their entire product for a number of years, provided they should brand it "Waterfill & Frazier, Distillers Hand-Made Sour-Mash, McBrayer, Anderson County, Kentucky."

Accordingly they ordered this brand, and were threatening to brand their goods as "Waterfill & Frazier" whisky when the Dowlings brought this action of injunction.

The chancellor granted the relief prayed for, and in this we concur. It seems to us that to state the case is to decide it. The object of the new concern in discarding the brands with which they commenced business of "G. G. Frazier & Co.," and of "J. M. Waterfill & Co.," to which there was no objection, and in adopting the artificial combination of "Waterfill & Frazier," was to get the benefit of the reputation of the old brand.

In Avery v. Meikle, 81 Ky., 113, Chief Justice Hargis argues that the chief test of intentional and illegal fraud is that the defendants there had changed the manner in which they had formerly branded their goods and had imitated the plaintiff's system.

It is not true as contended that this combination represented the name of either of the partners in the new concern. Neither J. M. Waterfill nor G. G. Frazier is named "Waterfill & Frazier," nor is that the name of W. J. Waterfill; and if the sole object in using this combination was to tell the truth as intimated it does not do so any more than did the discarded brand, "G. G. Frazier & Co.," or "J. M. Waterfill & Co."

The proof discloses clearly that the use of the word "distillers" by the Dowlings, after the words of the old brand, was not at all calculated to deceive the trade or the public, and hence this fact does not operate to prevent the plaintiffs from obtaining relief. (See Mattingly v. Mattingly, &c., 17 Ky. Law Rep., 1; Dant v. Head, 90 Ky., 261; Kidd v. Johnson, 100 U. S., 666.)

The judgment below is affirmed.

MAYSVILLE & BIG SANDY R. R. CO. V. TRUSTEES OF THE DOVER CHRISTIAN CHURCH.

(Filed February 13, 1897—Not to be reported.)

1. *Railroads—Injury to church property from construction of road*—In this action againt a railroad company to recover damages for injury to church property caused by the construction and operation of defendant's road along the street in front of it, a verdict in favor of plaintiffs for $1,500 is not flagrantly against the evidence, the jurors being the judges of the facts.

2. *The fact that the jury viewed the property after dark*, and that one of the plaintiffs, who furnished the lanterns, was present, does not afford ground for a new trial, as there is no evidence that with the lights furnished the jury could not properly view the property, and the evidence shows that the plaintiff, who was present, did not speak to any of the jury or in their presence.

Wadsworth & Cochran for appellant.

E. L. Worthington, L. W. Robertson and Garrett S. Wall for appellee.

Appeal from Mason Circuit Court.

Opinion of the court by Judge Paynter.

This action was brought to recover the damages caused to the church property by the obstruction thereto by the construction and operation of appellant's road along the street in front of it. The jury was told by the court that they could only award damages for the obstruction to the easement of access to their property by the construction and prudent operation of the road along the street in front of the church, and that they could not make an allowance to the plaintiffs on account of depreciation in the value of the property by reason of noise from passing or standing trains disturbing public worship. The jury returned a verdict for plaintiffs for $1,500.

The principal reasons urged for reversal are, first, that the verdict is not supported by the evidence; second, that the view of the property by the jury was had after dark, and that one of the plaintiffs assisted in the view.

One witness testified that the value of the church property was $3,500 to $4,000 just before it was generally known that the road was to be built; that the value of the property was depreciated, by injury to ingress and egress, two-thirds of the value it possessed before the road was built.

Another witness fixed the value of the property at $3,500, and estimated its depreciation at two-thirds of that value by reason of the construction and operation of the road in obstructing the access to the property.

Another witness estimated the value of the property at from $3,000 to $3,500, and estimated the depreciation at three-fourths of the value of the property, but he considered that one-half of the damages was caused by the noise of passing trains and one-half on account of obstruction to access.

Another witness estimated the value of the property at $1,800 to $2,000 before the road was built, and estimated its value at $400 after it was built; that the construction of the road had destroyed the use of the property because access was obstructed. On cross-examination he said that the noise of trains produced one-half of the depreciation.

The jury saw and heard the witnesses. Two of them fixed the depreciation of the value of the property by the obstruction to access

at much more than the verdict of the jury. One of them fixed it at lightly less, and one at considerably less than the verdict.

The jury saw and heard the witnesses, and viewed the property. The jurors were the judges of the facts, and we are not warranted, from the testimony in the case, to grant a new trial for the reason suggested, that the verdict is not supported by the evidence.

There is no evidence that with the lights furnished the jury they could not properly view the property. The uncontradicted evidence of the party furnishing the lanterns is that he did so at the instance of the sheriff in charge of the jury; that he did not speak to or talk with any of the jury, nor in their presence. There is no evidence that the sheriff was not present every moment during the examination of the property. Because of some unusal delay the jury reached the property at 5 P. M., instead of 2 P. M., on the day on which they started to and did view the property.

Judgment affirmed.

WHALEN, &C. ON PETITION.

(Filed February 16, 1897—Not to be reported.)

Ex parte petition for construction of will—The circuit court is not authorized to render judgment construing a will upon the *ex parte* petition of devisees where there is no allegation that any one is claiming adversely to the petitioners or that any controversy is liable to arise, and no affidavit even is filed as required by section 637 of the Civil Code.

L. Benton for petitioners.

Appeal from Harrison Circuit Court.

Opinion of the court by Judge White.

On the 8th day of May, 1895, J. W. Whalen, Newton Whalen and S. T. Whalen filed their petition in the Harrison Circuit Court, asking a construction of certain provisions of their father's will as to what estate they took in lands devised to them by said will.

The petition is purely *ex parte*. No defendants are made, nor do they claim that anyone claiming adversely to the devise in the will or denying their right in fee to the land devised, and no controversy is set up or shown in the petition as likely to arise, nor do they even file any affidavit, as required by section 637 of the Code.

We think the petition fails to make out a cause of action that either the Harrison Circuit Court or this court can take jurisdiction of, and, therefore, hold that the judgment appealed from was unauthorized. We, therefore, remand the proceedings, with direction to the lower court to set aside the judgment and dismiss the proceeding.

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affirmed the judgment for the reason that the injunction was the relief sought; in fact, gives the relief if sustained, and that in such cases no recovery could be had on the bond for counsel fees, quoting Bergin v. Sharer, 14 B. M., 497.

Judgment affirmed.

CUNDIFF V. CUNDIFF, &C.

(Filed February 27, 1897—Not to be reported.)

1. Breach of contract—Measure of damages—Conjectural profits—In this action by appellees to recover of appellant damages arising from the failure of the latter to roll the logs from land rented to appellee, to build fencing to keep out stock, and to dig a well according to the terms of the contract of rental, the appellees were not entitled to recover as damages the value of the crop which they might have produced upon such of the land as they did not cultivate by reason of the failure of appellant to remove the logs, conjectural profits not being a criterion of damages. And the appellees having failed to state the amount of damages sustained by reason of appellant's failure to build the fencing and to dig the well, they are without proof of actual damages sustained on that branch of the case.

2. Same—Instructions—There was no attempt on the part of the appellees to show the "reasonable value of the use of the land," of which they claim to have been deprived, and an instruction to the jury that "the measure of damages is the reasonable value of the use of the land of which he was deprived, considering his force of work hands," etc., was erroneous.

Birkhead & Clement for appellant.

Noe & Massie for appellees.

Appeal from Daviess Circuit Court.

Opinion of the court by Judge Paynter.

This is an action by appellees against appellant sounding in damages for the alleged violation of a contract by which appellant leased to appellees about twenty acres of land to be planted in corn, tobacco, sorghum, etc. It is alleged that appellant was to roll the logs on the land, and fence it in time for the appellees to plant it in a seasonable time, and that appellant was to have a well dug on the rented premises for the use of the appellees; that the appellant failed to roll all the logs and fence it in time for appellees to put in their crop on all the land rented of appellant; that he failed to have the well dug in a suitable time, which required them to carry water some distance, and that the fence was not sufficient to turn stock; that stock broke into his fields and damaged his crop, and in consequence of these several violations of the contract the appellees were damaged in the sum of $325. The several breaches of the contract were denied.

The appellee, W. H. Cundiff, testified that he was damaged $325 "by the failure of defendant to comply with his contract." This was an estimate by a witness who, in reaching the conclusion, determined in his mind the rule for measuring damages; they may have been proximate or remote. On cross-examination he said: "The items that go to make up the damages of $325 is what tobacco I could and would have raised on the land, judging by the crop of the previous years, which tobacco would have brought me about $260, and the corn I could and would have raised on the land would have been worth $60 or $70.

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claims that the council of the city elected him to the position, and this action was brought to establish his claim.

The charter (1874) provides that a majority of the board of councilmen shall constitute a quorum to transact all ordinary business.

A rule had been adopted by the council which reads as follows: "A majority of a quorum of members elected and voting shall be necessary to choose any officer elected by this board." As to the right of council to adopt it there can be no question. This rule was in force at the time Collopy claims he was elected. There were fourteen members of the board of council. Of course eight would constitute a quorum. The record of the proceedings of the council shows that when it convened at the meeting during which the voting was done for the election of the "foreman of street repairs and overseer of the poor" thirteen of the members were present.

The record of the council exhibited in this record is silent as to the number present when the voting took place. Only seven members voted at the election and all voted for Collopy. However, in our opinion the question to be determined is not as to whether, under the law ordinarily governing the action of boards of council of municipalities, those who may have been present and did not vote should be counted to make a quorum, nor as to whether under that law, if a majority of the council failed to attend, a majority of those present may act.

The question is whether the rule required that a quorum should vote in order that a majority of it should be enabled to elect an officer. If the contention of appellant be correct then five members could meet and elect such officers as the council were authorized to elect, regardless of whether a quorum was present or participated in the election. We are of the opinion that the meaning of it is that a "quorum of the members elected" should vote, and that a majority of that quorum could elect when the quorum was "voting." We will not elaborate our views, but quote from the opinion of the lower court as follows, to wit: "I have not the least doubt as to the purpose of the council in adopting that rule. It was to require at least a quorum to place itself on record in the important matter of electing city officials by that body. And this was the construction placed upon it by the board itself, to which we may look if there be any doubt about it. The presiding officer so construed it, and declared that no one was elected by reason of the failure of the *quorum* to vote, and the board quietly, without a dissenting voice, and for an entire year, so far as appears, acquiesced in that construction.

"Nor is this construction inconsistent with the language employed in the rule. It is certainly as easy to refer the words 'elected and voting' to the antecedent 'quorum' as it is to treat the words 'majority of a quorum' as an antecedent.

"If, as claimed by plaintiff, five be sufficient to a choice, regardless of the number of votes cast, then the words 'elected and voting' are wholly useless, and should *have* been omitted. They do no duty whatever, since it is irresistably implied that the successful candidate received as many as five legal votes. This means that he was voted for by five members entitled to vote. It is idle to talk about being elected by votes not cast at all. The words referred to ('elected and voting') are, therefore, upon plaintiff's theory, 'worse than useless;' they only tend to confuse what would be absolutely clear if they were omitted.

"On the other hand if the intent of the rule be to require a quorum to vote these words become intelligible and signify something. We have the idea of a quorum vote; not that any particular candidate

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Thomas F. Hargis, Wright & McElroy and Hargis & Turner, jr., for appellants.

Thomas H. Hines, B. F. Procter and Sims & Covington for appellees.

Appeal from Warren Circuit Court.

Opinion of the court by Judge Paynter.

Wm. Culleton died intestate leaving a widow, Catherine, and an only son, the appellant, John Culleton. The widow married John Burke, and appellee, Mary Keune, is the only issue of the marriage.

Culleton at his death owned a lot in Bowling Green which the son inherited subject to such uses as the law gave his mother. Subsequent to the marriage of Burke and wife, by the industry and thrift of both, certain parcels of real estate were acquired, which were conveyed to the husband, John Burke. On the 25th day of December, 1886, John Burke and his wife made a deed purporting to convey to appellee, Frederick Keune, the husband of their daughter, the real estate which Burke had, and also the Culleton lot. On the same day Keune, by deed, conveyed the property described in the deed to him to John Burke and Catherine Burke, with this provision, to wit: "To Catherine Burke for her life, and, if she should survive John Burke, to her and her assigns forever; but if she should die before John Burke, then at her death the title to all the foregoing-described property shall vest absolutely in the said John Burke and his heirs and assigns forever."

John Culleton was no party to these deeds. On the first day of May, 1890, John Burke and Catherine Burke made a deed to John Culleton, conveying to him the property mentioned in the foregoing deeds.

This action was instituted by Keune and wife to have the deed to John Culletin set aside—first, because John Burke was mentally disqualified from making the deed; second, that while the deed was absolute on its face, in fact it was made with an understanding of all concerned that Culleton was to hold the title in trust for Mrs. Keune. Catherine Burke died before the suit was brought.

The facts with reference to the execution of the deed are substantially these: John Burke had acquired such habits, or such business habits, as made his family feel that he was imperiling his estate, and the conclusion was reached that it was best to have him and his wife convey the property to John Culleton, as the witnesses express it, for "safety." It was not intended by any of them to injure Burke, or in anyway to deprive him of the enjoyment of a comfortable support out of the property. The record shows that he was incapable of managing his estate and incapable of entering into the contract. John Culleton was a priest in the Catholic Church when the deed was made. Afterwards he abandoned his priestly calling, withdrew from the church and married. When this occurred the trouble began. It is but just to Culleton to say that he never claimed that he was the exclusive owner of the property. He claimed that he held one-half of it for himself and the other half for his sister. While Culleton thought it would, at the death of the father and mother, become the property of himself and sister, and as he would die without issue, it would go to his sister, and as that would be the result, the sister concluded that the brother held it in trust for her, yet we are of the opinion had the deed been valid that he would

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Appeal from Trigg Circuit Court.

Opinion of the court by Judge Burnam.

These consolidated suits were instituted in the Trigg Circuit Court on the 15th day of December, 1892, by M. A. Hixon and her husband, J. T. Hixon, and Charity Battoe against C. T. Bridges and the other children and heirs at law of Mary Bridges, deceased, the plaintiffs, M. A. Hixon and Charity Battoe, and the defendant, C. T. Bridges, being the youngest children of said Mary Bridges, deceased. They allege that their father, William Bridges, the husband of Mary Bridges, their mother, died many years before their mother's death; that in December, 1853, Mary Bridges qualified as guardian of her three infant children, M. A. Hixon, Charity Battoe and C. T. Bridges, and executed bond as guardian; that she collected $158.24, which was due and owing to each of said minor children from the estate of their grandfather, the interests of all the older children being paid to them direct; that in August, 1854, she purchased at a decretal sale, made by the master commissioner of the Trigg Circuit Court, a tract of land containing 42 acres, situate in Trigg county; that by the advice of her older children she used in this purchase $474.72 which belonged to her three infant children, and for whom she was guardian, she at that time having no other funds with which to make said purchase, and that said purchase was made with the understanding and agreement on the part of all the children that the land purchased was to belong to and be for the benefit of herself and her said infant children, who were at that time residing with her.

The evidence in the record shows that she lived on this land until her death, in July, 1876. Her two daughters married and left the premises, one of them (Charity Battoe) afterwards returning and living with her mother up to the time of her mother's death. Some six or seven years before her death, when she had become old and infirm, she invited the defendant, C. T. Bridges, who was her youngest child, to make his home with her, and the evidence shows that he moved to the farm and lived there from 1869 until her death in 1876. She died intestate; no administration was ever granted upon her estate, and no claims were ever legally asserted against same.

After the death of his mother defendant, C. T. Bridges, continued to use and occupy the land, his sister, Mrs. Battoe, living with him for some time. Finally the plaintiff, Mrs. Hixon, demanded a division of the land, or that he should pay her for her interest in same, and in December, 1877, defendant, C. T. Bridges, entered into an agreement with the husband of plaintiff, M. A. Hixon, by which he selected arbitrators, who, on the same day, returned an award to the effect that Bridges was to pay over to Hixon and wife $200, and that they were to make Bridges a deed to their part of said land, and this was to be a full settlement. This agreement was never carried out because Hixon did not want to make a warranty deed.

The evidence shows also that John Logan recovered a judgment against S. M. Bridges, one of the older children of Mary Bridges, deceased, and an execution issued upon his judgment was levied upon the supposed interest of S. M. Bridges in the tract of land to which his mother held title at her death, the same in dispute in this action, and he also instituted suit to have said interest ascertained and subjected to his debt. The defendant, C. T. Bridges, resisted this proceeding on the part of Logan, and set out the facts in his answer that the property was paid for by money of the three younger

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the payment, first, of the costs of this suit, and then to be divided equally between the parties.

Wherefore this case is reversed and remanded for proceedings consistent with this opinion.

PFAFFINGER V. GILMAN.

(Filed February 10, 1897—Not to be reported.)

Joint verdict—Judgment against only one of several defendants—In an action against several defendants to recover damages for injuries inflicted upon plaintiff by a wild and vicious bull which it was alleged had been turned loose by defendants upon the streets of the city, a verdict having been returned "for the plaintiff," and assessing the damages, one of the defendants against whom alone judgment was rendered upon that verdict can not complain that judgment was not rendered against the other defendants also, as it was agreed in writing that she alone was the owner of the business for which the bull was purchased, and she was the one who, in law and justice, ought to pay, and would have to pay the judgment; and, besides, counsel for defendants had asked, after the testimony was heard, that the jury be instructed to find for the other defendants.

M. A., D. A. & J. G. Sachs for appellant.

A. A. Stoll and J. W. S. Clements for appellee.

Appeal from Jefferson Circuit Court, Common Pleas division.

Opinion of the court by Judge Guffy.

The appellee, Gilman, instituted this action in the Jefferson Circuit Court, Common Pleas division, against Margaretha Pfaffinger, Wm. Pfaffinger, John Schwartz, executor of Jacob Pfaffinger, doing business under the firm name of Pfaffinger & Co., and P. C. Kennett to recover damages for injuries inflicted upon him by a wild and vicious bull, which bull was, as alleged, turned loose by defendants upon the streets of Louisville, which bull was known by the defendants to be vicious, or they could, by ordinary diligence, have known the fact.

The defendant Kennett, by separate answer, denied all the averments of the petition, so far as he was concerned, and a motion was finally sustained to instruct the jury to find for him and judgment entered dismissing the action as to him, although no formal verdict was in fact returned as to him.

The other defendants, for joint and separate answer, denied that they were doing business as a firm under any name; also denied the allegations of the petition as to appellee's injuries, as well as the averment that the bull was under their control or that they knew or could, by ordinary diligence, have known the bull was wild or vicious, and pleaded contributory negligence on the part of appellee.

A trial resulted in a verdict and judgment against appellant for $750.

Appellant moved for a new trial upon the following grounds, viz: Excessive damages, given under the influence of passion or prejudice; verdict contrary to law and not supported by the evidence; error in giving and refusing instructions, and error in refusing a peremptory instruction to find for defendants.

Appellant also moved to correct the judgment rendered upon the

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Appeal from Pike Circuit Court.

Opinion of the court by Judge Hazelrigg.

There were three suits filed in the Pike Circuit Court against Bewe & Co., who were alleged to be nonresidents of the State, and attachments were procured and levied on large quantities of timber and other property.

The first attachment was issued and levied in the suit of the appellant, Duerrigan, but, upon the trial of all the actions, after consolidation, the court gave preference to the subsequent attachments and levies of Bartley & Saunders and of H. Ratcliff & Co., and of this appellant complains.

In their answer to his petition these subsequent attaching creditors controvert the debt of appellant on the ground that he was, in fact, a partner in the firm of Bewe & Co. and not entitled to wages, for which he had sued, as an employe of the firm. They charge that the claim is not a just one, but was invented to cover up the property of the firm and to defeat its creditors.

There is some proof conducing to show this, and, while it is not altogether satisfactory, there are circumstances which strongly support the chancellor's finding.

The nonresidents, Bewe & Co., who seem to have lived at Baltimore, do not appear to have transacted in person the business of buying, gathering up and shipping the logs purchased in Kentucky, but left their business to Duerrigan, who held himself out as their "representative, agent or partner." For five years before engaging in the work in Pike county he had been the "shipping clerk, inspector and purchasing agent of Bewe & Co., at Baltimore," and he appears to have bought and paid for large quantities of timber, etc., in Pike county. It is fairly to be inferred from the proof that the debts created in that section were made by him and on his promises.

He testifies that he was working for $75 per month for a part of the time and $100 per month for the latter part of his service. When he learned that Bewe & Co. were about to quit the business, he brought his suit for $1,867 on an account beginning on March 1, 1883, and ending June 1, 1885, the total being $2,625. and credits the claim in a lump as "amount paid on account" $757, and has his attachments issued and levied on substantially all the property belonging to Bewe & Co. in Kentucky.

Just why, with the funds of his debtors constantly passing through his hands, he let his wages remain unpaid for so long a period we are not told. It seems to us, considering the relations existing between himself and the firm, and his attitude toward those with whom he was dealing, that the burden was on him to explain every circumstance casting suspicion on his conduct and on his claim, and especially the delay in collecting his wages. If he fully disclosed the extent of his agency, when buying, he would not be responsible; but even this he did not do, the proof being that he held himself out as the "representative" of the firm of Bewe & Co.; and, according to another witness, he was held out by the firm as its "agent or partner."

On the whole case, we see no good reason for disturbing the judgment of the chancellor, and it is, therefore, affirmed.

BRAMEL, &C. V. BRAMEL, &C.

(Filed March 12, 1897.)

1. *Will contest*—The testator having by his will disposed of his property in an apparently rational manner for the benefit of those with whom he had lived the greater part of his life, who had cared for him in his declining years and with whom his relations were necessarily closer and more intimate than with any one else, a verdict of a jury sustaining the will should not be disturbed unless manifestly against the evidence. It appearing that the will itself was a rational one, that under the circumstances there seems to have been no undue influence exerted over the testator, and that the fact of his testamentary capacity was supported by disinterested witnesses, the verdict can not be said to be against the evidence.

2. *Same—Instructions—Prejudicial error*—Although an instruction that "if the jury believe from all the evidence that the instrument of writing read in evidence was subscribed by John Bramel in the presence of two credible witnesses, who subscribed it with their names in his presence, and that said John Bramel, at that time, was of sound mind, they will find said instrument to be his will," is objectionable on the ground that it put to the jury the question of whether the paper was properly executed, which is a question for the court, it was not prejudicial to the rights of the appellants, for the jury found that it was so subscribed, which conclusion the court must have reached as a matter of law.

3. *Same*—The submission to the jury by the instruction the question of the credibility of the attesting witnesses, although erroneous, was not prejudicial to the appellants.

4. *Same*—The fact that one instruction told the jury to find for the propounders of the will if they believed from the evidence that the testator was of sound mind, while another told them to find against the propounders if they believed the testator was unduly influenced, was not misleading to the jury, since the instructions are to be considered as a whole, and the omissions in one may be supplied by reference to another.

5. *Burden of Proof*—The instruction that "if the jury believe from all the evidence that said instrument of writing is consistent in its provisions and rational on its face, the presumption is that John Bramel was of sound mind at the time of its execution, and the burden shifts to contestants to show that he was not of sound mind at that time," was not reversible error under the established rule in this State as to the shifting of the burden of proof.

6. *An objection to an instruction as misleading* because a statement of a mere abstract proposition upon the subject of testamentary capacity can not be sustained where the instruction proceeded to give a correct definition of the capacity required to render a man mentally competent to make a will according to the decisions of this court.

7. *The instruction which stated that the capacity required to render a man competent to make a will* was "to know his property and the natural objects of bounty and his duty to them," was not objectionable as stating by implication that the testator owed duties to the devisees named in the paper.

8. *The words "settled purpose of his own,"* as used in the instruction, are not materially different in meaning from the approved language, "fixed purpose of his own."

9. *Evidence*—The objection urged to the refusal of the court to permit appellants to prove by appellee that on a former trial a devisee testified to a certain conversation between the appellee and the testator can not be sustained, since it is not an admission against the devisee.

E. L. Worthington, W. H. Wadsworth, J. N. Kehoe, A. D. Cole and C. D. Newell for appellants.

Cochran & Son and L. W. Robertson for appellees.

Appeal from Mason Circuit Court.

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sisted. So, where a locomotive sets fire to fields and buildings along the track, the sufferer can not state in what the negligence consists—whether there is a defect in the furnace or carelessness in the management—some negligence is presumed, and it must of necessity be alleged generally. And the same rules apply to an answer which sets up contributory negligence."

This court took this view in the case of the L. & N. R. R. Co. v. Wolf (80 Ky., 82). The court, in deciding that case, used this language: "It is contended by counsel that the reply fails to deny the substantive facts constituting contributory negligence, and only traverses the averment of negligence, which is by denying a legal conclusion. The error in this position lies in the assumption that the allegation of negligence is a mere legal conclusion, and that the supposed substantive facts constitute contributory negligence, neither of which is true. The absence of care in the performance of an act is not merely the result of such absence, but the absence itself, and it is not, therefore, a mere conclusion of law, and may be pleaded generally" in an answer, the facts having been specifically set out in the petition. And in many other cases which have been decided in this court, the plea of contributory negligence was set out substantially as in the amended answer of defendant, and have been held good. There are many ways in cases such as this, in which landholders may be guilty of such contributory negligence as may defeat recovery for losses sustained. (See Sherman and Redfield on Negligence, sections 679 to 682, and Wood on Railways, Minor's edition, 1575 to 1600.

We are, therefore, of the opinion that the court erred in striking this plea from the amended answer. Another ground of error complained of was the admission by court of a statement made by appellee in his testimony before the jury that Patton, the claim agent of appellant, had said that he would settle the claim and would pay it in sixty days; and also in permitting his son-in-law to testify that Patton had said (at the time he came to ascertain the causes of the injury complained of that, in his conversation with appellee), "you will likely hear from it in thirty or sixty days; he said that we would be paid for it, and that we would hear from it in sixty days." This testimony was excepted to at the time, and the court allowed it to go to the jury over the appellant's objection.

This is not an action upon a contract or agreement entered into by the company through its claim agent, Patton. It is a suit for injuries resulting from negligently allowing sparks to escape from the locomotive. And whilst it is very plausibly contended by appellee that this evidence was not introduced to show admission of liability on the part of the railroad; that no instruction was predicated upon it, and that the jury were alone directed to find upon the evidence that the spark-arrester was out of order, and that the testimony was competent because it was part of a conversation which had been called out by plaintiff, being a part of the *res gestæ* of the conversation, it is well settled that "the admissions or declarations of an agent are received in evidence against a principal but as parts of the *res gestæ;* hence, only such as accompany the acts which are relied on for recovery can be proven. Thus, it is not true that where an agency is established, the declarations of agents are admitted merely because they are his declarations. They are only evidence when they form a part of the contract entered into by the agent on behalf of a principal, and in that case they become admissible. The cases on the subject draw this distinction between the declarations of the agent accompanying the making of an agreement, and, therefore,

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plaintiffs became the purchasers, they became doubtful of the jurisdiction of the court, and raised that issue by an amended petition and by exceptions to the commissioner's report of sale. The chancellor overruled the exceptions and upheld the jurisdiction of the Jessamine court. We think this ruling correct. This was not an action to settle the estate of a deceased person, and for that reason required by section 65 of the Civil Code to be brought in the county in which the personal representative was qualified. Nor in our opinion does subsection 3 of section 62 of the Code apply to an action of this kind.

There it is provided that actions for the sale of real property under a mortgage must be brought in the county in which the subject of the action is situated except for debts of a decedent. It seems to us that this exception had reference to and was made in view of the provisions of section 65.

It is manifest that if an action was pending to settle the estate of a deceased person, and mortgage liens were set up, the court, where the personal representative was qualified, alone having jurisdiction of such action, must also have jurisdiction to decree a sale of the mortgaged property, although it may be situated in another county. Hence the necessity for an exception to the general rule.

In this case there was no personal representative and no suit to settle the estate. Moreover, it was a suit to sell the husband's interest as well as that of his wife's, and for his debt, and we do not see how in a suit in Fayette county his interest could have been sold, the action as to him being clearly local. But in distributing the surplus proceeds of the sale the husband was given his full share as tenant by the curtesy in the whole tract over the objection of the guardian *ad litem* and his child. It seems to us that, as from the averments of the petition this debt was that of the husband, the value of his interest ought to have gone to pay his debt, which would seem to leave the entire surplus for the child. This being true it is unnecessary to pass upon the question at to whether the husband's interest is to be fixed under the old or new law regulating his interest in his wife's estate. Upon the return of the case the court should adjudge the surplus proceeds to the child unless the husband should make it appear that it was in fact the wife's debt in whole or in part.

This he should be allowed to show if he desires, as there has in fact been no issue made on that behalf or plea to which he was called on to respond.

The judgment as to the Shields is affirmed, and, as the collection of the surplus after satisfaction of the plaintiff's debt was suspended by supersedeas, damages will be awarded.

On the appeal of the guardian *ad litem* the judgment is reversed for proceedings consistent herewith.

GRAY, &C. V. COMMONWEALTH.

(Filed February 11, 1897.)

Change of venue—Power to set aside order—Liability of sureties in bail bond —The court had the power without notice to set aside a consent order granting a change of venue in a criminal case at any time during the term at which it was entered, having erroneously granted the order before the defendant, who was under bond, had given a new bond for his appearance at the proper court or been surrendered to the court or proper officers. And the sureties in the

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The record in this case does not show that the defendant or his securities ever executed the new bond required by the statute; nor did the securities ever at any time surrender the custody of the defendant to the court or the proper officer, or indicate to the court in any way that they desired to be released from their obligation on the bail bond of defendant. Their obligation required that the defendant should at all times render himself amenable to the orders and process of the court in the prosecution of said charge, and they could have exonerated themselves on said bond only by a formal surrender of the defendant to the court or its officers, or by the execution of a new bond for his appearance to answer the charge in Ohio county.

The order granting the change of venue before the execution of the necessary bond was an error on the part of the court, which it was the duty of the court to correct by setting aside the order, and it had ample power and authority to do this at any time during the term of court at which said order was entered; and it was not at all incumbent upon it to have given notice to the defendant of such action on the part of the court, as these defendants had entirely failed to perform or comply with the necessary conditions upon which said order could have been legally made under the statutes.

The defendants assumed to answer for the appearance of said Gray, and to see that he complied with all orders of the court, and it was their duty to see that he executed the proper bail for his appearance in the Ohio Circuit Court, or to have surrendered him back to the custody of the court; and the failure to take these necessary steps leaves these defendants bound upon the bond which they executed.

It is not enough for them to say that they caused the said Scott Gray to appear in court at the time of the making of the order changing the venue, or that he remained in court during the entire day; their obligation required more than this—that he "should at all times render himself amenable to the orders and process of the court in the prosecution of the charge; and, if convicted, to render himself in execution thereof, and if he failed to perform any of these conditions that they would pay to the Commonwealth the sum of $3,000."

Having failed to see to the execution of the bail bond for the appearance of the defendant in the Ohio Circuit Court, and having also failed to surrender him to the court, it was undoubtedly their duty to see that he was ready to answer when called upon in the Daviess Circuit Court, in which he stood indicted.

For the reasons indicated in this opinion the judgment of the lower court is affirmed.

HARLAN, &C. V. EILKE, &C.

(Filed February 11, 1897.)

Resulting trusts—Where a father who undertook to invest money for his son used it in buying property which he procured to be conveyed to himself without the son's consent, an enforcible trust was thereby created in favor of the son, there being nothing in section 19 of article 1, chapter 63, General

Statutes (section 2353, Kentucky Statutes), which prevents the enforcement of such a trust.

C. B. Seymour for appellants.

Phelps & Thum and Dodd & Dodd for appellees.

Appeal from Jefferson Circuit Court, Chancery division.

Opinion of the court by Judge Paynter.

It appears from satisfactory testimony that in 1882 Ellie Eilke, the eleven-year-old son of William Eilke, sr., desired to become a jockey. His father reluctantly consented to it, but finally did so, and emancipated his son, saying to him: "My boy, if you think you can make a living, you can go." He admonished his son to save his money; send it to him and he would invest it for him.

Under these circumstances the son entered upon his career as a jockey, and in the prosecution of his business traveled over the country for several years, earning a yearly salary of some $3,000 or $4,000. The father seems to have been afflicted and thriftless. The son sent him several thousand dollars, and he invested it in the real estate in controversy. The father, without the knowledge of the son, had the deeds made to himself. In 1893 the father died, and this action was instituted by Ellie Eilke to have the trust declared, and to recover the property.

Section 19, article 1, chapter 63, General Statutes, reads as follows: "When a deed shall be made to one person and the consideration shall be paid by another, no use or trust shall result in favor of the latter, but this shall not extend to any case in which the grantee shall have taken a deed in his own name without the consent of the person paying the consideration, or where the grantee, in violation of said trust, shall have purchased the land deeded with the effects of another person."

We agree with the learned counsel for appellants that no claim like that of the appellee should be sustained except upon the fullest and clearest proof. After the examination of the proof in this case we can not escape the conclusion that the money with which the property was bought was that of the appellee, which he sent to his father to invest for him.

Appellee introduced several witnesses to sustain his claim. They appear to be worthy of credit; besides no effort was made to impeach them or to contradict their statements. In addition to the facts which they prove with reference to the son sending home his money to the father and its investment in the real estate, they also prove that the father had no source from which he obtained the money with which to purchase property except through the son.

There is nothing in the statute quoted which prevents the trust from being enforced. On the other hand the saving clauses in the statute recognize the equitable doctrine that an enforcible trust exists where one takes a deed in his own name without the consent of the person paying the consideration, or where the grantee, in violation of such trust, shall have purchased the lands deeded with the effects of another person.

We are of the opinion that the land was held in trust for Ellie Eilke, and that he is entitled to recover it. (Grayham v. King, 96 Ky., 339; Faris v. Dunn, 7 Bush, 276; Miller v. Edwards, 7 Bush, 394.)

The judgment is affirmed.

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It is manifest in this case that appellees had full notice of the lien from a trustworthy source—from one who knew the truth of the matter—hence it is immaterial whether Town be regarded as appellants' agent or not; the notice was sufficient. The court, therefore, erred in refusing the instruction asked, and erred in giving instructions 1 and 2.

The judgment appealed from is, therefore, reversed and cause remanded, with directions to set aside the verdict and judgment and award appellants a new trial and for proceedings consistent with this opinion.

SLACK & PERKINS V. KOON & PERRY, &C.

(Filed February 12, 1897—Not to be reported.)

1. Landlord's lien—Partnership—Where one of two parties in the hotel and saloon business had only an interest in the profits and not in the furniture, etc., used in the business, the lien of the landlord for rent under a lease to the partner who owned the goods is superior to the lien of a partnership creditor.

2. It was not necessary for the landlord to sue out his attachment in order to preserve his landlord's lien, it being sufficient for him to assert it by petition in this suit by the attaching partnership creditors.

Bush & Worten and Hill & Hill for appellants.

J. C. Hodge for appellees.

Appeal from Livingston Circuit Court.

Opinion of the court by Judge White.

The appellants, Slack & Perkins, sued Koon & Perry, the appellees, in the Livingston Circuit Court on an account for $380.66, and at the same time sued out attachments against the property of Koon & Perry and had it levied on a lot of personal property then in the St. Clair Hotel and saloon, at Grand Rivers. This property consisted of furniture, bar-room fixtures, liquors and many other articles usually found in a hotel and bar room. Several other small executions were also sued out from the quarterly court of Livingston county, and levied on the same property, subject to appellants' attachment lien.

On notice and motion the county judge made an order of sale, and the attached property was sold, and brought the sum of $500, the appellee, Ross, claiming a landlord's lien on the attached property; also procured from a justice of the peace an attachment for rent due, and to become due, for the sum of $360, rent of the premises occupied by Koon, and also had the same levied on the property attached by appellants.

Appellee Ross filed his petition, asserting that he was the owner of the property known as the St. Clair Hotel property, in the town of Grand Rivers, and that the defendant, Koon, had rented said property from him for the period of twelve months from the 1st day of April, 1892, to the 31st day of March, 1893, at the agreed price of $360, to be paid monthly ($30 each month), and to be paid in advance, except the month of April, which was to be paid on May 1st, and claiming landlord's lien for his rent on the goods attached and on the money arising from sale of same.

To this petition appellants filed an answer, denying that the hotel

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ca. sa., hence he had no right to apply to any court for a release or discharge, for he was not restrained of his liberty by any one.

In the numerous cases decided by this court involving the responsibility of bail, or discharge of insolvent debtors, we have not found a case in which the circuit court or a circuit judge had ordered the discharge of an insolvent debtor, nor have counsel referred to any such case.

We think it manifest that the circuit court had no jurisdiction nor authority to entertain the motion of Harris to be allowed to take the oath to be discharged, nor to receive the schedule of property, and the orders and judgment in that regard are null and void, and are no defense to this action.

The judgment appealed from is, therefore, reversed and cause remanded, with directions to overrule the demurrer and for proceedings consistent with this opinion.

If, however, the appellee has any valid defense he should be allowed to plead it.

FRAZIER, &C. v. DOWLING, &C.

(Filed February 13, 1897—Not to be reported.)

Trade-marks—The purchasers of a distillery known as the "Waterfill & Frazier" distillery, and of the exclusive privilege to use the brand "Waterfill & Frazier" in the manufacture of whisky, are entitled to protection in the use of that brand as against the firm of Waterfill & Frazier, composed of one of the original owners of the brand and a son of the other. And the fact that the defendants sought to be enjoined from using the brand purchased by plaintiffs discarded the brands with which they commenced business, and which were unobjectionable, and imitated the plaintiffs' system of making their goods, is evidence of fraudulent intent. Nor is the use of the word "Distillers" by plaintiffs after the words of the old brand calculated to deceive the trade or the public, and hence this fact does not operate to prevent plaintiffs from obtaining relief.

Thomas F. Hargis and Phelps & Thum for appellants.

Humphrey & Davie for appellees.

Appeal from Jefferson Circuit Court, Chancery division.

Opinion of the court by Judge Hazelrigg.

Beginning in 1870 the firm of Waterfill & Frazier, composed of W. J. Waterfill and R. H. Frazier, built up in the course of several years a widespread reputation for a brand of whisky manufactured by them in Anderson county, consisting of the words "Waterfill & Frazier, distillers, hand-made sour-mash whisky, Anderson county, Kentucky," the particular words composing the brand being "Waterfill & Frazier," coupled, however, with the other words as arranged above.

In 1882 Waterfill sold his interest in the distillery and in the brand to his partner, Frazier, who continued the business as before.

In 1885 Waterfill again became the owner of a half interest in the property and business in connection with John and Edward Dowling, Frazier conveying to them the "Waterfill & Frazier distillery," so known throughout the entire country and so named in the government records, together with the exclusive privilege to use the brand of "Waterfill & Frazier" in the manufacture of whisky. The

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